Supreme Court No. S_____

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

GIL N. MILEIKOWSKY, M.D., Plaintiff and Appellant, vs. TENET HEALTHSYSTEM, et al., Defendants and Respondents	2nd Civ. B168705 (Los Angeles County Superior Court No. BS079131)

APPEAL FROM THE SUPERIOR COURT OF LOS ANGELES COUNTY
(HONORABLE DAVID P. YAFFE, JUDGE)

PETITION FOR REVIEW OF DECISION OF COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION FOUR, AFFIRMING JUDGMENT OF SUPERIOR COURT

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PETITION FOR REVIEW

TO THE HONORABLE RONALD M. GEORGE, CHIEF JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF CALIFORNIA:

Plaintiff and Appellant Gil N. Mileikowsky ("Mileikowsky") respectfully petitions this Honorable Court for review of the decision of the Court of Appeal, Second Appellate District, Division Four, filed April 18, 2005, affirming the judgment of the Los Angeles County Superior Court. A copy of the decision which was published is Appendix A to this

Petition.

On May 4, 2005 the Court of Appeal denied a timely filed Petition for Rehearing, a copy of which is Appendix B to this Petition.

I. ISSUES PRESENTED FOR REVIEW

A. May a hearing officer (an attorney hired by the adversary hospital) terminate a hospital's medical peer review hearing convened to determine whether a physician's clinical staff privileges should be renewed and whether a summary suspension of his medical privileges should be upheld where neither the hospital's by-laws or California statutes (Business and Professions Code Sections 809, et seq.) authorize the hearing officer to take such action?

B. If a physician allegedly disrupts a peer review hearing in front of his peers (i.e. physicians reviewing the case who will decide the issues), may the hearing officer (an attorney hired by the adversary hospital in violation of Haas v. County of San Bernardino, 27 Cal.4th 1017 (2002) and Yaqub v. Salinas Valley Memorial Healthcare System, 122 Cal.App. 4th 474 (2004)), terminate a hospital's medical peer review hearing without obtaining the approval of the hospital's medical peer review committee.?

C. If the hearing officer may terminate a medical peer review hearing without obtaining the approval of the medical peer review committee, what are the guidelines or standards for such a decision?

D. May a hospital summarily suspend a physician's clinical staff privileges in the absence of any evidence of any imminent danger or harm to anyone?

II GROUNDS FOR REVIEW

Rule 28(b)(1) of the California Rules of Court provides:

> "The Supreme Court may order review of a Court of Appeal decision:
> (1) When necessary to secure uniformity of decision or to settle an important question of law...."

This case involves important issues regarding the authority and power of "hearing officers" appointed and paid by hospitals to terminate peer review conducted pursuant to Business and Professions Code Sections 809, et seq.. That the issues are important is evident from the three Amicus Curiae briefs filed with the Court of Appeal by the Association of American Physicians & Surgeons, Inc., the Union of American Physicians and Dentists, and the Consumer Attorneys of California.[1]

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[1] In an earlier related writ proceeding to challenge his summary suspension, Mileikowsky was supported by amicus curiae briefs filed by the California Medical Association, the American Medical Association, the Union of American Physicians and Dentists, and The California Academy of Attorneys for Health Care Professionals. See Mileikowsky v. Superior Court, Court of Appeal, Second Appellate District, Division Four (2nd Civil B150037). Division Four denied the writ on a technical ground without

The decision of the Court of Appeal below is extraordinary. It contravenes the express Legislative intent that physicians be evaluated by their peers ("It is the policy of this state that peer review be performed by licentiates. . . .") Business and Professions Code Section 809.05.

The opinion of the Court of Appeal below, without mentioning the decision by name, essentially repudiates this Court's decision in Rosner v. Eden Township Hospital District, 58 Cal.2d 592 (1962), which overturned the exclusion of a physician from a hospital who was allegedly not temperamentally suitable. . . ." In so ruling the Rosner court stated:

> "[A] hospital ... should not be permitted to adopt standards for the exclusion of doctors from the use of its hospital which are so vague and ambiguous as to provide a substantial danger of arbitrary discrimination in their application. **In asserting their views as to proper treatment and hospital practices, many physicians will become involved in a certain amount of dispute and friction,** and a determination that such common occurrences have more than their usual significance and show temperamental unsuitability for hospital practice of one of the doctors is of necessity highly conjectural. **In these circumstances there is a danger that the requirement of temperamental suitability will be applied as a subterfuge where**

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reaching the merits, i.e., whether a physician can have his clinical staff privileges summarily suspended without evidence of imminent danger. Again, in the instant case Division Four declines to reach this issue. See Slip Opinion, pp. 44-46. This Court may grant review on all issues, including the summary suspension/imminent danger issue, which the Court of Appeal refused to consider, or it may decide the hearing officer issues and remand the case to the Court of Appeal to decide the summary suspension issue (See Rule 29.3(c)) subject to further review by this Court.

> **considerations having no relevance to fitness are present.** It may be noted that Dr. Rosner opposed election to the board of directors of a slate of candidates endorsed by members of the medical staff and that **he has apparently testified for plaintiffs in malpractice cases.** (58 Cal.2d at 598-99).[2]

The decision of the Court of Appeal below runs contrary to the clear trend in the law established by this Honorable Supreme Court in recent administrative law cases such as Bonnell v. Medical Board, 31 Cal. 4th 1255 (2003) (rejecting Medical Board's interpretation of governing statute) and Haas v. County of San Bernardino, 27 Cal.4th 1017 (2002) (disqualifying hearing officer who was a private attorney hired by the County, with the possibility of future employment).

It is significant that this Court's Haas decision was expressly applied to hospital "hearing officers" by the Court of Appeal, Sixth Appellate District, in Yaqub v. Salina Valley Memorial Healthcare System, 122 Cal.App.4th 474 (2004).

Review should be granted so that this Court may decide whether attorneys appointed and paid by hospitals to assist peer review by licentiates may terminate the hearings without approval by the Hearing Committee and without statutory or by-law authority. It is especially important for this Court to make the decision because there are no statutes or by-laws authorizing such awesome power.

Mileikowsky has already filed a Petition for review with this Court with respect to a

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[2] Likewise, Mileikowsky agreed to testify in a medical malpractice action. See Slip Opinion p. 44, which fails to mention that one of the defendants was Tenet. See Opening Brief, p.4.

related case involving the same hospital, Mileikowsky v. Tenet Healthsystem, 128 Cal.App.4th 262 (2005), pet. for rev. filed May 13, 2005, Case No. S133894. That case grew out of Mileikowsky's earlier lawsuit which he filed to compel Tenet to accept and process his staff reappointment application form that Tenet initially refused to provide. The Superior Court (Judge Robert O'Brien) granted Mileikowsky's motion for preliminary injunction to compel Tenet to process his reappointment application on April 20, 1999.

It may be convenient for this Court to consider the Petition in S133894 when it considers this one. The two cases are factually related although the legal issues are different. There is, however, one unifying theme in connection with both cases. The Court of Appeal below disregarded the absence of statutory authority and gave new power to attorneys – in the first case to allow Mileikowsky's attorney to enter into a stipulation without his authority, which could result in dismissal of his case, and in the second case to allow an attorney appointed by and paid for by Mileikowsky's adversary, the hospital, to terminate peer review without statutory authority and by-law authority.[3] Both published

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[3] If Mileikowsky had an attorney, he would have known to challenge the impartiality of Willick, whose conflict of interest was cleverly masked by the Hospital, which sent a letter (obviously drafted by the hospital's attorneys), to Mileikowsky stating Willick ". . . does not regularly represent the . . . [hospital]." Had Mileikowsky been represented by counsel he most assuredly would have inquired further. Mileikowsky does reluctantly concede that he did not preserve the issue by challenging Willick after his voir dire but before the substantive part of his hearing. Mileikowsky concedes that he did not raise the issue in the Court of Appeal and therefore cannot directly raise it in this Petition. He did not raise it in the Court of Appeal because this Court in Anton v. San Antonio Community Hospital, 19 Cal.3d 802 (1977) held physicians were not entitled to hire attorneys for peer review hearings. (Footnote continued on page 7)

opinions are consistent as to their extraordinary proposition that ultimate terminating sanctions can willy nilly be granted without even reaching the merits. Is that what justice is all about? After all, the equivalent in criminal law would be the death sentence without ever looking at the evidence.

III STATEMENT OF THE CASE

The facts set forth below are taken mostly from the opinion of the Court of Appeal. However, the Court of Appeal omitted some material facts, which omissions were called to the attention of the Court of Appeal in a timely Petition for Rehearing filed April 29, 2005 and denied on May 4, 2005. See Rule 28(c)(2).

Dr. Gil N. Mileikowsky had staff privileges at Encino-Tarzana Regional Medical Center "(Hospital") since 1986 (Slip Opinion, p.3). Every two years (until 1998) he was reappointed . However, in February 1999 the Hospital notified him that he was no longer on staff because he did not timely file his reappointment application. Mileikowsky contended the Hospital failed to provide him with the form and failed to notify him that the form was due. See generally Mileikowsky v. Tenet Healthsystem, 128 Cal.App.4th 262, 264-265 (2005).

Mileikowsky filed suit in April 1999 and obtained a preliminary injunction allowing him to continue to have staff privileges and essentially compelling the Hospital to process his reappointment application, which he submitted to the Hospital. See Slip Opinion, pp. 3-

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That a physician may not be represented by an attorney at a peer review hearing increases the importance of limiting the authority of a hearing officer to terminate a hearing, especially without approval by the Hearing Committee, based upon alleged misconduct at the hearing by the unrepresented physician.

4.

On January 11, 2000 the Hospital recommended that his reappointment application be denied (Slip Opinion, p.4). The By-laws of the Hospital (in conformity with Business & Professions Code sections 809, et.seq.) provided Mileikowsky with the right to a hearing by fellow physicians who would comprise a Hearing Committee (Slip Opinion , p.4).

The Opinion of the Court of Appeal below does refer to the first hearing on the reappointment issue, but only briefly, to avoid undermining a major, but false,point the Court of Appeal makes much later in its Opinion. Specifically, the Court of Appeal acknowledged the first hearing in the following portion of the first paragraph at the top of page 5 of the Slip Opinion:

> "A hearing commenced, but in September 2000, the Hospital's advocate filed a motion contending that Dr. Mileikowsky had waived his hearing rights by failing to produce documents regarding termination of his medical staff privileges at Cedars-Sinai in 1998. **THE HEARING OFFICER SUBMITTED THE ISSUE TO THE HEARING COMMITTEE which ruled that Dr. Mileikowsky had waived his right to a hearing . . . .**" (Emphasis added)

The portion of the paragraph quoted above is extremely significant to this case because it establishes that the Hearing Committee, NOT THE HEARING OFFICER, makes the decision as to whether a hearing should be terminated. Mileikowsky makes this critical point now in this narrative Statement of the Case because at page 37 of the Slip Opinion the Court of Appeal rejected Mileikowsky's contention with respect to the second hearing that the second hearing officer , Dan Willick, failed to submit his termination

recommendation to the Hearing Committee. At page 37 of its Slip Opinion the Court of Appeal said submission of the termination decision to the Hearing Committee ". . . is simply unworkable. . . ."

Mileikowsky set all this out in his timely filed Petition for Rehearing . See pages 4-7 of the Petition for Rehearing. As stated above, the Court of Appeal did briefly mention the "first hearing" at the top of page 5 of its Slip Opinion, but did not provide details, and did not link it to page 37 of its Slip Opinion, which **CONTRADICTS** page 5, where the Court of Appeal says the very thing that did happen at the first hearing, i.e., submission of the termination decision to the Hearing Committee, ". . . is simply unworkable. . . . ."

With respect to the first hearing, which was to determine whether Mileikowsky's reappointment application should be granted or denied, the hearing was conducted before a Hearing Committee convened pursuant to Business and Professions Code Sections 809 et.seq.. The hearing officer was attorney Lowell Brown. Again, Mileikowsky set this out at pages 4-5 of his Opening Brief and again in his Petition for Rehearing, pp.4-5. As stated, therein, the first hearing resulted in its termination on November 30, 2000 by a **WRITTEN DECISION** of the **HEARING COMMITTEE**, not by hearing officer Lowell Brown.

The Court of Appeal does disclose that the Hospital's appellate review body reversed the written termination decision by the Hearing Committee. The appellate review body issued its reversal decision on April 26, 2001. See Slip Opinion, p.5. The appellate review body ruled that Mileikowsky's alleged discovery violations (failure to provide records timely) would allow the Hearing Committee to make adverse findings of fact against

Mileikowsky and would allow the Hearing Committee to prohibit Mileikowsky from offering evidence at the hearing. See Slip Opinion p.6

In the meantime, while Mileikowsky's reappointment application was under consideration, the Hospital summarily suspended his clinical staff privileges on November 16, 2000 without any good cause or even telling Mileikowsky why. Mileikowsky requested a hearing on his summary suspension (Slip Opinion, p.7) and the Hospital, in response, provided a combined hearing – to restart the first hearing (following reversal by Hospital's appellate review body on April 26, 2001,see Slip Opinion, p.6) and to consider the summary suspension. Thus, one Hearing Committee would review both matters - (1) the denial of the reappointment application, which resulted in the written decision reversed by the appellate review body, and (2) the summary suspension. Mileikowsky had objected to combining the two hearings because the summary suspension was the more critical one and the one that resulted in the immediate termination of his staff privileges. The summary suspension was and still is devastating to his medical practice and livelihood.

The Court of Appeal failed to mention the overriding importance of peer review and the severe, adverse consequences which flow to a physician who has the unfortunate experience of being subjected to discipline by his peers or the Hospital's administrators in this case. At the Hearing Committee hearing of September 24, 2001 Mileikowsky asked Gerald Clute, the Chief Operating Officer, whether he understood the significance and consequences of the termination of staff privileges. Dr. Mileikowsky asked the following question:

"Did it ever appear to you as a drastic and extreme

> gesture or action to terminate the privileges of any physician?"

Clute answered, "Oh, yes."

Clue went on to acknowledge that he understood that the termination of staff privileges would be reported to the Medical Board by virtue of Business & Professions Code Section 805. Clute also acknowledged that within 30 days the hospital would report the fact of staff privileges termination to the National Data Bank. See Transcript of September 24, 2001, pp. 825-826.

Clute acknowledged that if any physician applied for staff privileges at a hospital where he was the Chief Operating Officer with such a record, i.e., a summary suspension of privileges for imminent danger, he would not want that physician at his hospital. Clute acknowledged that the chances of a physician practicing medicine anywhere in the civilized world were not favorable if a physician had his staff privileges terminated for imminent danger. See pp. 828-829 of the transcript of September 24, 2001. (The passages above regarding the importance of clinical staff privileges and peer review were included in the Petition for Rehearing filed with the Court of Appeal. See pp.3-4 of the Petition for Rehearing)

Mileikowsky's requests to bifurcate the two matters and have the summary suspension issue heard first was rejected by Tenet's attorney's and Dan Willick, who was retained by the Hospital to act as the hearing officer. See Slip Opinion, pp.,8-9. Mileikowsky was prevented by the Business and Professions Code and the By-laws from having an attorney represent him. Thus, as a non lawyer, Mileikowsky was compelled to

deal with complicated legal and factual issues without a lawyer. See Slip Opinion, pp.8-23.

For this second hearing, where Dan Willick, the attorney hired by Mileikowsky's adversary, the Hospital, was to act as the hearing officer. A new Hearing Committee was to be selected. One of the members of the second Hearing Committee was Dr. Larry Pleet, whose background was described by Mileikowsky in his Opening Brief filed with the Court of Appeal, which description was supported by appropriate references to the record. See Opening Brief, p.9. The Slip Opinion omitted any mention of Dr. Pleet by name or background, which Mileikowsky repeated in his Petition for Rehearing to enable him to present Dr. Pleet's background in this Petition for Review in conformity with Rule 28(b)2).

Dr. Larry Pleet was selected to be on the Hearing Committee after having been subjected to extensive voire dire conducted on January 30, 2001. According to the January 30, 2001 transcript, Dr. Pleet had been on the Hospital's staff since 1965. He received his medical degree from UCLA in 1960 , and is Board certified in otolaryngology. He did not know Mileikowsky prior to the hearing, but did know the "prosecutor," Dr. Richard Wulfsberg, for 25 years. Doctors Pleet and Wulfsberg referred patients to each other (see transcript, pp. 63-64), Opening Brief, p. 9; Petition for Rehearing, pp. 8-9).

Dr. Pleet was on the Hearing Committee and, being present at the hearings, was in a position to observe the conduct of the participants and hearing officer Dan Willick, the attorney hired by the Hospital. During the hearing Willick made certain rulings with which Mileikowsky disagreed. Mileikowsky, deprived of the right to have an attorney, was compelled to respond to Willick's rulings on his own.

The Court of Appeal described the acrimonious relationship between Mileikowsky

and attorney Dan Willick at pages 9 through 19 of its Slip Opinion. The alleged disruptive conduct of Mileikowsky and Willick took place in the presence of the Hearing Committee. It should be emphasized here that since November 16,2000, Mileikowsky did not have staff privileges at the Hospital. The summary suspension was in place. Thus, Mileikowsky was not benefitting from any delay occasioned by the verbal sparring between Mileikowsky and attorney Willick. Fearing Willick might mischaracterize the on-going activity, Mileikowsky requested that he be permitted to have a videotape technician video tape the proceedings (Slip Opinion, p.20), which was denied.

On March 1, 2002, hearing officer Dan Willick asked the parties to submit a written brief on the issue of whether Mileikowsky had abandoned his defense (Slip Opinion, p.20). Mileikowsky, a non lawyer, prepared a brief and sent copies on March 15, 2002 to "the prosecutor" (Dr. Wulfsberg), the hearing officer (Dan Willick) and to all members of the Hearing Committee (Slip Opinion, p.20).

On March 1, 2002, Willick also sent an inflammatory memorandum to the Hearing Committee accusing Dr. Mileikowsky of refusing to abide by his "rulings" without specifying what they were. (See Appendix D). On March 15,2002, Mileikowsky, with his two physician assistants, sent a response memorandum with his brief to Willick, the Hearing Committee and Wulfsberg (Appendix E).

To even suggest that Dr. Mileikowsky had any sort of an "ex parte" communication by providing all parties his brief and responsive memorandum defies the law of gravity.

At this point the Court of Appeal described what happened:

"On March 19, 2002, a member of the Hearing

> Committee reportedly called the Hospital and said '[the hearing officer's] request to deny [Dr.Mileikowsky] from questioning witnesses is outrageous, absolutely outrageous, to change in the middle of the . . . procedure . . . is an outrageous thing to do'. . ." (Slip Opinion, pp.20-21)

The description of Dr. Larry Pleet's phone message by the Court of Appeal is not complete and omits a key part. Mileikowsky's reference to the Pleet phone message was set forth at pages 8-9 of his Opening Brief filed with the Court of Appeal. The Brief made an appropriate reference to the record.

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

> "Debbie, this is Dr. Pleet calling. My opinion is Mr. Willick's request to deny Gil [Petitioner] from questioning witnesses is outrageous, absolutely outrageous, to change in the middle of the rulings in the procedure and the legal things behind it, I think it is an outrageous thing to do to him. Based on this brief and the information in it, if Mr. Willick has made these requirements, he is out to lunch and should be replaced (CT 242, lines 19-20; CT 243, lines 1-4)."

In his Petition for Rehearing filed with the Court of Appeal Mileikowsky complained about the court's abbreviated reference to an anonymous Hearing Committee member's message and repeated what he stated in his Opening Brief. See Petition for Rehearing , pp. 8-9.

This Court can consider the facts omitted from the Court of Appeal's decision because Mileikowsky did give the Court of Appeal the opportunity to provide the missing information. See Rule 28(c)(2). Mileikowsky believes the omissions by the Court of Appeal were significant because Dr. Pleet was a long time friend of the prosecutor, Dr. Wulfsberg (a fact not disclosed by the Court of Appeal's opinion although called to the Court of Appeal's attention in the Petition for Rehearing) and because Dr. Pleet suggested the possibility that Willick ". . . should be replaced. . . ." (See Mileikowsky's Opening Brief, p.8, and his Petition for Rehearing, pp. 8-9). Even Tenet acknowledged the complete quote of Dr. Pleet at page 18 of its Respondent's Brief. The Hospital was not supposed to be represented by attorneys since Mileikowsky was not allowed to have an attorney, although he desperately needed one to deal with Willick. Mileikowsky is attaching to this Petition pursuant to Rule 28.1(e) a copy of the letter, which was part of the Administrative Record (and therefore a trial court exhibit) lodged with the trial court. It is Appendix F to this Petition. Tenet's attorneys (on their law firm stationary), in effect, requested Willick to terminate the hearing.

In response to the letter from Tenet's attorneys to Willick, Willick, **without** submitting the question of whether to terminate the hearing to the Hearing Committee, terminated it by a ruling of March 30, 2000 (Slip Opinion, p.21). Among other things, Willick contended Mileikowsky disrupted the proceedings by ". . . yelling. . . ." (Slip Opinion, p.22). Willick did not, contrary to the initial hearing officer, Lowell Brown, submit the termination order to the Hearing Committee for its approval.

One of the reasons given for terminating the hearing was that Mileikowsky violated a ruling that Willick had made ". . . to protect Dr. Mileikowsky from prejudice and confusion[.]" (Slip Opinion, p.22). With friends like this who needs enemies?

Willick referred to alleged discovery violations (Slip Opinion, p.22). Apparently, he "forgot" what the first appellate review body did when it reversed the first Hearing Committee's decision – it ruled that discovery violations would justify the exclusion of evidence or the making of adverse findings (See Slip Opinion, p.6)[4]. This is consistent with Article VIII, Section 4D of the By Laws, which does not authorize terminating the hearing for discovery violations, but rather, as the first appellate review body noted, authorizes exclusion and admission sanctions (See generally Opening Brief, pp.42-43).

More important, the By-laws specifically deal with a physician who disrupts the hearing. As Mileikowsky set out at page 45 of his Opening Brief, Article III, Section 4 (L) of the By-laws authorizes exclusion from the hearing. The section provides as follows:

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

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[4] The first appellate review body ruled that discovery violations do not constitute a waiver of the right to a hearing. The members of the first appellate review body included two physicians . There were no physicians on the second appellate review body.

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The Court of Appeal omitted all mention of this key provision of the By-laws because it totally undermines the theory of its Opinion. Mileikowsky called this significant omission to the attention of the Court of Appeal at page 11 of his Petition for Rehearing. Therefore, this Court may consider it. See Rule 28(c)(2).

As the Court of Appeal's decision discloses, Mileikowsky appealed the hearing officer's decision to another three person appellate review body, which affirmed the hearing officer's decision (Slip Opinion, p.23). As Mileikowsky noted at page 16 of his Opening Brief filed with the Court of Appeal, it was not clear whether under the By-laws there was an administrative appeal since the By-laws contemplated an appeal from a written report to be submitted by the Hearing Committee. See generally Article VIII, Section 6 Part A of the By-laws. Mileikowsky appealed only to avoid any contention that he failed to exhaust administrative remedies by not appealing. Since there is no dispute that Mileikowsky did exhaust available administrative remedies nothing further need be said on the subject[5].

After losing before the Appellate Review Body, Mileikowsky sought administrative mandamus in the Superior Court. The Court of Appeal discussed the administrative mandamus proceeding before the Superior Court at pp. 24-26 of its Slip Opinion but conveniently omitted a favorable reference by the Superior Court to Mileikowsky on the

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[5] The fact is that appellate jurisdiction by the Appellate Review Body can only to be based on the review of a written decision by the Hearing Committee. Mileikowsky suggests that this is a further ground for disputing the authority of the hearing officer to make the decision himself. There really is no provision in the By-laws for appellate review of a decision by the hearing officer as opposed to the Hearing Committee itself. Absent such report, there can be no "presumption of correctness" of the appellate process in this case.

issue of whether Mileikowsky had physically assaulted anyone.

Mileikowsky pointed out at p.18 of his Opening Brief that the Superior Court stated there was no evidence that Mileikowsky physically assaulted no one. Mileikowsky referred to the Clerk's Transcript, p. 401, lines 17-21. At p. 25 of the Slip Opinion the Court of Appeal quoted the Superior Court's characterization of the record as revealing Mileikowsky having shouted at people and having disrupted the hearings by his disorderly conduct and refusal to obey orders of the hearing officer concerning the filing of briefs. In his Petition for Rehearing at p. 12 Mileikowsky called to the attention of the Court of Appeal its omission of the favorable comment by the Superior Court, that there was no evidence that Mileikowsky physically assaulted anyone.

The Court of Appeal suggested that Mileikowsky was physically combative but ignored the trial court's statement that after reviewing the record there was no evidence that Mileikowsky physically assaulted anyone. The trial court stated, "No, I don't think there's any evidence of that." (CT 401, lines 17-21). See page 18 of Appellant's Opening Brief and page 12 of his Petition for Rehearing. The Court of Appeal selectively quoted from the trial court's comments but ignored the favorable part regarding the lack of any evidence regarding physical activity on the part of Mileikowsky.

The Superior Court denied the Petition for Writ of Administrative Mandamus and the Court of Appeal affirmed that ruling on April 18, 2005 in its published decision.

IV ARGUMENT

If there ever was an issue that this Supreme Court should resolve it is the issue of the authority of hearing officers to control the outcome of the peer review process at hospitals

in California. This case has drawn a number of amicus briefs because the issue is so critical to the practice of medicine in California. The issue in this case also is inextricably intertwined with the fairness of administrative hearings in general. This Court has shown a great interest in assuring the citizens of the State of California that administrative tribunals are fair. With the exception of this case the Courts of Appeal have also followed the lead of this Court to make sure that hearings are fair.

After this Court decided Haas v. County of San Bernardino, 27 Cal.4th 1017 (2002) (holding that hearing officers appointed by counties and cities must not have an economic conflict of interest), the Court of Appeal in Yaqub v. Salinas Valley Memorial Heahlthcare System, 122 Cal.App.4th 474 (2004) applied the ruling to hospital hearing officers. The instant case involves peer review of physicians by physicians at hospitals. The central idea of peer review is to have a physician evaluated by fellow physicians. Business & Professions Code Section 890.05 states:

> "It is the policy of this State that peer review be performed by licentiates. . . ."

Section 809.5(a) directs the governing body of hospitals to ". . . give great weight to the actions of peer review bodies. . . ."

The provisions of the Business & Professions Code governing peer review were designed to emphasize the importance of the physicians evaluating a fellow physician. The Legislature did not want the process to be bogged down in legalistic and technical procedures. For this reason physicians are not even allowed to have attorneys representing them unless the hospital agrees, in which case both sides may have attorneys. In this

particular case Dan Willick, an attorney selected and paid by the hospital, essentially took over the proceedings and elevated himself to a higher stature than the members of the peer review committee (Hearing Committee) let alone an administrative law judge.

The Legislature has not seen fit to grant hearing officers such awesome authority. There is no provision of any statute in the State of California that authorizes hearing officers to terminate hearings to which physicians are entitled as a matter of statutory law and constitutional due process. Indeed, the By-laws promulgated by the hospital in furtherance of the Business & Professions Code do not contain any provision authorizing the hearing officer to terminate any hearing or to exercise any dispositive power let alone vote. Obviously acknowledging the absence of direct statutory authority or even any authority in the By-laws, the Court of Appeal infers such implied authority. However, there is no necessity to infer such authority that does not exist because the By-laws do cover the unusual situation where a physician might disrupt the proceeding. In such a circumstance the By-laws specifically authorize the hearing officer to exclude the physician from the hearing and for the hearing to continue in his absence. Thus, there is no need to imply power or authority that is not necessary. It is especially dangerous when we know that many hearing officers are simply attorneys, not physicians, hired by hospitals and have significant economic conflicts of interest, some of which may not be disclosed.

In the instant case the Court of Appeal stated at p. 37 that the hearing officer should not submit the decision to terminate the proceeding to the Hearing Committee because the Hearing Committee, comprised of doctors, does not have the time to get involved in procedural matters. By mischaracterizing the termination of the hearing as a mere

procedural matter, the Court of Appeal ignores the reality of the situation – the decision to terminate a proceeding without addressing the merits, is not procedural. It goes to the very heart of the case. If the hearing is terminated that ends the matter and the physician loses the ability ever to be judged on the merits. The Court of Appeal apparently forgot at p.37 what it mentioned at p.5 of its Slip Opinion, that with respect to the first hearing conducted by hearing officer Lowell Brown, the hearing officer did submit the ultimate decision to the Hearing Committee. It was the Hearing Committee, not hearing officer Lowell Brown, that terminated the first hearing.

At p. 37 of its Opinion the Court of Appeal states that submitting the matter to the Hearing Committee "is simply unworkable. . . ." Well, it worked perfectly with respect to the first hearing.

It is especially appropriate that the Hearing Committee itself make the final decision because the Business & Professions Code and the By-laws commit the final decision to the Hearing Committee, not to the hearing officer. In this particular case the major point by the hearing officer was that Mileikowsky was disrupting the proceedings. However, that is a matter which is within the purview of the Hearing Committee because the physicians are present at the hearing and are able to observe the conduct directly. Here, for example, Dr. Larry Pleet, who observed the proceedings, felt that if anyone should be excluded it should be the hearing officer, Dan Willick. If Mileikowsky was so disruptive why would Dr. Larry Pleet, who knew the prosecutor, Dr. Wulfsberg for 25 years and who referred patients to Dr. Wulfsberg, side with Mileikowsky over Willick. Unless there is a video tape and/or an audio tape of the proceedings appellate tribunals are really unable to get an accurate

picture of what really is happening. The hearing officer can make self serving statements that the physician is disrupting the proceedings but unless there is a video tape or, at a minimum, an audio tape, one does not know for sure who is disrupting whom. On the value of having a video tape of an administrative hearing see Lacy Street Hospitality Services v. City of Los Angeles, 125Cal.App.4th 526 (2004). Mileikowsky did request a videographer, but his request was denied.

In criminal cases, no matter how disruptive the defendant might be, the case is not terminated. Rather, the unruly defendant can be removed and the trial can proceed in his absence. As stated the By-laws themselves in this case contemplate the possibility that a disruptive physician might be removed. However, the By-laws do not contemplate the termination of the hearing. Even if the hearing could be terminated, the termination decision must be made by the Hearing Committee itself and not by the hearing officer. Here it is undisputed that the hearing officer was hired and paid for by the hospital, the same hospital that was essentially functioning as the adversary against Mileikowsky, who had agreed to testify against Tenet in a medical malpractice case, hence Tenet's vicious retaliation.

The Legislature has provided for peer review because of its importance, yet the decision below, if allowed to stand, undermines the legislative scheme that emphasizes the importance of peer review. The termination of clinical privileges disrupts the physician's relationship with his patients, and jeopardizes his ability to deliver continuous medical care, thus placing patient's health in danger. It also destroys the physician's livelihood.

This Court has not spoken in quite a while on the subject of peer review. This is an excellent case for this Court to take because of the issues presented. It is a matter of

statewide importance. This Court should take the case and set forth some standards for how peer review is to be conducted.

It is incredible that the Court of Appeal had to reach to a 20 year's old administrative decision involving the Armed Services Board of Contract Appeals to try to find some authority for the termination of a hearing by an administrative law judge. See Slip Opinion, p. 36, citing Metodure Corp. v. United States, (1984) 6 Cl.Ct. 61. It must be kept in mind that a hearing officer selected to preside over a Hearing Committee at a hospital is not the functional equivalent of an administrative law judge. The hearing officer must stand aside and let the licentiates review the conduct of the physician whose staff privileges are being examined. The opinion below elevates the hearing officer to a stature above that of the Hearing Committee and above an administrative law judge. Essentially it stands the process on its own head. The Hearing Committee physicians become an appendage to the hearing officer.

In conclusion, this case presents two related issues: can a hearing be terminated at all by anyone even if the physician is disruptive, and if the hearing can be terminated, who should make the ultimate decision, the Hearing Committee or the hearing officer?[6]

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[6] The issue of whether a hospital may summarily suspend clinical staff privileges absent evidence of any imminent danger should also be decided by some appellate court, preferably this Court, although Mileikowsky acknowledges the Court of Appeal has twice avoided resolving this matter. The refusal of Willick to bifurcate the hearing was the major area of disagreement. Without an attorney to represent him, Mileikowsky valiantly tried to persuade Willick to bifurcate the hearing. Mileikowsky aggressively (but non violently) objected because he did not want to be deemed to have waived the issue. Had Mileikowsky been represented by an attorney he would have avoided the legal confrontation with Willick, whose unacceptable rulings were aimed at provoking him into making some inflammatory but understandable comments. The

Mileikowsky respectfully urges this Court to take the case and rule that it must be the Hearing Committee because they are comprised of physicians, whereas the hearing officer is simply an attorney financially dependent on the Hospital. Under these circumstances the conflict of interest is potentially overwhelming. Indeed, that is precisely what occurred in this case: Hospital attorneys Christensen & Auer requested that Hospital attorney Willick, whom the Hospital selected, terminate the proceeding because it was feared Mileikowsky was winning, and Willick, hired by the Hospital, granted the request of Christensen & Auer.

There has been a danger all along in administrative proceedings that the lawyers are taking over and manipulating the system. Indeed, that is what occurred in the case of Nightlife Partners v. City of Beverly Hills, 108 Cal.App. 4th 81 (2003), where the attorney ("the prosecutor") controlled the hearing examiner. The Court of Appeal condemned an administrative proceeding where the attorney with a conflict of interest controlled the proceedings even though nominally there was a hearing officer. The Court of Appeal in Yaqub v. Salinas Valley Memorial Healthcare System, supra, cited the Nightlife Partners v. City of Beverly Hills case with approval. That case is very similar to what occurred here in that the attorneys for the Hospital, Christensen & Auer, essentially took over the proceeding and exercised influence over Dan Willick, another attorney hired by the Hospital. Here, the record overwhelmingly demonstrates that such an incestuous relationship existed between the hearing officer and Tenet's attorneys. See Appendix C and F. It is noteworthy that

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hospital, by depriving Mileikowsky of his right to a hearing succeeded in terminating the hearing without allowing the Hearing Committee to make any decision. Indeed, Willick did not even allow the Hearing Committee to decide the termination issue because he knew this Hearing Committee would not approve it in light of Dr. Pleet's comments.

while neither side was supposed to have an attorney the Hospital ended up utilizing its multiple attorneys to get the proceeding terminated. Christensen & Auer should not have been permitted to submit a letter to Willick requesting the termination of the hearing since Mileikowsky was not permitted to submit a lawyer's letter in opposition.

Review should be granted to give this Honorable Court the opportunity to discuss and resolve these important statewide issues, otherwise the decision of the Court of Appeal below will encourage hospitals to continue to hire attorneys in order to control the outcome of the proceedings. If there ever was a case that presented these issues clearly, this is such a case.

Physicians are subjected to disciplinary proceedings when they are outspoken with respect to their advocacy of health care. Many physicians are attacked for having the nerve to testify against hospitals. When a hospital wants to remove a physician who is simply outspoken in his criticism of the hospital and who advocates quality of health care for patients, the hospital relies upon the disruptive physician "technique." This is being seen more and more in the medical world because medical complications are significant source of income for hospitals. See front page story reported by USA Today on May 18, 2005.

'ERRORS STILL TAKING LIVES
Hospitals Are Urged To Take Action"

The article quotes the May 18, 2005 Journal of the American Medical Association and Co- author Lucian Leape of Harvard's School of Public Health, who said, "We have to turn the heat up on the hospitals" . . . [as], "there's no economic incentive for hospitals to reduce errors because they make more money by treating the resulting problems. . . . "

The above confirms Mileikowsky's observations in the "Rape Of The Medical Peer Review Process by Tenet Healthsystem" dated March 21,2002 - Exhibit No. 171 in Mileikowsky's correspondence Index Vol. III demonstrating how hospitals' administrators put their dollar signs ahead of their patients' vital signs.

In Sahlolbei v. Providence Health Care, 112 Cal.App. 4th 1137 (2003), the hospital tried to remove the physician contending that he was disruptive. His termination for being "disruptive" was reversed by a preliminary injunction due to a lack of prior administrative hearing. In Clark v. Columbia/HCA, 25 P.3d 215 (Nev. 2001), a hospital which terminated a physicians privileges for "being disruptive" was held not to be immune from liability as management's motive were to be retaliatory for his reporting the facility to various agencies. See section headed "Facts" in the published opinion of Clark v. Columbia /HCA, supra.

Because of the danger that a hospital will pursue a physician and terminate his privileges for reasons unrelated to his ability to practice medicine it is extremely important that the peer review process be fair and not controlled by hospital administrators and their attorneys. The Hospital was not supposed to be represented by attorneys since Mileikowsky was not allowed to have an attorney, although he desperately needed one to deal with Willick.

V CONCLUSION

For the foregoing reasons, Plaintiff and Appellant Gil N. Mileikowsky, M.D. respectfully asks this Honorable Court to grant review to consider these important statewide

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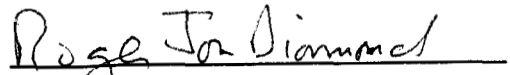
and nation wide issues.

Respectfully submitted,



ROGER JON DIAMOND
Attorney for Plaintiff & Appellant
Mileikowsky

Supreme Court No. S_____

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

GIL N. MILEIKOWKSY, Plaintiff and Appellant, vs. TENET HEALTHSYSTEM, et al., Defendants and Respondents	2nd Civ. B168705 (Los Angeles County Superior Court No. BS0979131)

CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that pursuant to Rule 28.1(d)(1) of the California Rules of Court, the enclosed brief of Appellant is produced using 13-point Roman type including footnotes and contains approximately 7,194 words which is less than the 8,400 words permitted by this rule. Counsel relies on the word count of the computer program used to prepare this brief.

Dated: May 25, 2005

Respectfully submitted,

Roger Jon Diamond

ROGER JON DIAMOND
Plaintiff-Appellant

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

GIL N. MILEIKOWSKY, Plaintiff and Appellant, v. TENET HEALTHSYSTEM et al., Defendants and Respondents.	B168705 (Los Angeles County Super. Ct. No. BS079131)

APPEAL from a judgment of the Superior Court of Los Angeles County, David P. Yaffe, Judge. Affirmed.

Roger Jon Diamond for Plaintiff and Appellant.

Robinson, Calcagnie & Robinson and Sharon J. Arkin for Consumer Attorneys of California as Amicus Curiae on behalf of Plaintiff and Appellant.

Davis, Cowell & Bowe and Andrew J. Kahn for Union of American Physicians and Dentists as Amicus Curiae on behalf of Plaintiff and Appellant.

Parker Mills & Patel and David B. Parker for Association of American Physicians & Surgeons, Inc., as Amicus Curiae on behalf of Plaintiff and Appellant.

Christensen & Auer and Jay D. Christensen for Defendants and Respondents.

Appellant Gil Mileikowsky, M.D., held staff privileges with respondent Encino-Tarzana Regional Medical Center (the Hospital) until it terminated those privileges.[1] More precisely, the Hospital determined not to reappoint Dr. Mileikowsky to staff in January 2000, a decision that permitted Dr. Mileikowsky to continue working there while a hearing on the denial took place. Then, in November 2000, the Hospital summarily suspended his staff privileges which immediately cut off his use of its facilities.

California law (Bus. & Prof. Code, § 805 et seq.) codifies a physician's right to seek peer review of adverse decisions concerning staff membership. In an effort to implement the statutory provisions, the Hospital promulgated Medical Staff Bylaws (Bylaws) which contain, among other thing, a description of its hearing and appellate review procedures, referred to as a "Fair Hearing Plan." In accordance with the Bylaws, a hearing was convened before a panel of peers (the Hearing Committee[2]) to review the Hospital's dual actions. The hearing went on

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1 Respondent Tenet Healthsystem is, as we understand it, the Hospital's parent company. The two are jointly referred to herein as respondents.

2 Dr. Mileikowsky refers to this body as the Medical Hearing Committee or MHC. Respondents prefer the term Judicial Review Committee or JRC. We use the term found in the Bylaws.

for many sessions, but did not culminate in a finding on the substantive charges. Instead, the hearing officer terminated the proceedings based on Dr. Mileikowsky's having committed a number of alleged procedural transgressions, including violation of orders and disruption of hearing sessions. His decision was upheld after an administrative appeal.

Dr. Mileikowsky filed a petition for writ of mandate contending that the hearing officer did not have the authority to suspend the hearing. He sought a new or further hearing. The trial court denied the writ. He appeals from the denial, supported by amicus curie briefs from the Association of American Physicians & Surgeons, Inc. (Association), Union of American Physicians and Dentists (Union), and Consumer Attorneys of California (Consumer Attorneys). We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. Denial of Dr. Mileikowsky's Reappointment Application

Certain background facts are not in dispute. Dr. Mileikowsky's staff privileges at the Hospital commenced in 1986. In 1998, privileges were revoked on the ground that he had not timely submitted an application for reappointment, and had therefore voluntarily resigned. Dr. Mileikowsky, insisting that his failure to reapply was inadvertent, filed a petition for writ of mandate in a related lawsuit (*Mileikowsky v. Tenet*, Super. Ct. L.A. County, 1999, No. BS056525) seeking to set aside the determination that he had resigned.[3] The trial court granted a temporary restraining order and request for preliminary injunction in April 1999.

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3 Dr. Mileikowsky later filed a second complaint (*Mileikowsky v. Tenet Healthsystem*, Super. Ct. L.A. County, 2000, No. BC233153) which ended up essentially superseding the first complaint. That litigation culminated in the related appeal in *Mileikowsky v. Tenet Healthsystem* (Apr. 4, 2005, B159733) ___ Cal.App.4th ___, from an order imposing sanctions on Dr. Mileikowsky, including both monetary sanctions and an order striking the complaint, for repeated refusals to provide discovery.

Following that, the Hospital reversed course and acted on Dr. Mileikowsky's application for reappointment on January 11, 2000--by recommending that it be denied.[4] The stated grounds were that Dr. Mileikowsky engaged in "dangerous, disruptive, threatening, abusive and unprofessional conduct in relation to [Hospital] personnel, Medical Staff officers, and patients."[5]

Dr. Mileikowsky challenged the decision, seeking a hearing as provided in the Bylaws. Under the Bylaws, practitioners impacted by an "adverse recommendation or action," including "denial of reappointment" or "suspension of staff membership," are permitted to request a hearing before a "hearing committee" and to appeal any adverse decisions to an "appellate review body." (Bylaws, art. VIII, § 2.A.2, 2.A.3, 2.C, and 2.D.)

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4 To be precise, the action was undertaken by the Hospital's Medical Executive Committee (MEC), but since the actions of the MEC are, for all relevant purposes herein, the actions of the Hospital, we do not distinguish between the two.

5 Details were provided in a June 2000 letter setting Hearing Committee review of the decision, which set forth 43 specific charges against Dr. Mileikowsky, including that he "disrupted a planned childbirth class" in 1989 by "refusing to vacate the doctors[']dining area"; copied records in violation of established policy in 1989, 1991, and 1993; ordered a nurse to modify a medication order written by another physician in 1990; failed to visit a patient for two days in 1990; negligently lacerated a patient's cervix in 1991; negligently perforated a patient's colon in 1991; sutured an episiotomy without anesthesia in 1995; and failed to complete documentation of medical records. A number of the charges had to do with lack of cooperation with attempts by the Hospital's peer committees to review his cases, including threatening to refuse to meet with one committee in 1989; failing to attend a meeting in 1990; interfering with another committee's review of the perforation incident; bringing court reporters to committee meetings; claiming that members were acting out of improper motives; failing to attend meetings in 1996; failing to respond in writing to allegations of misbehavior; leaving a 1998 meeting after only a few minutes; and refusing to accept certified letters containing notice of meetings.

A hearing commenced, but in September 2000, the Hospital's advocate filed a motion contending that Dr. Mileikowsky had waived his hearing rights by failing to produce documents regarding termination of his medical staff privileges at Cedars-Sinai in 1998. The hearing officer submitted the issue to the Hearing Committee which ruled that Dr. Mileikowsky had waived his right to a hearing. This was appealed to the appellate review body appointed pursuant to article VIII, section 6.D of the Bylaws.[6]

The appellate review body agreed that Dr. Mileikowsky violated article VIII, section 3.G of the Bylaws by deliberately delaying and refraining from producing evidence.[7] The appellate review body further agreed with the Hospital that article VIII, section 10.C of the Bylaws "provides the basis for waiver of rights under the Bylaws in a broad range of circumstances."[8] The appellate review body did not, however, uphold the ruling that the proceedings initiated by Dr. Mileikowsky should be terminated. It concluded instead that Dr. Mileikowsky should be

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6 Article VIII, section 6.D permits the chair of the Hospital's governing board to appoint an appellate review committee to review decisions of a hearing committee. In his brief, Dr. Mileikowsky refers to this body as the "Appeal Body." Respondents simply call it "the Board." Again, we prefer the term used in the Bylaws.

7 Article VIII, section 3.G gives both sides the right to inspect and copy documentary information relevant to the charges against the physician. It further provides that disputes regarding requests for access to documents shall be submitted to the hearing officer "who may impose any safeguards deemed necessary in the interests and [*sic* (probably should be 'of')] fairness or for the protection of the peer review process."

8 Article VIII, section 10.C provides: "If at any time after receipt of notice of an adverse recommendation, action or result, a practitioner fails to make a required request or appearance or otherwise fails to comply with this Fair Hearing Plan or to proceed with the matter, s/he shall be deemed to have consented to such adverse recommendation, action or result and to have voluntarily waived all rights to which he might otherwise have been entitled under the medical staff bylaws then in effect or under this Fair Hearing Plan with respect to the matter involved."

disallowed from entering into evidence matters regarding his termination of medical staff and clinical privileges at Cedars-Sinai or any other matter related to documents that had not been produced by him on a timely basis. In addition, the Hearing Committee would be entitled to make adverse findings of fact against Dr. Mileikowsky based on his failure to produce documents.

B. Summary Suspension

The appellate review body's decision reinstating proceedings on the decision to deny the reappointment application was issued on April 26, 2001. In the meantime, as we have seen, Dr. Mileikowsky's medical staff privileges at the Hospital were summarily suspended on November 16, 2000. The Hospital's letter of that date to Dr. Mileikowsky confirming the "oral notice [of his suspension] previously provided" stated that the suspension was based on the conclusion of the president of the medical staff and the chief executive officer that "failure to immediately suspend [Dr. Mileikowsky's] clinical privileges may result in an imminent danger to the health, safety, or well being of patients and/or others."

Dr. Mileikowsky requested "as soon as possible . . . an explanation of the factual bases of [the Hospital's] conclusion that '. . . failure to immediately suspend [Dr. Mileikowsky's] clinical privileges may result in an imminent danger to the health, safety, or well being of patients and/or others.'"

A report dated November 28, 2000, described six incidents to support the summary suspension. The first occurred in February 1999, when Dr. Mileikowsky came to complain about the notice that his appointment had expired based on failure to submit an application for reappointment, he became "very angry, loud and aggressive" when a staff member refused to allow him to see his credential file. He also "roughly grabbed [another staff member who refused his request] by the lapel badge." It was further alleged that he cursed at the staff members and

threatened to get them fired. The second stated basis for the suspension was a December 1999 incident where Dr. Mileikowsky was informed, during performance of a surgery, that his assistant did not have surgical privileges. Dr. Mileikowsky allegedly backed the operating room manager against a wall while screaming at her and jabbing his finger in her face. The third basis for the suspension was an August 2000 incident in which Dr. Mileikowsky took pictures to support his request for a new TRO in the related lawsuit. His actions purportedly caused one female medical staff obstetrician to be "startled, frightened and upset." The fourth incident occurred in October 2000, when Dr. Mileikowsky used a vacuum extractor during a delivery more than three times and applied fundal pressure during a difficult delivery. The fifth incident occurred on November 5, 2000. Dr. Mileikowsky asked odd questions of the attending nurse while performing a circumcision, and allegedly removed excessive skin. The sixth incident occurred on November 10, 2000, when Dr. Mileikowsky brought his "office manager" to view a delivery. The Hospital's security was instructed to prevent this person from observing the delivery, and Dr. Mileikowsky yelled at the security guard "in a very hostile manner."

To bolster the summary suspension, the report noted that the nurses union had, on November 16, 2000, submitted a written complaint to the Hospital's chief executive officer complaining about Dr. Mileikowsky's behavior, and that Dr. Mileikowsky entered Hospital premises and attempted to utilize photocopying equipment after being informed of his suspension.

C. Administrative Hearing

Dr. Mileikowsky requested a formal hearing to review the summary suspension. In response, the Hospital expressed its intent to both set a hearing on the summary suspension and restart the hearing on the denial of the request for

reappointment. The hearing was to be held before a single Hearing Committee consisting of five members of the medical staff. Daniel Willick was appointed hearing officer[9] and Dr. Richard Wulfsberg was assigned to be the advocate for the Hospital. Neither party would be represented by legal counsel, in accordance with article VIII, section 4C of the Bylaws.[10]

The general charges were summarized as follows: "A. You have engaged in a long and on-going pattern of dangerous and unacceptable mistreatment of patients, staff and medical staff. [¶] B. You have engaged in a pattern of unacceptable, aggressive verbal and physical assaults on hospital personnel. [¶] C. You have provided dangerous and substandard care in violation of express hospital rules. [¶] D. You have engaged in a long and on going pattern of interference and obstruction of the peer review process, without good cause, regarding issues related to your medical management of patients' [*sic*] and your conduct."

The Hospital listed 37 specific facts to support the general charges, essentially a compilation of the facts set forth earlier to support the Hospital's decisions to deny reappointment and summarily suspend staff privileges, with some of the older incidents omitted. The incidents began in 1990, and, as we have seen, ranged from such matters as possible medical mistakes to failure to attend meetings or cooperate with other physicians attempting to conduct peer review of

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9 Both sides acceded to his appointment in that capacity.

10 Article VIII, section 4.C provides that "neither the petitioner, the executive committee nor the governing board shall be represented, by legal council [*sic*], before the Hearing Committee unless the Board, in its sole discretion, permits all sides to be represented by legal counsel" and that the petitioner "shall be entitled to be accompanied and represented at the hearing by a licensed practitioner who is not an attorney-at-law and who preferably is a member of hospital's medical staff."

patient treatment. Charge number 27 specifically alleged that Dr. Mileikowsky had been summarily suspended by Cedars-Sinai in January 1998.

1. Request for Dismissal of Charges/Bifurcation

Dr. Mileikowsky objected to the number of charges and the age of the majority of the incidents described. He sought to have the older charges dismissed by the hearing officer. He also sought to have the hearing bifurcated so that matters pertaining to the summary suspension could be resolved first. At that time, he took the position that "[s]ince the By-laws limit the [Hearing Committee's] role to fact finding, it necessarily follows that [the hearing officer] must rule on issues of law, including motions to exclude evidence."

The hearing officer ruled that he lacked authorization under either the Bylaws or California law to dismiss charges. The hearing officer further ruled that he lacked authority to stay the summary suspension and that "[b]ifurcation of these proceedings would be inappropriate since the [Hospital] contends that all of the charges against Dr. Mileikowsky are the basis for his summary suspension" and "bifurcation would not lead to any quicker decision on the summary suspension since the same evidence will be presented by the [Hospital] as the basis for both the summary suspension and the recommendation to terminate privileges." In the hearing officer's view, although the Hospital "initially based the summary suspension on certain limited charges" it was not precluded from contending at the hearing "that the summary suspension [was] justified by all of the allegations against Dr. Mileikowsky."

Dr. Mileikowsky repeatedly asked the hearing officer to reconsider his decision on bifurcation and issue a swifter decision on the summary suspension. When these efforts proved fruitless, he requested permission to address these issues directly to the Hearing Committee. On August 28, 2001, the hearing officer

expressly ruled: "Dr. Mileikowsky may not present his motion for bifurcation to the [Hearing Committee]. Pursuant to the [Bylaws] [citation], the Hearing Officer determines the order of procedure at the hearing and makes all rulings on matters of procedure. . . . [The motion for bifurcation] which concerns procedure may not be presented to the [Hearing Committee]. [¶] . . . While I recognize that Dr. Mileikowsky disagrees with the procedures being followed at this hearing, he does not have the authority to decide what those procedures will be."

2. Hearing Officer's Discovery Rulings

In connection with the hearing, the Hospital requested that 20 categories of documents be produced, including "[a]ll documents identifying any professional medical, psychiatric, psychological, substance abuse or personnel counseling services [he] received" going back to his medical internship and a 1984 fellowship program, and documents reflecting his whereabouts on particular days from January 23, 1991, to July 6, 2000. In response to the parties' motions, the hearing officer ruled that some of the document requests were overbroad or violated Dr. Mileikowsky's right to privacy, but otherwise ordered the requested documents to be produced, acknowledging that certain documents might not exist due to the passage of time.

With regard to charge 27, the Cedars-Sinai charge, the hearing officer requested clarification concerning how the charges related to the Hospital's actions against Dr. Mileikowsky in 2000. By letter dated March 19, 2001, the Hospital supplied additional detail, alleging that Dr. Mileikowsky "failed to provide the Credentials Committee with a suitable explanation for the Cedars-Sinai Medical Center action, thereby interfering with the Credentials Committee's ability to process [his] reappointment application." The letter narrowed the request to production of the formal written decisions that upheld termination of

Dr. Mileikowsky's staff privileges at Cedars-Sinai. On April 12, the hearing officer ordered that those documents be produced.

In May 2001, the Hospital reported that Dr. Mileikowsky had failed to supply the requested Cedars-Sinai documents and asked that there be a finding that "Dr. Mileikowsky's suspension and subsequent termination at [Cedars-Sinai] occurred because Dr. Mileikowsky provided dangerous and substandard care which caused a potential or imminent danger of harm to patients."

In a ruling dated June 11, 2001, the hearing officer ruled that "the [Hospital] will be permitted to disclose to the Hearing Committee Dr. Mileikowsky's violation of my ruling that he produce the [Cedars-Sinai] Judicial Review Committee decision and findings in the matter which led to his suspension and loss of privileges and that he produce the written decision of the Governing Board of [Cedars-Sinai] affirming the decision of the Judicial Review Committee. The Hearing Committee will be permitted to learn that Dr. Mileikowsky's Medical Staff privileges at [Cedars-Sinai] were suspended and terminated due to a medical disciplinary cause or reason in November 1999 as a result of an accusation filed in January, 1998."

Dr. Mileikowsky protested, contending that Cedars-Sinai had not authorized him to release documents and pointing out that he had signed a release permitting Cedars-Sinai to release documents to the Hospital. The hearing officer did not change his ruling.

3. Hearing Officer's Ruling Re Written Submissions on Peer Review

As we have seen, some of the charges against Dr. Mileikowsky involved failure to cooperate in peer review with respect to his care of certain patients where there was no allegation that the care itself was deficient. In a June 11, 2001, ruling, the hearing officer instructed the parties to submit a brief statement in

writing as to each allegation that Dr. Mileikowsky failed to cooperate in peer review involving patient care where there was no charge that Dr. Mileikowsky provided deficient patient care. These written submissions were to be submitted to the Hearing Committee and there was not to be any other presentation of evidence regarding underlying patient care in those cases.

In his August 24, 2001, letter, the hearing officer stated: "Dr. Mileikowsky is in default on my June 11, 2001 Ruling . . . which requires certain written submissions about peer review and patient care . . . ." In an October 12, 2001, ruling, after noting that Dr. Mileikowsky had still not submitted any statements, the hearing officer warned: "In the absence of any appropriate written submission from Dr. Mileikowsky regarding patient care and peer review in compliance with my June 11, 2001 Ruling . . . , I will instruct the Hearing Committee that based upon this they may find that the Medical Staff's initiation of peer review of Dr. Mileikowsky's patient care was reasonable and warranted as to those peer review matters where the only charges against Dr. Mileikowsky are that he failed to participate in, cooperate in, or obstructed peer review. [Fn. omitted.] I will issue this instruction when evidence is first presented on such peer review."

4. Hearing Officer's Rulings Re Lawsuit/Exhibits

The hearing officer issued rulings pertaining to exhibits in the period before the evidentiary portion of the hearing began. On July 11, 2001, he ruled that the parties should not present documents filed in the lawsuits except for sworn statements relevant to the matters at issue in the hearing and that Dr. Mileikowsky was to submit an organized set of his proposed exhibits and an exhibit list 10 days before the next hearing session. In an August 24, 2001, letter, the hearing officer stated that Dr. Mileikowsky was "in default on my July 11, 2001 Ruling . . . regarding submission of his exhibit list and exhibits by August 6, 2001." In a

ruling dated August 28, the hearing officer stated: "Dr. Mileikowsky apparently is choosing to ignore the requirement . . . that all documents expected to be introduced at the hearing must be exchanged at least ten days prior to commencement of the hearing. . . . This default precludes Dr. Mileikowsky from presenting exhibits at the hearing unless and until he presents a request for relief from his default along with an exhibit list and proposed exhibits submitted to the Hearing Officer and the [Hospital]." In a letter dated October 1, the hearing officer reiterated that "Dr. Mileikowsky's continuing failure to seek to cure [defaults with respect to exhibits] is extremely ill advised, and if not corrected quickly will easily have the legal effect of resulting in his concession of the validity of major aspects of the allegations against him."

Dr. Mileikowsky expressed a wish to present as exhibits documents filed in the lawsuit and transcripts of proceedings, primarily to illustrate that the Hospital violated the preliminary injunction granted in case number BS056525. This was the subject of numerous letters to the hearing officer in which he reiterated his request and berated the hearing officer for denying it. In various letters on this subject, Dr. Mileikowsky accused the hearing officer of "suffer[ing] from . . . delusions"; "express[ing] [his] ignorance of the subject"; behaving "irresponsibl[y]"; being "out of touch"; failing to "face reality"; and showing "confusion."

In a ruling dated March 14, 2001, the hearing officer stated: "This hearing will not be a forum for Dr. Mileikowsky to present proof of the claims which he is asserting in his pending lawsuits against various members of the Medical Staff at [the Hospital] . . . . Dr. Mileikowsky should not seek to inform the members of the Hearing Committee of his pending lawsuits." On July 11, the hearing officer issued a further ruling that stated: "As explained in my March 14, 2001 Ruling this hearing will not be a forum for Dr. Mileikowsky to litigate his pending

lawsuits and he shall not seek to inform the Hearing Committee of the lawsuits." In a letter dated August 24, the hearing officer stated: "I will not change my rulings excluding the submission of court filings from Dr. Mileikowsky's lawsuits, other than relevant sworn statements, as exhibits in this matter."

In a September 13, 2001, ruling, the hearing officer reiterated that the parties should not bring up the lawsuits at the hearing. That order described an attempt by Dr. Mileikowsky to ask questions that implied there had been a violation of a court order by the Hospital with respect to his encounter with a security guard in November 2000. The hearing officer noted that Dr. Mileikowsky reacted emotionally and yelled in reaction to the hearing officer's ruling. The September 13 ruling stated that a recess would be called whenever Dr. Mileikowsky was "out of control" and that sanctions would be imposed if the behavior recurred.

5. Hearing Officer's Rulings Re Contact With the Hearing Committee

On several occasions during voir dire of potential Hearing Committee members, the hearing officer stated that "[t]he matters that go on within this hearing room are confidential and should stay in the hearing room and not be repeated outside the hearing room. The only things to be said outside the hearing room are, if you're on the hearing committee, the dates of the hearings and where the locations are."

On November 1, 2001, the hearing officer issued a ruling in response to Dr. Mileikowsky's charges that Dr. Wulfsberg and others had improper contacts with the Hearing Committee. Dr. Mileikowsky had stated: "The members of the Hearing Committee are like a jury and it is well known that neither party is supposed to have any ex parte communications with jury members." The hearing officer's response was, among other things: "No evidence has been presented by

lawsuits and he shall not seek to inform the Hearing Committee of the lawsuits." In a letter dated August 24, the hearing officer stated: "I will not change my rulings excluding the submission of court filings from Dr. Mileikowsky's lawsuits, other than relevant sworn statements, as exhibits in this matter."

In a September 13, 2001, ruling, the hearing officer reiterated that the parties should not bring up the lawsuits at the hearing. That order described an attempt by Dr. Mileikowsky to ask questions that implied there had been a violation of a court order by the Hospital with respect to his encounter with a security guard in November 2000. The hearing officer noted that Dr. Mileikowsky reacted emotionally and yelled in reaction to the hearing officer's ruling. The September 13 ruling stated that a recess would be called whenever Dr. Mileikowsky was "out of control" and that sanctions would be imposed if the behavior recurred.

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Dr. Mileikowsky to show that there has been any violation of my admonitions to the Hearing Committee and to the parties not to have communications with members of the Hearing Committee regarding the substance of these proceedings except in the hearing room" and "it is inevitable that each of the parties to the proceedings . . . and their representatives are in contact with the members of the Hearing Committee. As I have instructed the Hearing Committee, what is important is that there is no communication with members of the Hearing Committee regarding the substance of these proceedings, except in the hearing room."

6. Dr. Mileikowsky's Conduct During Hearing Sessions

The hearing commenced in January 2001. Sessions were generally scheduled in the evening, from 6:30 p.m. until 10:00 p.m. Voir dire of potential panel members and other procedural matters consumed seven sessions--which were spread out over many months--and actual substantive matters were not addressed until August 16, 2001, when opening statements were made. Over the course of the next 16 sessions which took place between August and December 2001, the Hospital called witnesses to testify in support of the charges.

Dr. Mileikowsky arrived late at the session on August 28, 2001, and requested a continuance because his physician-assistant was in surgery. He submitted a written motion to bifurcate and argued with the hearing officer about whether he could present it to the Hearing Committee--issues that had already been addressed by the hearing officer. He tried to bring up the related lawsuit. He argued with the hearing officer about whether the hearing officer had the authority to limit examination of witnesses. He argued with the hearing officer when the hearing officer admonished him to ask questions rather than engage in a dialogue. He argued with the hearing officer when the hearing officer questioned the

relevance of a line of questioning. At one point, the hearing officer stated that Dr. Mileikowsky seemed to be trying to "provoke something."

At the August 29, 2001, session, Dr. Mileikowsky argued with the hearing officer when the hearing officer interrupted him for badgering a witness. Dr. Mileikowsky attempted to question a witness about the lawsuit and preliminary injunction and argued with the hearing officer when the hearing officer cut off the line of questioning. He interrupted the questioning of a witness to demand production of a patient chart, and referred to the hearing as "the Spanish Inquisition." Dr. Mileikowsky repeatedly criticized the hearing officer for "interrupting" him and for taking the Hospital's side when the hearing officer ruled against him on objections. Similar comments were made at the August 30 session and the September 4 and 5 sessions. At the September 4 session, the hearing officer threatened to suspend questioning if Dr. Mileikowsky did not cease arguing about a ruling. At the September 5 session, the hearing officer admonished Dr. Mileikowsky for intimating that court orders had been violated and for bringing up the litigation. Also on September 5, the hearing officer reminded Dr. Mileikowsky of the ruling concerning the lawsuits and warned him if he persisted in trying to "perpetrate [the] fiction about there being a court order . . . that prohibited people from escorting [him]," the hearing officer would "take steps to precisely inform the [Hearing Committee] of what the true nature of the law was." At the very next session, on September 29, 2001,[11] however, Dr. Mileikowsky attempted to bring up the litigation again.

At the October 22 session, the Hospital introduced a document that purported to summarize the medical cases that triggered the attempted peer review

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11 Several hearing sessions scheduled for mid-September were cancelled due to the attack on the World Trade Center on September 11, 2001.

process in 1998. The document had been prepared at the request of the hearing officer since the underlying care of the patients involved was not raised in the charges that led to the termination of staff privileges and was not directly at issue in the hearing. Dr. Mileikowsky had been provided an opportunity to create a document addressing why he believed these cases should not have triggered peer review, but had not done so. Dr. Mileikowsky accused the hearing officer of being out of touch with reality. The hearing officer warned Dr. Mileikowsky that he could adjourn the hearing. After a lengthy discussion, the session was terminated early because Dr. Wulfsberg's continuity with the witness had been disrupted.

The October 23, October 29, and November 1, 2001, sessions were interrupted for argument concerning whether Dr. Mileikowsky could introduce exhibits when he was in default of the Bylaws and the hearing officer's order concerning preparation of an exhibit list and providing copies of proposed exhibits to the Hospital.

Dr. Mileikowsky again attempted to bring up the related litigation and preliminary injunction at the November 5, 2001, session. At that point, Dr. Wulfsberg asked for greater sanctions, such as excusing the witness or stopping the hearing.

At the November 12, 2001, session, there were several periods when questioning was interrupted while Dr. Mileikowsky argued with the hearing officer over rulings. At one point the hearing officer warned Dr. Mileikowsky to stop "[o]r [he] will excuse [Dr. Mileikowsky] from the hearing room."

The transcripts reflect that two sessions besides the October 22 sessions were terminated early.[12] The session on November 29, 2001, was terminated by

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12 Respondents' brief indicates that "four hearing sessions" were "cut short and/or cancelled" as the result of "Dr Mileikowsky's disruptive behavior." The brief goes on to cite *three* sessions in addition to the two discussed above--the sessions on September 5,

the hearing officer after Dr. Mileikowsky made some foundational objections and complained that he had not received copies of documents being shown to the witness and the panel. The session, which began at around 7:00 p.m., was adjourned at 7:25 p.m.--over Dr. Mileikowsky's objection--so that copies of documents could be supplied to him.[13] On November 30, 2001, the hearing officer issued a ruling noting there had been "repeated instances where Dr. Mileikowsky has disrupted the hearing by yelling and refusing to comply with my rulings" and warning he would "take appropriate action" if the disruptions did not cease. The ruling also noted that Dr. Mileikowsky was often late to arrive and had caused sessions to start late. The ruling further stated that the hearing officer was satisfied that documents at issue on November 29 had been faxed to Dr. Mileikowsky.

The session on December 17, 2001, which began at 6:37 p.m., was adjourned early--at 8:12 p.m.--when Dr. Mileikowsky argued with the hearing officer over objections sustained during Dr. Mileikowsky's cross-examination of a witness testifying concerning the vacuum extraction. For example, Dr. Mileikowsky asked the witness to find something objective on the chart that would document any injury to the baby. The witness referred to "a

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October 29, and December 3, 2001. The session on September 5 commenced at 6:56 p.m. and was ended at 9:42 p.m. by the hearing officer because he thought the members of the Hearing Committee "need to get some sleep." The October 29 session commenced at 7:10 p.m. and ended at 9:45 p.m., which was, according to the hearing officer "beyond the time I said we'd adjourn." The session on December 3 commenced at 7:06 p.m. and ended at 9:49 p.m. after the hearing officer indicated an intention to "take a break to talk about other [matters]."

13 The Hospital subsequently submitted proof that Dr. Mileikowsky had timely received a copy of the exhibits--a letter from the Hospital to the hearing officer enclosing a copy of a facsimile transmission sheet dated November 19, 2001, and an Airborne Express document indicating that a package had been signed for by Dr. Mileikowsky's receptionist on November 20, 2001.

cephalohematoma." Dr. Mileikowsky interjected that that was not an objective document. The hearing officer told him not to interrupt the witness and to ask a question. A few minutes later the witness said that Dr. Mileikowsky would have to "ask a pediatrician" whether a cephalohematoma could be distinguished from an edema by the speed at which it resolved. Dr. Mileikowsky retorted: "The fact is that you have the hutzpah [*sic*] to sit here and say that I caused injury . . . and you don't have the knowledge." When the hearing officer told him he was out of order and threatened to adjourn the hearing, Dr. Mileikowsky said that the whole hearing was out of order and that the hearing officer was "ready to adjourn before we started." The hearing officer abruptly adjourned the hearing stating that "Dr. Mileikowsky is refusing to abide by my ruling . . . regarding no argument." No further evidentiary sessions were held after that date.

7. Posthearing Rulings

On December 24, 2001, the hearing officer asked the parties to submit briefs regarding his authority to declare a default based on Dr. Mileikowsky's actions in the following areas: failure to produce documents; failure to prepare an exhibit list and set of exhibits; failure to submit a written statement concerning the peer review allegations; and repeated disruption of hearing sessions by violating orders concerning questioning of witnesses and repeated references to the lawsuits he had filed.

On January 3, 2002, the hearing officer issued a written ruling stating that Dr. Mileikowsky had "acted to disrupt the orderly conduct of [the] hearing on a number of occasions" by refusing "to comply with [the hearing officer's] Rulings regarding the examination of witnesses and the introduction of evidence"; engaging in "noisy yelling at hearing sessions" on September 5, November 29, and December 17, 2001; and making statements containing "invective and personal

attacks directed towards witnesses" and others. The hearing officer ruled that further questioning of witnesses on Dr. Mileikowsky's behalf be done by his assistants or representatives, that the hearings be videotaped, and that a security officer be present in the hearing room. He stated that "[t]he hearing sessions shall not reconvene until Dr. Mileikowsky responds in writing that he will comply with my rulings regarding the conduct of this hearing, including specifically the rules set forth in this Ruling."

A few days later, the hearing officer postponed a scheduled session because Dr. Mileikowsky had sent him a letter indicating he would not abide by the ruling concerning the examination of witnesses, and that he would like to have his own videotape technician and security guard in the room.

On February 19, 2002, the hearing officer reiterated in a written ruling that "the 'hearing sessions shall not reconvene until Dr. Mileikowsky responds in writing that he will comply with my rulings regarding the conduct of this hearing, including specifically the rules set forth in' [the] January 3, 2002 Ruling."

On March 1, 2002, the hearing officer asked the parties to submit a written brief on the issue of whether Dr. Mileikowsky had abandoned his defense of the matter by refusing to state that he would comply with the rulings regarding future proceedings or whether other procedures should be followed. Dr. Mileikowsky prepared a brief, sending it not just to the hearing officer and Dr. Wulfsberg, but also to the members of the Hearing Committee. The brief stated that the hearing officer had ruled that questioning of witnesses on Dr. Mileikowsky's behalf had to be conducted by one of his representatives. An attached letter from his two representatives stated that they did not feel qualified to provide the kind of representation that the hearing officer's ruling demanded.

On March 19, 2002, a member of the Hearing Committee reportedly called the Hospital and said "[the hearing officer's] request to deny [Dr. Mileikowsky]

from questioning witnesses is outrageous, absolutely outrageous, to change in the middle of the . . . procedure . . . is an outrageous thing to do." Attorneys representing the Hospital sent a letter claiming that "The statements . . . contained in Dr. Mileikowsky's . . . brief are so inflammatory, false and misleading that there is no way this [hearing] can be rehabilitated," and asked the hearing officer to rule that he had "failed to proceed . . . in good faith and has therefore waived his rights to hearing and an appellate review."

8. Hearing Officer's Order Terminating Proceedings

On March 30, 2002, the hearing officer issued a ruling formally terminating the hearing sessions, stating that "[t]he intentional acts of misconduct by Dr. Mileikowsky have so prejudiced the hearing that it is impossible to complete it consistent with the requirements of fair procedure and due process imposed by California law" and that "Dr. Mileikowsky's repeated acts of misconduct at this hearing have created a situation where he has waived his right to the completion of this hearing and thereby has failed to exhaust his administrative remedies."

According to the ruling, the primary basis for the decision to terminate was the letter Dr. Mileikowsky wrote to the members of the Hearing Committee, which the hearing officer deemed "unauthorized" and "an obvious attempt to prejudice their consideration of the matters before them." The hearing officer referred to his November 1, 2001, ruling wherein it was reportedly stated that "the Hearing Committee have no communication 'regarding the substance of these proceedings, except in the hearing room'" and that "'the parties not . . . have communications with members of [the] Hearing Committee regarding the substance of these proceedings, except in the hearing room.'" In addition, the hearing officer accused Dr. Mileikowsky of misinforming the Hearing Committee in his letter by indicating that no one would be able to question witnesses on Dr. Mileikowsky's

behalf. As evidence of prejudice from these actions, the hearing officer stated: "At least one Hearing Committee member is reported to have been outraged by my purported refusal to allow any representative of Dr. Mileikowsky to question witnesses."

The second basis was Dr. Mileikowsky's conduct with respect to his related lawsuit. The hearing officer stated: "Since I wished to have the Hearing Committee use its own judgment without reference to inconclusive legal proceedings, I ruled that the lawsuits should not be referenced in the Medical Staff hearing" in order to "protect Dr. Mileikowsky from prejudice and confusion[.] [H]e violated my rulings by continuously making reference to his lawsuits in front of the Hearing Committee and by misrepresenting the rulings in his lawsuits."

The third basis was Dr. Mileikowsky's violation of orders regarding discovery in June and July 2001. The ruling particularly referenced documents related to the decision of Cedars-Sinai to terminate his medical staff privileges, and calendars and appointment books that would have indicated Dr. Mileikowsky's whereabouts when he avoided appearing at peer review investigations.

The fourth basis was failure to produce copies of exhibits expected to be introduced at the hearing 10 days before the commencement of the hearing in July 2001.

The fifth basis was Dr. Mileikowsky's failure to submit any briefing concerning the allegations that he failed to cooperate in peer review.

The sixth basis was Dr. Mileikowsky's conduct in disrupting hearing sessions by allegedly "yelling, . . . disobeying [the hearing officer's] rulings regarding the questioning of witnesses, and . . . misrepresenting whether he received documents which [we]re the subject of a particular hearing." By way of example, the hearing officer referenced the September 5, 2001, session, where Dr. Mileikowsky "disrupted the proceedings because he disagreed with [the

hearing officer's] prohibition of his reference to his litigations in front of the Hearing Committee" and the session on November 29, 2001, where he "disrupted [a session] by falsely contending that he had not received a . . . letter . . . enclosing exhibits." The ruling further specifically described the December 17, 2001, session as one in which Dr. Mileikowsky engaged in "disorderly conduct and disruption of hearings."

The seventh basis was Dr. Mileikowsky's use of language in written and oral statements that "abuse[d] witnesses, the MEC's representatives, hospital administrators, and [the hearing officer]." For example, at the December 17, 2001, session, Dr. Mileikowsky called a witness "superficial and careless," stated that "'[the witness didn't] have the knowledge,'" and had an "'interest to see that [Dr. Mileikowsky's] practice goes down the tube.'" In a letter to the hearing officer, Dr. Mileikowsky accused an attorney for the MEC of "fabrications." In another letter, Dr. Mileikowsky said of the hearing officer that he "lie[s] by omission" and "[s]uffer[s] from the same delusions as [the MEC attorney]."

Finally, the hearing officer pointed to Dr. Mileikowsky's "continuing refusals to obey my rulings for the conduct of this hearing" evidenced at the December 17, 2001, session and in the letters that followed.

D. Administrative Appeal

The hearing officer's decision to terminate was appealed to another three-person appellate review body. The appellate review body affirmed, concluding that Dr. Mileikowsky "repeatedly disrupted hearing sessions and used personal invective and threatening language"; "repeatedly violated the Hearing Officer's order that he refrain from referencing his two lawsuits brought against [the Hospital's] parent company and many Medical Staff physicians"; "refused to comply with Discovery required by [Government Code] Section 809 and the

[Bylaws]"; and "entered into unauthorized ex parte communications with the entire Hearing [Committee] relating to the subject matter of the Hearing."

E. Dr. Mileikowsky's Writ Petition

After exhausting his administrative remedies, Dr. Mileikowsky filed a petition for writ of mandate in the superior court. In his first amended petition,[14] Dr. Mileikowsky alleged that after the related lawsuit was filed and a preliminary injunction issued prohibiting the Hospital from preventing Dr. Mileikowsky from exercising the privileges of an active status physician and surgeon or reporting to others that he had voluntarily resigned, the Hospital "purported to process [his] application in accordance with [its] By-Laws" but voted to deny it without hearing or notice. Dr. Mileikowsky alleged that he appealed the decision, and an administrative hearing commenced in October 2000. Then, in November, the Hospital "blatantly violated once again the preliminary injunction [in case no. B159733] by purporting to summarily suspend [Dr. Mileikowsky's] privileges on November 16, 2000." The Hospital upheld the summary suspension "in violation of the By-Laws, in violation of the preliminary injunction, and in violation of the due process clauses of the federal and state [C]onstitutions." Thereafter, the Hospital "purported to provide [Dr. Mileikowsky] with a combined hearing regarding his reappointment application and the summary denial of his staff privileges with a new Hearing Officer and a new Hearing Committee." That hearing was "illegally suspended on March 30, 2002 by [the hearing officer], who failed to obtain the approval of the [Hearing] Committee."

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14 The original petition is not in our record.

The petition sought a new administrative hearing, and also asked that the hearing officer be appointed by the court or, alternatively, that the hearing be conducted entirely by the court.

F. Trial Court's Ruling

At the hearing on the petition, the trial court stated that the hearing officer's decision came to it with a "presumption of correctness" and that Dr. Mileikowsky had not met his burden of showing that the decision was not supported by the weight of the evidence. The court made particular reference to "one instance . . . where the reporter who was reporting [the hearing] threw up her hands and walked out because [Dr. Mileikowsky] kept interrupting, [and] she could not make any kind of an intelligible transcript of what was going on" and another where Dr. Mileikowsky "was shouting at people, [and] insisting on reading into the record a . . . ruling [the court] had made that was not relevant to any point being discussed at the time."

The court denied the writ petition on March 14, 2003. We quote from the court's order explaining its reasoning at length: "The administrative hearing was terminated based upon findings that [Dr. Mileikowsky] had repeatedly disrupted the hearings by disorderly conduct, defiance of the hearing officer's rulings made to control [Dr. Mileikowsky's] conduct, violation of the hearing officer's rulings concerning the admissibility of evidence, refusal of [Dr. Mileikowsky] to provide information requested from him relating to the charges against him despite orders by the hearing officer to do so, and [Dr. Mileikowsky's] repeated failure and refusal to obey orders of the hearing officer concerning the filing of briefs.

"The administrative record contains substantial evidence to support the administrative decision, and, under the circumstances, the court finds that the

termination of the administrative hearing was not arbitrary or capricious, and was not an abuse of discretion by the governing board.

"The administrative decision was the culmination of a long course of disruptive conduct by [Dr. Mileikowsky] since his application for staff privileges was initially denied on January 11, 2000. The administrative hearings have produced an administrative record that now fills ten cartons which, placed one on top of another, constitute a stack of documents almost nine feet high. [Dr. Mileikowsky] has been given more than an adequate opportunity to oppose administratively respondent's efforts to rid itself of his presence upon its medical staff. He is entitled to no more."

Judgment was entered on respondents' behalf. Dr. Mileikowsky moved for a new trial based on insufficient evidence to support the court's decision. The motion was denied. This appeal followed.

DISCUSSION

I

Standard of Review

The parties dispute the standard of review to be applied on appeal. Dr. Mileikowsky contends that we should examine the issues raised de novo. The Hospital insists that the rulings of the hearing officer and administrative review body must be upheld as long as they are supported by substantial evidence. In addition, the parties are in disagreement over whether the writ was properly taken under Code of Civil Procedure section 1085 (traditional or ordinary mandamus) or section 1094.5 (administrative mandamus).[15]

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15 As explained in *Bunnett v. Regents of University of California* (1995) 35 Cal.App.4th 843, 848: "Statutes provide for two types of review by mandate: ordinary mandate and administrative mandate. [Citation.] The nature of the administrative action

The parties' confusion is understandable. There are two distinct issues embedded in the seemingly simple question of whether to uphold the hearing officer's decision: (1) whether the hearing officer had the authority to suspend the hearing as a sanction under the Hospital's Bylaws and/or the provisions of the Business and Professions Code governing termination of physicians' hospital staff privileges; and (2) whether the administrative record supports the conclusion that Dr. Mileikowsky's conduct justified terminating the proceeding. A different standard of review applies to each issue.

The first essentially asks whether Dr. Mileikowsky was afforded the hearing required by the Business and Professions Code and the Bylaws. Failure to provide a hearing required by law or regulation is remedied by a petition for traditional mandate, as this court stated in *DeCuir v. County of Los Angeles* (1998) 64 Cal.App.4th 75. There, the Civil Service Commission had refused to hold a hearing and made a decision based on review of written materials. The claimant contended he was excused from seeking review by way of ordinary mandate. We disagreed: "The commission's denial of a hearing is itself a reviewable determination. That was the context in which [the claimant's] claim was presented and reviewed. The fact that [the claimant] did not prevail does not establish that a petition for ordinary mandate will automatically fail. . . . [M]andate is not only available to review the action of the commission where there is a hearing, but is the appropriate procedure to test the commission's denial of a hearing." (*Id.* at p. 82.)

Moreover, determining whether hearing procedures complied with the relevant statutes and the Bylaws requires application of the rules of statutory interpretation and construction. In such cases, "'[t]he appropriate mode of review

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or decision to be reviewed determines the applicable type of mandate. [Citation.] In general, quasi-legislative acts are reviewed by ordinary mandate and quasi-judicial acts are reviewed by administrative mandate."

. . . is one in which the judiciary, although taking ultimate responsibility for the construction of the statute, accords great weight and respect to the administrative construction. [Citation.]'" (*Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 12.) Despite the deference given, "[t]he court, not the agency, has 'final responsibility for the interpretation of the law' under which the regulation was issued." (*Id.* at p. 11, fn. 4.)

Yamaha dealt with interpretation of the underlying statute. The same standard applies to appellate review of an administrative body's interpretation of its own regulations: "As a general rule, the courts defer to the agency charged with enforcing a regulation when interpreting a regulation because the agency possesses expertise in the subject area. [Citation.] However, final responsibility for interpreting a statute or regulation rests with the courts and a court will not accept an agency interpretation which is clearly erroneous or unreasonable." (*Aguilar v. Association for Retarded Citizens* (1991) 234 Cal.App.3d 21, 28.)

The conclusion that traditional mandamus applies and review is de novo in situations similar to the present case was reached by the court in *Unnamed Physician v. Board of Trustees* (2001) 93 Cal.App.4th 607, where the physician contended that the respondent hospital's medical staff Bylaws did not properly implement the provisions of the Business and Professions Code and that the notice given to him did not comply with the requirements of statute. (*Id.* at p. 618.) The court concluded that the physician based his challenge on the failure of respondents to comply with law, and that therefore, review would be under standards of traditional mandamus. (*Ibid.*) The court further recognized that "[i]n reviewing a trial court's ruling on a writ of mandate, an appellate court is 'ordinarily confined to an inquiry as to whether the findings and judgment of the trial court are supported by substantial evidence. [Citation.]'" (*Ibid.*) However, where the duty the petitioner seeks to enforce "is one derived from statute," and the

question presented is "what does the statue require," the appellate court is "confronted with questions of law only, [and is] to address the legal issues de novo." (*Id.* at pp. 618-619.)

Similarly, in *Rosenblit v. Superior Court* (1991) 231 Cal.App.3d 1434, the physician filed a petition for writ of mandate seeking to reinstate his hospital staff privileges, primarily raising procedural issues such as whether he had sufficient notice of the charges against him and whether he had a meaningful opportunity to voir dire panel members. The court interpreted the question presented as "whether there was a fair trial and whether the [hospital] proceeded in a manner required by law." (*Id.* at p. 1443.) Findings by the trial court as to these types of matters represented "conclusion[s] of law," and were to be reviewed "de novo" by the appellate court based on independent review of the administrative record. (*Id.* at pp. 1442-1444.)

Once it is resolved whether hearing officers have the power under the statute and regulations to impose the equivalent of terminating sanctions, however, the issue becomes whether such sanctions should have been imposed in a particular case. Applying the law to a particular factual situation is a judicial or quasi-judicial function. Section 1094.5 of the Code of Civil Procedure is the provision that governs review of quasi-judicial administrative decisions. (*Selby Realty Co. v. City of San Buenaventura* (1973) 10 Cal.3d 110, 123.) The scope of review under section 1094.5 was laid out by the Supreme Court in *Selby Realty Co. v. City of San Buenaventura, supra*: "Subdivision (b) of section 1094.5 of the Code of Civil Procedure provides that the scope of inquiry in a mandamus proceeding brought to inquire into the validity of a final administrative order shall extend to whether the respondent has proceeded without or in excess of jurisdiction, whether there was a fair trial, and whether there was any prejudicial abuse of discretion. Abuse of discretion is established if the respondent has not proceeded in the manner required

by law, the decision is not supported by the findings, or the findings are not supported by the evidence." (10 Cal.3d at pp. 123-124.)

Our review of the issue of whether Dr. Mileikowsky's behavior warranted the sanction imposed is not resolved, however, by a determination of whether "the [administrative review body's] findings of fact are supported by substantial evidence," as respondents contend. Neither the appellate review body nor the Hearing Committee made any findings of fact based on the evidence presented with respect to the substantive charges against Dr. Mileikowsky. The "facts" on which the hearing officer relied to impose sanctions are better described as the procedural background, which is found in the administrative record and is not subject to serious dispute. Like a trial court confronted with a litigant who repeatedly disobeys court orders, the hearing officer exercised discretion in choosing how to respond. The question of whether the ultimate sanction should have been imposed is subject to the same standard of review as our review of a trial court's order imposing similar sanctions on a litigant: abuse of discretion. (See, e.g., *In re Marriage of Chakko* (2004) 115 Cal.App.4th 104, 108.)[16]

II

Hearing Officer's Authority

"In 1989, the state Legislature enacted California Business and Professions Code section 809 et seq. for the purpose of opting out of the federal Health Care Quality Improvement Act of 1986 [citation], which was passed to encourage

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16 Our conclusion in this regard is supported by the Seventh Circuit's decision in *Chapman v. U.S. Commodity Futures Trading Commission* (7th Cir. 1986) 788 F.2d 408.) In affirming an agency decision to dismiss a proceeding due to failure to comply with a discovery order, the court said: "As this agency sanction was within statutory limits, it can be upset only if it reflects an abuse of discretion." (*Id.* at p. 411.)

physicians to engage in effective peer review. California chose to design a peer review system of its own, and did so with the enactment of these sections. [Citation.] Section 809 provides generally that peer review, fairly conducted, is essential to preserving the highest standards of medical practice and that peer review which is not conducted fairly results in harm both to patients and healing arts practitioners by limiting access to care. [Citation.] The statute thus recognizes not only the balance between the rights of the physician to practice his or her profession and the duty of the hospital to ensure quality care, but also the importance of a fair procedure, free of arbitrary and discriminatory acts." (*Unnamed Physician v. Board of Trustees*, *supra*, 93 Cal.App.4th at p. 616.)

Section 809 et seq. of the Business and Professions Code "delegates to the private sector the responsibility to provide fairly conducted peer review in accordance with due process, including notice, discovery and hearing rights" and "also defines what constitutes minimum due process requirements for the review process." (*Unnamed Physician v. Board of Trustees*, *supra*, at p. 622.) "The statute allows for and encourages effective peer review, while at the same time it balances the interests of both the physician and the public in ensuring fair, nonarbitrary, and nondiscriminatory procedures. [Citations.] It does this by defining the minimum procedures required and by mandating strict compliance with the procedures outlined." (*Ibid.*)

Section 809.2 sets forth the statutory requirements for hearing procedures. Under subdivision (a), the hearing is to be held either before an arbitrator or "a panel of unbiased individuals." Subdivision (b) provides that a hearing officer may be "selected to preside at a hearing held before a panel" and "shall not be entitled to vote." The practitioner has the right to voir dire panel members and to challenge the impartiality of such members. Challenges are to be ruled on by "the presiding

officer, who shall be the hearing officer if one has been selected." (§ 809.2, subd. (c).)

Under subdivision (d) of section 809.2, the parties have the right to inspect and copy documents relevant to the charges and "[t]he failure by either party to provide access to this information at least 30 days before the hearing shall constitute good cause for a continuance." "The . . . presiding officer [that is, the hearing officer where one has been selected] shall consider and rule upon any request for access to information, and may impose any safeguards the protection of the peer review process and justice requires." (*Id.*, subd. (d).)

Under subdivision (f) of section 809.2, the parties are to "exchange lists of witnesses expected to testify and copies of all documents expected to be introduced at the hearing." "Failure to disclose the identity of a witness or produce copies of all documents expected to be produced at least 10 days before the commencement of the hearing shall constitute good cause for a continuance." (*Id.*, subd. (f).) Continuances may be granted "by the . . . presiding officer on a showing of good cause." (§ 809.2, subd. (g).)

Subdivision (h) of section 809.2 requires a hearing to commence within 60 days after receipt of a request for hearing and to be completed "within a reasonable time, after a licentiate receives notice of a final proposed action or an immediate suspension or restriction of clinical privileges," unless the "presiding officer issues a written decision finding that the licentiate failed to comply with subdivisions (d) and (e) in a timely manner, or consented to the delay."

Finally, section 809, subdivision (a)(8) requires promulgation of "written provisions implementing Sections 809 to 809.8" to be included "in medical staff bylaws." And section 809.6, subdivision (a) provides that "[t]he parties are bound by any additional notice and hearing provisions contained in any applicable

professional society or medical staff bylaws which are not inconsistent with Sections 809.1 to 809.4, inclusive."

As we have seen, the Hospital did promulgate Bylaws that add further detail to the statutory procedures. Among other things, the Bylaws mandate rather than permit the appointment of a hearing officer "to preside at the evidentiary hearing." (Bylaws, art. VIII, § 3.D.) In line with the powers expressly granted by statute to the "presiding officer," the hearing officer is empowered to rule on challenges for bias (*id.*, § 3.F) and disputes regarding access to documents and other information (*id.*, § 3.G), and grant continuances (*id.*, § 3.I). In addition, "[t]he hearing officer shall act to maintain decorum and to assure that all participants in the hearing have a reasonable opportunity to present relevant oral and documentary evidence. He/she shall be entitled to determine the order of procedure during the hearing and shall make all rulings on matters of procedure and the admissibility of evidence." (Bylaws, art. VIII, § 4.B.) Finally, article VIII, section 3.G provides that disputes regarding requests for access to documents shall be submitted to the hearing officer "who may impose any safeguards deemed necessary" in the interests of fairness and to protect the peer review process.

The Bylaws also list various ways in which a practitioner can be deemed to have waived his or her right to a hearing. A waiver can occur if the practitioner fails to request a hearing "within the time and in the manner specified." (Bylaws, art. VIII, § 2.E.) Under article VIII, section 4.A, a hearing can be waived by "[a] practitioner who fails without good cause to appear and proceed" at the hearing. In addition, article VIII, section 10.C provides that if after receipt of a notice of adverse recommendation or action, "a practitioner fails to make a required request or appearance or otherwise fails to comply with this Fair Hearing Plan or to proceed with the matter," he or she "shall be deemed to have consented to such adverse recommendation, action or result and to have voluntarily waived all rights

to which he might otherwise have been entitled under the medical staff bylaws then in effect or under this Fair Hearing Plan with respect to the matter involved."

Noting that nothing in these provisions expressly permits the hearing officer to suspend the hearing based on the practitioner's conduct in disobeying orders or disrupting hearing sessions, Dr. Mileikowsky and amicus Union contend that the hearing officer exceeded his authority and violated Dr. Mileikowsky's right to a hearing before his peers. Respondents concede that the power to terminate proceedings is not expressly set forth in the Bylaws or the relevant statutes, but contend that such power is reasonably inferable from existing provisions or the inherent power of a judicial or quasi-judicial officer.

As we have said, our responsibility is to interpret the governing statutes and regulations with due deference to the appellate review body's interpretation. (See, e.g., *Aguilar v. Association for Retarded Citizens*, *supra*, 234 Cal.App.3d at p. 28.) "To determine the intent [of a statute or regulation], the court turns first to the words, attempting to give effect to the usual, ordinary import of the language and to avoid making any language mere surplusage. [Citations.] The words must be construed in context in light of the nature and obvious purpose of the regulation where they appear. [Citation.] The various parts of an enactment must be harmonized in context of the framework as a whole. [Citations.] The regulation [or statute] must be given a reasonable and common sense interpretation consistent with the apparent purpose and intention of the agency, practical rather than technical in nature, and which, when applied, will result in wise policy rather than mischief or absurdity." (*Id.* at pp. 28-29.)

Although the Business and Professions Code does not specifically speak in terms of termination of proceedings or waiver of rights, section 809.2, subdivision (h), expressly relieves hospitals of their obligation to commence a hearing "within 60 days after receipt of the request" or complete a hearing "within a reasonable

time" where the practitioner fails to comply with subdivisions (d) and (e) pertaining to discovery. In addition, the statute contemplates that hearings will have a "presiding officer" who will render rulings on procedural matters and "may impose any safeguards the protection of the peer review process and justice requires." (Bus. & Prof. Code, § 809.2, subd. (d).) The statutes further contemplate that hospitals will promulgate Bylaws to implement the statutory provisions that will be binding on the parties. (*Id.*, § 809.6.)

The Bylaws go into greater detail concerning the various ways in which rights may be waived. Article VIII, section 10.C, in particular, is quite broad--any failure to comply with the Fair Hearing Plan outlined in the Bylaws may be deemed a waiver of the right to contest the adverse action. In its April 2001 ruling reversing the decision to terminate the previous hearing, the appellate review body noted that article VIII, section 10.C of the Bylaws "provides the basis for waiver of rights under the Bylaws in a broad range of circumstances."

The hearing officer's conclusion that he had the power to suspend the hearing based on the conduct of the practitioner is in line with the relevant statutes and the Bylaws as interpreted by the appellate review body. His decision that the rules permit termination of a hearing when the practitioner is repeatedly disruptive, disdainful of the hearing officer's authority, and flagrantly violates the rules pertaining to discovery and documentary exhibits was not "clearly erroneous" or "unreasonable," and was affirmed by the appellate review body. (See *Aguilar v. Association for Retarded Citizens*, *supra*, 234 Cal.App.3d 21.) We see no basis for reaching a contrary interpretation.

Moreover, even if the power to control proceedings was not specifically enunciated in the relevant statutes and Bylaws, hearing officers have "wide latitude as to all phases of the conduct of the hearing, including the manner in which the hearing will proceed. [Citations.]" (*Cella v. United States* (7th Cir. 1953) 208

F.2d 783, 789.) Administrative agencies are "'free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties.'" (*Ibid.*, quoting *Federal Communications Comm. v. Pottsville Broadcasting Co.* (1940) 309 U.S. 134, 143, accord, *Fairbank v. Hardin* (9th Cir. 1970) 429 F.2d 264, 267.) The pronouncements are in accord with the fundamental rule that judges have "inherent power to control litigation before them." (*Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953, 967.) In order to ensure that the hearings mandated by the Business and Professions Code proceed in an orderly fashion, hearing officers must have the power to control the parties and prevent deliberately disruptive and delaying tactics. The power to dismiss an action and terminate the proceedings is an important tool that should not be denied them.

Our conclusion that a hearing officer may terminate a hearing as a sanction for flagrant disobedience to orders is supported by the case of *Metadure Corp. v. United States* (1984) 6 Cl. Ct. 61. The case involved a hearing before the Armed Services Board of Contract Appeals (Board). Its regulations stated that "[i]f any party fails or refuses to obey an order issued by the Board, the Board may then make such order as it considers necessary to the just and expeditious conduct of the appeal.[17]" (6 Cl. Ct. at p. 66, quoting 32 C.F.R. App. A, at 435 (1982).) The administrative law judge directed the plaintiff to provide access to its books and records. The order was not complied with, and the administrative law judge imposed a sanction of dismissal. Plaintiff argued before the Court of Claims that the sanction was arbitrary and capricious. The court noted that, just as a court enjoys "inherent power enabl[ing] it to invoke dismissal as a sanction in situations involving disregard of orders" and "great leeway in formulating orders to control

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17 Hearings before the Board were referred to as "appeals."

discovery," the Board's administrative law judges "by virtue of their case management authority, are given broad discretion to manage the litigation on their dockets." (*Id.* at pp. 66-67.) In the case before the court, the administrative record consisted "primarily of voluminous submissions dealing with a major discovery dispute concerning not the nature or scope of discovery, but whether plaintiff would allow discovery to be completed" resulting in "[s]quandering the resources of the administrative tribunal" and "unfair[ness] to other litigants." (*Id.* at p. 67.) Consequently, the court had no difficulty holding that "the administrative law judge acted well within his authority in imposing a preclusionary sanction . . . because of plaintiff's willful failure to comply with the . . . order." (*Id.* at p. 68.)

Dr. Mileikowsky argues alternatively that the decision to terminate the hearing should have been made by the Hearing Committee rather than the hearing officer acting alone. As can be seen from the above-quoted provisions, nothing in the Bylaws or relevant statute suggests that the Hearing Committee rather than the presiding officer or hearing officer is to decide procedural questions. To the contrary, the provisions we have quoted uniformly indicate that procedural matters are addressed to the presiding officer or hearing officer. The alternative that Dr. Mileikowsky advocates--that contested procedural issues be argued to and decided by the Hearing Committee--is simply unworkable. The panel assembled in the present case consisted of busy medical practitioners. The record reflects the difficulty experienced in convening evidentiary hearing sessions two or three evenings a week for a few hours at a time due to the conflicting schedules of all concerned. If such panels were to be charged with determining procedural matters in addition to the difficult substantive questions, there would be little hope of having these types of proceedings resolved in any reasonable time.

We acknowledge the concern expressed by amicus Association that too much power in the hands of the hearing officer could lead to the loss of the statutorily-mandated peer review. The Association fears that a hearing officer might be tempted to impose terminating sanctions when a difficult defending physician appears to be scoring points with the peer committee. Moreover, the Association points out, the Bylaw's prohibition on representation by legal counsel during the hearing session guarantees that there will be some deviance from standard litigation practices and courtesies. But our recognition of a hearing officer's *authority* to impose the ultimate sanction does not mean that termination of hearings will be routine or that gratuitous impositions will be upheld. Hearing officer decisions to terminate proceedings due to the alleged violation of procedural rules will always be reviewable in court. Courts are reluctant to deprive a litigant of the opportunity to have the substantive merits of his or her case be heard except in egregious circumstances. An extensive record of misbehavior would have to exist to justify a decision to deprive a practitioner of the peer review afforded by statute. It is to the issue of whether the decision to terminate the hearing was justified by the record in the present situation that we now turn.

III

Appropriateness of Terminating Sanction

As we have seen, the hearing officer gave eight reasons for imposing a terminating sanction: (1) the brief Dr. Mileikowsky addressed to the members of the Hearing Committee; (2) Dr. Mileikowsky's continuous references to his lawsuit and misrepresentations concerning the rulings made; (3) Dr. Mileikowsky's violation of orders regarding discovery; (4) Dr. Mileikowsky's failure to exchange his exhibits 10 days before the commencement of the hearing sessions; (5) Dr. Mileikowsky's failure to submit any briefing concerning the

allegations that he failed to cooperate in peer review; (6) Dr. Mileikowsky's conduct in disrupting hearing sessions by yelling and disobeying the hearing officer's ruling regarding the questioning of witnesses, and misrepresenting whether he received documents; (7) Dr. Mileikowsky's use of abusive or inappropriate language in written and oral statements; and (8) Dr. Mileikowsky's general refusals to obey the hearing officer's rulings for the conduct of the hearing.

In affirming the ruling, the appellate review body focused on four of the reasons given: (1) that Dr. Mileikowsky repeatedly disrupted hearing sessions and used personal invective and threatening language; (2) that he repeatedly violated the hearing officer's order that he refrain from referencing his related lawsuit; (3) that he refused to comply with discovery required by Business and Professions Code section 809 and the Bylaws; and (4) that he entered into unauthorized "ex parte" communications with the entire Hearing Committee.

Dr. Mileikowsky and amicus Association focus on the first reason expressed by the hearing officer, and contend that sending the post-hearing brief to the members of the Hearing Committee was not improperly ex parte because it was served on both sides. It is clear from the context that the hearing officer was not motivated by the belief that the brief had not been served on the other side. After the final hearing session on December 17, 2001, the hearing officer asked for briefing on the issues of appropriate sanctions short of termination and for suggestions on how hearing sessions could proceed in an orderly fashion in the future. After receiving the parties' briefs, the hearing officer made a ruling on how further sessions would proceed. Dr. Mileikowsky was openly defiant and made clear that he did not intend to accede to the hearing officer's ruling. The hearing officer then asked for briefing on whether Dr. Mileikowsky's refusal to proceed under the rules laid down represented a waiver. Dr. Mileikowsky attempted to circumvent him by addressing his response directly to the Hearing Committee.

The hearing officer had previously ruled that procedural issues were to be addressed to him alone, and repeatedly refused Dr. Mileikowsky's numerous requests that he be allowed to petition the Hearing Committee for review of procedural rulings. The hearing officer was outraged about the brief not because it was "ex parte," but because it represented a flagrant disregard of prior rulings and confirmed Dr. Mileikowsky's cavalier attitude toward the authority of the hearing officer.

It is important to keep in mind that the hearing officer's final series of requests for briefing on appropriate sanctions and hearing procedures represented the culmination of numerous prior attempts to induce Dr. Mileikowsky to respect the hearing officer, the hearing process, and the requirements imposed on him by the statues and Bylaws. Dr. Mileikowsky had repeatedly failed to supply documents requested and had already suffered lesser sanctions as a result. He had failed to supply an exhibit list or copies of exhibits he intended to use, and had been forbidden to introduce exhibits until he complied with the rules pertaining to exchange of exhibits. In defiance of that order, he repeatedly attempted to show new documents to witnesses and was argumentative when reminded of the hearing officer's ruling. Seeking to gain control over the issues, the hearing officer had asked the parties to provide written statements to be distributed to the Hearing Committee with respect to the medical files underlying the charges that Dr. Mileikowsky failed to cooperate with peer review. Dr. Mileikowsky disregarded that request. Dr. Mileikowsky repeatedly attempted to bring up the related lawsuit when cross-examining witnesses to create the impression that court orders had been violated, and was argumentative with the hearing officer when he was cut off. Indeed, Dr. Mileikowsky's habitual response to adverse evidentiary rulings was to argue, accuse the hearing officer of bias, or make contemptuous comments about the hearing officer and/or the hearing process.

As we have said, courts are reluctant to approve imposition of the ultimate sanction unless it is clear from the record that the transgressing party left no viable alternative. In *Newland v. Superior Court* (1995) 40 Cal.App.4th 608, this Court explained why: "The rule that a sanction order cannot go further than is necessary to accomplish the purpose of discovery is some 35 years old in California, and is rooted in constitutional due process." (*Id.* at p. 613, citing *Caryl Richards, Inc. v. Superior Court* (1961) 188 Cal.App.2d 300.) In *Caryl Richards*, the defendant failed to adequately respond to discovery about the chemical properties of its product even after being ordered to do so. The trial court ordered that defendant's answer be stricken and its default entered. The appellate court in *Caryl Richards* reversed, and we quoted and adopted its reasoning in *Newland*: "'While under the statue the court undoubtedly has the power to impose a sanction which will accomplish the purpose of discovery, when its order goes beyond that and denies a party any right to defend the action or to present evidence upon issues of fact which are entirely unaffected by the discovery procedure before it, it not only abuses its discretion but deprives the recalcitrant party of due process of law. "The fundamental conception of a court of justice is condemnation only after hearing. To say that courts have inherent power to deny all right to defend an action and to render decrees without any hearing whatever is, in the very nature of things, to convert the court exercising such an authority into an instrument of wrong and oppression, and hence to strip it of that attribute of justice upon which the exercise of judicial power necessarily depends."'" (*Newland*, *supra*, at p. 614, quoting *Caryl Richards*, *supra*, at p. 305.)

Numerous other appellate courts have held that imposition of a terminating sanction by the trial court is excessive where the party's conduct is not extreme and other options were available to protect the integrity of the litigation process. (See, e.g., *Midwife v. Bernal* (1988) 203 Cal.App.3d 57, 64 ["Constitutional due

process 'imposes limitations on the power of courts, even in aid of their own valid processes, to order discovery sanctions that deprive a party of his opportunity for a hearing on the merits of his claim'"]; *Thomas v. Luong* (1986) 187 Cal.App.3d 76, 81 [holding that courts "should not deprive a party of all right to defend an action if the discriminating imposition of a lesser sanction will serve to protect the legitimate interests of the party harmed by the failure to provide discovery"]; *Morgan v. Ransom* (1979) 95 Cal.App.3d 664, 670 [court held that the "sanction of peremptory dismissal, without consideration of the merits, is fundamentally unjust unless the conduct of a plaintiff is such that the delinquency interferes with the court's mission of seeking truth and justice"].)

There is no question, however, that in some egregious circumstances terminating sanctions are appropriate. In *Collisson & Kaplan v. Hartunian* (1994) 21 Cal.App.4th 1611, for example, defendants failed to respond to discovery, failed to respond to letters requesting responses, and disregarded a court order issued in a hearing on a motion to compel. After the trial court granted a request for sanctions by striking the answer, defendants served responses and moved for reconsideration, claiming that the sanction was too drastic since it was only their first effort at drafting responses. The Court of Appeal rejected that argument: "Defendants' characterization of their further responses as being their 'first effort' to respond, while literally correct, is nonetheless misleading. The point that defendants fail to acknowledge is that, while this may have been their first [attempt] to respond, it was not plaintiff's first [attempt] at receiving straightforward responses. Defendants chose to ignore the many attempts, both formal and informal, made by plaintiff to secure fair responses from them. Accordingly, we find no abuse of discretion by the trial court." (*Id.* at p. 1618.)

In *Lang v. Hochman* (2000) 77 Cal.App.4th 1225, the court reviewed cases where terminating sanctions were upheld, and discerned the following basic

scenario: "[T]he trial court imposed a terminating sanction after considering the totality of the circumstances: conduct of the party to determine if the actions were willful; the detriment to the propounding party; and the number of formal and informal attempts to obtain the discovery. In each case, the offending party spent months avoiding or evading discovery." (*Id.* at p. 1246.) The same pattern appeared in the case before the court in *Lang*. The history of this case showed that "[defendant] did not comply with the court's orders. The referee viewed [defendant's] constant declarations that it fully complied with the discovery request as 'disingenuous at best.' The referee and the court found [defendant's] lack of diligence to be willful, tactical, egregious and inexcusable. [Defendant's] conduct prevented [plaintiff] from preparing for trial since the documents were necessary to [his] objective of showing misappropriation and commingling of funds. The court, over the course of the year, progressively sanctioned [defendant]. Still, [defendant] did not produce the requested documents. [¶] The trial court and the referee conducted many hearings and afforded [defendant] numerous opportunities to comply with the orders." (*Id.* at p. 1247.) On that procedural background, the court upheld the trial court's ruling.

Our review of the administrative record convinces us that the hearing officer did not abuse his discretion in terminating the hearing. Dr. Mileikowsky was repeatedly sanctioned, repeatedly warned, and repeatedly importuned to treat the hearing officer and the hearing process with respect. By the time the hearing officer imposed the terminating sanction, less severe sanctions had already been tried with respect to discovery and exhibits. They obviously had little impact, as Dr. Mileikowsky neither produced the documents nor prepared his exhibits or exhibit list. Despite the ineffectuality of prior sanction orders, the hearing officer initially hoped to impose lesser sanctions to deal with the disruptive conduct at the hearing sessions. But Dr. Mileikowsky threatened to defy the ruling if sessions

were reconvened. The hearing officer could not disregard Dr. Mileikowsky's disdain for his authority forever. Nor could he permit Dr. Mileikowsky to continue to unnecessarily prolong the proceedings. The Hospital was entitled to closure, and the Hearing Committee members were entitled to get on with their lives. The decision to terminate the hearing was justified under the circumstances.

IV

Substantive Issues

Dr. Mileikowsky and amicus Association devote considerable portions of their briefs to the contention that the summary suspension was unwarranted. Amicus Consumer Attorneys express concern that Dr. Mileikowsky's staff membership was withdrawn in retaliation for his agreement to testify in a medical malpractice action. We are not called on here to review the merits of the decision to suspend Dr. Mileikowsky's hospital privileges or the decision to refuse his request for reappointment. The sole issue presented is whether the hearing officer's ruling, upheld by the appellate review body, terminating the administrative proceeding based on Dr. Mileikowsky having waived his rights to proceed by his behavior was correct or whether instead Dr. Mileikowsky's due process rights were violated by premature adjournment of the hearing.

A similar debate arose in *Bollengier v. Doctors' Medical Center* (1990) 222 Cal.App.3d 1115, where the physician claimed that the charges against him were procedurally invalid. When the hearing officer refused to dismiss the charges, he sought a writ of mandate from the superior court, arguing he should not be required to stand trial on charges which were procedurally defective. On appeal from the order denying the petition based on failure to exhaust administrative remedies, the parties presented "extensive arguments regarding the facts surrounding the suspension" and provided "conflicting evidence to support their respective

positions." (*Id.* at p. 1122.) The physician presented evidence of "his outstanding surgical skill and 'legendary' patient care" and alleged that the suspension was "economically motivated." (*Ibid.*) The hospital set forth evidence of "'gross misconduct'" and argued that summary suspension was "necessary to protect patients and others from [the physician]." (*Ibid.*) The Court of Appeal refused to take the bait, limiting itself to the procedural issue presented: "Factual findings have not yet been made in this case and, as is evident from the arguments, many of the facts are hotly contested. This court cannot make the required factual determinations. . . . Thus, all of the discussion and exhibits regarding the disputed facts are irrelevant to the issues before us." (*Id.* at pp. 1122-1123.)

Turning to the procedural issues, the court held that the trial court had correctly ruled that the physician failed to exhaust his administrative remedies. The physician contended that administrative remedies were inadequate "because there is no mechanism for an interim review of the claimed procedural deficiencies." (*Bollengier*, *supra*, 222 Cal.App.3d at p. 1129.) The court concluded that the lack of opportunity for interim review did not render the administrative process meaningless: "The fact petitioner is facing numerous charges of misconduct and claims procedural irregularities took place, does not warrant court intervention before the administrative proceedings are concluded." (*Ibid.*) Moreover, to the extent the physician contended that summary suspension was invalid because need for immediate action was not present and the suspension was done in bad faith, these were factual challenges that required resolution of disputed facts. (*Id.* at p. 1131.)

Dr. Mileikowsky and amicus Association raise arguments that echo those in *Bollengier*, contending that the Hospital's summary suspension decision was taken in bad faith and in the absence of evidence of imminent harm. These were the issues being litigated before the Hearing Committee. Dr. Mileikowsky's actions

caused the hearing to be terminated and prevented the Hearing Committee from issuing a decision on the merits. As a result, like the court in *Bollengier*, we do not reach the substantive issues.

DISPOSITION

The judgment is affirmed.

CERTIFIED FOR PUBLICATION

CURRY, J.

We concur:

HASTINGS, Acting P.J.

GRIMES, J.*

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* Judge of the Los Angeles Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT

DIVISION 4

May 4, 2005

Roger Jon Diamond
2115 Main Street
Santa Monica, CA 90405-2215

Gil N. Mileikowsky, M.D.
v.
Tenet Healthsystem, et al.

B168705
Los Angeles County No. BS079131

THE COURT:

Petition for rehearing is denied.

cc: All Counsel
File

APPENDIX B

Encino · Tarzana
Regional Medical Center
Tarzana Hospital
Tenet HealthSystem

Tarzana Hospital
18321 Clark Street
Tarzana, CA 91356

December 31, 2001

Daniel H. Willick, Esq.
Law Offices of Daniel H. Willick
1925 Century Park East
Seventeenth Floor
Los Angeles, CA 90067

Re: Hearing Of Gil Mileikowsky, M.D.

Dear Mr. Willick:

This letter shall serve as the Medical Executive Committee's ("MEC").response to your letter dated December 24, 2001 wherein you request both parties to submit in writing their position regarding your authority to declare that Dr. Mileikowsky has forfeited his right to a hearing due to his failure to follow procedures for hearings as required both by law and by the Medical Staff Bylaws ("Bylaws").

1. **Dr. Mileikowsky's Request For an Extension of Time to Respond to Your December 24, 2001 Request**

Before discussing the substance of your requests, I want to address Dr. Mileikowsky's latest request for yet another extension of time. In your December 24, 2001 letter, you directed Dr. Mileikowsky to respond to the issues raised in my December 21, 2001 letter by the close of business on December 28. You further directed both Dr. Mileikowsky and the MEC to respond to the issue of your authority to declare Dr. Mileikowsky in default, thus forfeiting his right to a hearing, by the close of business on December 31. Dr. Mileikowsky's December 28 response consists of a request for an extension of time to January 7, 2002 in order for his attorney to familiarize himself with the issues and advise Dr. Mileikowsky on a response. The MEC opposes any further delays, and this one in particular, for the reasons set forth below.

Dr. Mileikowsky has been without counsel for many months during this hearing by his own choice. He could have retained counsel to assist with the hearing issues long before now, but did not do so. Moreover, when he finally did retain new counsel, which he did more than a month ago, he retained such counsel only with respect to the pending litigation.[1] Therefore, Dr. Mileikowsky should not be permitted at this 11th hour to obtain additional time to bring his new counsel up to speed on the hearing issues, simply because he did not choose to do so long before.

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1 I have been informed by legal counsel Stephen G. Auer that Dr. Mileikowsky's new counsel, Kevin Mirch, represented at the December 19, 2001 status conference before Judge Crispo that, as of that date, he was representing Dr. Mileikowsky only with respect to the litigation cases, not the hearing.

Furthermore, the next hearing is scheduled for January 7, 2002, the same date on which Dr. Mileikowsky proposes to respond. It is imperative that the issues be briefed and decisions made expeditiously with respect to the procedures to be followed for this scheduled hearing and for any future hearings. Those decisions should not be postponed until the very day of the hearing.

As we have seen repeatedly, this is another in a long line of requests by Dr. Mileikowsky for extensions of time and further delays—delays requested by the man who cries to anyone who will listen that he is being denied a speedy hearing and that the delays are "killing him." For these reasons, Dr. Mileikowsky's request for an extension of time to respond to the requests in your December 24, 2001 letter should be denied.

2. Authority to Declare Dr. Mileikowsky Has Waived His Right to a Hearing

Article VIII, Section 4A of the Bylaws provides that a practitioner who fails without good cause to appear and proceed at such hearing shall be deemed to have waived his/her rights in the same manner and with the same consequences as provided in Section 2E[2]. In addition, Article VIII, Section 4B provides that the hearing officer shall: a) maintain decorum and assure that all participants in the hearing have a reasonable opportunity to present relevant oral and documentary evidence; and b) determine the order of procedure during the hearing and shall make all rulings on matters of procedure and the admissibility of evidence. Furthermore, Article VIII, Section 4L of the Bylaws provides that "no person shall disrupt any hearing. Any person in attendance who disrupts a hearing after being warned by the Hearing Officer to cease such disruption on penalty of exclusion, shall, at the discretion of the Hearing Officer, leave the hearing. If such excluded person is the affected practitioner or a witness, s/he shall have the right to submit to the Hearing Committee, not later than ten days after such exclusion, a written affidavit of his/her testimony or other evidence, with copies thereof to the other party."

As outlined in the MEC's December 21, 2001 letter, Dr. Mileikowsky has been unable to control his comportment in at least three hearing sessions causing you to: 1) admonish him for his unacceptable behavior; 2) issue a warning that if he was unable to control his behavior you would be forced to call a recess; 3) terminate at least two of the hearing sessions due to his unprofessional, intimidating and threatening behavior toward the witnesses, the panel members, myself and you; and 4) issue a warning to him that if he continues to disrupt the hearing and if he fails to comply with your rulings, you will order him to submit his testimony or other evidence in writing and by way of written affidavit.[3]

In addition to Dr. Mileikowsky's inability to control his comportment, he has failed to comply with California law, the Bylaws and your rulings with regard to: 1) discovery requests[4]; 2) production of an exhibit

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[2] Article VIII, Section 2E provides that a practitioner who fails to request a hearing within the time and in the manner specified in 2D waives any right to such hearing and to any appellate review to which s/he might otherwise have been entitled.

[3] Ruling dated November 29, 2001.

[4] California Evidence Code 809.2(d) and Article VIII, Section 3G of the Bylaws provides that each party shall have the right to inspect and copy, at its own expense, documentary information relevant to the charges which the other party has in its possession or control as soon as practicable after a receipt of a request therefore, but at least thirty (30) days prior to the hearing if reasonably possible. Despite multiple requests by the MEC and your rulings dated March 1, March 26, April 12 and June 11, 2001, Dr. Mileikowsky has failed to comply with discovery.

list and copies of exhibits to be introduced at the hearing[5]; and 3) written response brief concerning peer review where the MEC does not contend in this hearing that Dr. Mileikowsky's underlying patient care is deficient.[6] These matters have been noted by you in your December 26, 2001 Ruling regarding Dr. Mileikowsky's request for an expedited hearing.

Dr. Mileikowsky's behavior during the latest hearing session on December 17 clearly indicates that he has no intention of complying with either California law, the Bylaws or your orders when it comes to following hearing procedures. Accordingly, it is the MEC's contention that due to Dr. Mileikowsky's: a) obstructive behavior, as outlined above; and b) his interference with the MEC's efforts to expedite this hearing, you have the authority pursuant to the Bylaws to find that Dr. Mileikowsky has failed to proceed, without good cause, and therefore, he has waived his right to a hearing and appellate review.

3. **Recommendations**

A. Advisement and Warning

That being said, it is the MEC's contention that Dr. Mileikowsky's present behavior is a strategy to force you to terminate this hearing session so that he may later assert, either to the Board or to a Court, that he was denied his right to a fair hearing without notice. Thus, the MEC wants to ensure that Dr. Mileikowsky is sufficiently warned, in advance, of the consequences of his improper and disruptive behavior before terminating sanctions are imposed on him. Therefore, the MEC requests that you appropriately warn and advise Dr. Mileikowsky in the form of a Ruling that any further failure by him to comply with California law, the Bylaws, or your rulings can result in your making a finding that he has failed to proceed, without good cause, and therefore, he has waived his right to a hearing and appellate review. If, after such warning and advisement, Dr. Mileikowsky persists in the course of conduct he has exhibited throughout this hearing process, you have the authority to terminate the proceedings and make the findings discussed above. Alternatively, if Dr. Mileikowsky's disruptive conduct continues, you may consider ordering that the remaining evidence be submitted by affidavit. Such an order should be effective to stop such inappropriate conduct and would allow the completion of this hearing.

In addition to warning Dr. Mileikowsky of the consequences of any further disruptions in the hearing, the MEC requests the following orders:

B. Sanctions For Defaults and Failures to Comply With Rulings

The MEC requests that you impose the sanctions threatened in your October 12, 2001 ruling by: 1) denying Dr. Mileikowsky any additional time to correct his default with regard to his production of discovery documents, admission of exhibits and a submission of a response brief concerning peer review where the MEC does not contend in this hearing that Dr. Mileikowsky's underlying patient care is deficient; 2) informing the JRC on the record of the requirements set forth by California law, the Bylaws and your rulings regarding the production of documents, the admission of exhibits and submission of response briefs; 3) informing the JRC that it is Dr. Mileikowsky's choice to ignore these requirements and that is the only reason that he may not

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[5] California Evidence Code 809. 2(f) and Article VIII, Section 3 H of the Bylaws provides that at the request of either side, the parties shall exchange copies of all documents expected to be introduced at the hearing. This exchange shall take place at least 10 days prior to commencement of the hearing. Despite multiple requests and your rulings dated July 11, August 28, and September 5, 2001, Dr. Mileikowsky has not submitted his list of exhibits or copies of exhibits that he intends to introduce at the hearing.

[6] Rulings dated March 26, April 12, June 11, September 5, and October 12, 2001.

introduce any documents or a response brief at this late date; and 4) instructing the JRC that based on Dr. Mileikowsky's failure to submit a response brief concerning peer review, they may find that the Medical Staff's peer review of Dr. Mileikowsky's patient care was reasonable and warranted as to those peer review matters where the charges against Dr. Mileikowsky are that he failed to participate in, cooperate in, or obstructed peer review.

C. Imposition of Security Conditions and Videotaping For All Further Hearings

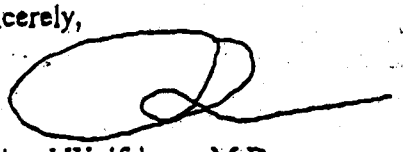
Furthermore, the MEC requests that, in accordance with its December 21, 2001 letter, you: 1) order all future hearing sessions to be videotaped for security purposes; 2) post a security guard in the hearing room; 3) order security to check Dr. Mileikowsky and his packages, outside the view of the hearing panel members and witnesses, with a metal detector to determine if he has any dangerous devices; and 4) terminate the hearing session the moment Dr. Mileikowsky's behavior is out of control.

D. Imposition of Procedures For Cross-Examination of MEC Witnesses

With regard to the cross-examination of future MEC witnesses, the MEC requests that: 1) Dr. Mileikowsky be instructed to work with his representative to compose, in advance, a list of questions relevant to the Charges and documents about which the witness has been called to testify; 2) Dr. Mileikowsky be instructed that only his representative will be permitted to question the witnesses; and 3) Dr. Mileikowsky be informed that if he has additional questions for a witness, you will grant a recess so that he may discuss these questions with his representative.

Thank you for your attention to these issues.

Sincerely,



Richard Wulfsberg, M.D.

cc: Gil Mileikowsky, M.D. (facsimile and US Certified Mail)
Kevin Mirch, Esq.
Debbie Miller, CMSC
Jay D. Christensen, Esq.

LAW OFFICES OF
DANIEL H. WILLICK
1925 Century Park East
Seventeenth Floor
Los Angeles, California 90067

Telephone: (310) 286-0485
Facsimile: (310) 286-0487
E-Mail: willick@ucla.edu

MEMORANDUM

CONFIDENTIAL PEER REVIEW COMMUNICATION

To: Members of the Hearing Committee, Dr. Mileikowsky and Dr. Wulfsberg and Ms. Debbie Miller

From: Daniel H. Willick, Esq. D. H. W.

Date: March 1, 2002

Re: **Hearing Schedule**

A dispute has arisen over the continuing conduct of these hearings. I have entered orders providing that the hearings will not proceed unless and until Dr. Mileikowsky agrees to obey certain rulings which I have made regarding how these hearings will proceed. Dr. Mileikowsky has refused to do so and has responded in writing on several occasions that he intends to violate some of those rulings. Under the circumstances, I do not believe it appropriate at this time to reconvene the hearing sessions until a mechanism has been established to resolve this issue.

I anticipate dealing with these questions in the near future. Please provide the Medical Staff Office with a calendar of your availability in April, 2002 for continued sessions in this matter.

Thank you for your patience and anticipated cooperation.

APPENDIX D

To: Members of the Hearing Committee, Dr. Wulfsberg, Ms. Debbie Miller

From: Gil Mileikowsky, M.D., Jose Spiwak, M.D., and Daniel Wiseman, M.D.

Cc: Daniel H. Willick, Esq.

Date: March 15, 2002

Re: Response to Memo Re: Cancellation of the Hearing Schedule

As you know, three months have passed since our last meeting on December 17, 2001. **Mr. Willick has cancelled all of the subsequent meeting dates.** In his March 1 memo to you, Mr. Willick attributed these cancellations to "a dispute [that] has arisen over the continuing conduct of these hearings" and stated that he would not permit the hearings to proceed "unless and until Dr. Mileikowsky agrees to obey certain rulings which I have made regarding how these hearings will proceed." We are troubled by Mr. Willick's decision and repeated cancellations, which we believe to be not only unjustified but in excess of his authority. We write this memorandum because we feel obliged to respond.

We want you to know that we want this hearing to resume immediately and to reach its conclusion as soon as reasonably possible. By bringing the hearing to a halt, these ongoing cancellations violate Dr. Mileikowsky's right to an expedited hearing. The delay penalizes him indefinitely, preventing him from pursuing his medical practice.

We are concerned that the March 1 memo prejudices Dr. Mileikowsky by placing blame on him for the delay and may discourage you from continuing to participate in future meetings. Unfortunately, Mr. Willick's rulings make the continuation of the hearing difficult, if not impossible. We have used our best efforts to comply with the rulings and repeatedly requested to "Meet and Confer" with the MEC representatives and Mr. Willick to resolve any issues. Unfortunately, our requests continue to be opposed by the MEC and denied by Mr. Willick, which we believe is reflective of bias against Dr. Mileikowsky.

We have attached Dr. Mileikowsky's Brief, in which we hope you will read the full responses to Mr. Willick's conditions, which are quoted on pages 5-6. We hope you can see through the MEC's disparagement of Dr. Mileikowsky and its apparent efforts to prejudice the hearing process. Above all, we hope that you will not be discouraged from completing your task, as a Member of the Hearing Committee, to reach a fair conclusion based on all of the facts at issue.

While we expect that Dr. Mileikowsky will be found innocent of all charges, that his clinical privileges will be restored, and that he will be able to return to his chosen professional activities as soon as possible, the Committee must be permitted to make the decision. We hope you can appreciate the "Catch 22" situation that Dr. Mileikowsky faces as a result of this contrived administrative roadblock, and that you will bear with us.

Thank you for your patience and understanding. Please hang in there.

CHRISTENSEN & AUER

LAW OFFICES

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PASADENA, CALIFORNIA 91101
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PROFESSIONAL CORPORATION

STEPHEN G. AUER
PROFESSIONAL CORPORATION

ANNA M. SUDA
DONNA J. DEMPSTER

AUTHOR'S DIRECT LINE
(626) 395-7350
AMS@CA-HEALTHLAW.COM

March 19, 2002

VIA FACSIMILE AND U.S. MAIL

Daniel H. Willick, Esq.
Law Offices of Daniel H. Willick
1925 Century Park East
Seventeenth Floor
Los Angeles, CA 90067

Re: Hearing of Gil Mileikowsky, M.D.

Dear Mr. Willick:

At approximately 12:30 p.m. today, Debbie Miller ("Ms. Miller"), CMSC at Encino-Tarzana Regional Medical Center (ETRMC), received a voice mail message from Lawrence Pleet ("Dr. Pleet"), a member of the Judicial Review Committee ("JRC") in the above-entitled matter.

Dr. Pleet's message indicated that, in his opinion, "Mr. Willick's request to deny Gil (i.e., Dr. Mileikowsky) from questioning witnesses is outrageous, absolutely outrageous." Dr. Pleet then requested that Ms. Miller return his call to inform him of whether there was a hearing session tomorrow. When Ms. Miller returned Dr. Pleet's telephone call, Dr. Pleet indicated that he had received a fax of a brief from Dr. Mileikowsky dated March 15, 2002 which, among other things, included an attached letter from Drs. Wiseman and Spiwak which indicated that they were not comfortable questioning witnesses. Dr. Pleet also indicated that the fax had been sent to other JRC members.[1] Attached herewith is a transcription of Dr. Pleet's voice mail message and a summary of Ms. Miller's conversation with Dr. Pleet.

It is the MEC's contention that Dr. Mileikowsky's March 15, 2002 brief contains multiple false and inflammatory statements regarding your rulings, conduct and role in this hearing as well as the conduct and actions taken by the MEC.

---

[1] Drs. Fleischer, Ballin, Miyashita, and Nassoura have indicated to Ms. Miller that they have received a copy of Dr. Mileikowsky's March 15, 2002 brief with various attachments.

With regard to you, Dr. Mileikowsky makes multiple assertions that the conditions imposed by you for this hearing are arbitrary and an abuse of your discretion. He then asserts that these conditions were placed on him because of your perceived personal conflict with him and because of the vigorous disagreements between you and he. He further asserts that your rulings, in particular your ruling which requires his representative to question witnesses, limit his ability to examine and cross-examine witnesses and said limits were placed on him because he has already rebutted an overwhelming majority of the charges against him, thereby implying that you are biased against him and are intentionally interfering with his right to a fair proceeding. Dr. Mileikowsky also submitted a letter dated February 28, 2000 signed by Drs. Wiseman and Spiwak which indicate their refusal to question witnesses and their fear with regards to a security guard in the room. Based on Dr. Pleet's statements this letter, by itself, is sufficient to infuriate the JRC members. The problem with this letter is that, until the March 15, 2002 brief, this letter was never submitted to you, the MEC or the Medical Staff Office.

Dr. Mileikowsky also falsely asserts that you denied him his right to present evidence that a previous administrative committee and a court of law conducted a hearing on the evidence now at issue in this hearing and have made a factual and legal determination in his favor. Further, Dr. Mileikowsky's brief falsely indicates that you have deliberately delayed and indefinitely prolonged the hearing.

With regard to the MEC, Dr. Mileikowsky's brief falsely asserts that he requested this hearing in November of 2000 following an unlawful summary suspension and illegal interview between himself and the MEC; that he has made ongoing efforts to overcome ETRMC's delay of fifteen months to present his defense; that he has lost patients, lost income, and has suffered and continues to suffer immense harm as a result of ETRMC's unlawful summary suspension for nonexistent imminent danger; that Dr. Wulfsberg threatened him and violated the confidentiality of the hearing by opening the door of the meeting to invite the security guard in; that in light of the serious harm to Dr. Mileikowsky and his patients the MEC had an obligation to institute and complete a hearing within the 30 days reasonably demanded by him; that the MEC used the voir dire of the JRC as a pretext to prolong the hearing by nine months; and that all the MEC's charges, with the exception of the two medical records at issue, have been prosecuted and he has been found innocent.

Clearly, Dr. Mileikowsky's actions are yet another attempt to circumvent your authority as the hearing officer and to taint the hearing process. Unfortunately, Dr. Mileikowsky's latest action prejudices the MEC in a manner which makes it impossible to proceed with this hearing. The statements, as outlined above, contained in Dr. Mileikowsky's March 15, 2002 brief are so inflammatory, false and misleading that there is no way this JRC can be rehabilitated.

APPENDIX F

Accordingly, in addition to the arguments made in the MEC's letters dated December 31, 2001, January 25, and March 15, 2002, the MEC requests that, pursuant to Article VIII, Section 4A, you rule that Dr. Mileikowsky, without good cause, has so disrupted and undermined this hearing process as to be deemed to have failed to proceed with this hearing in good faith and has therefore waived his rights to hearing and an appellate review.

For the record, this letter has been reviewed and edited by Dr. Wulfsberg, Representative of the MEC.

Thank you for your attention to this issue.

Very truly yours,

Anna M. Suda

AMS/bjc

Enclosure

cc: Gil Mileikowsky, M.D. (facsimile and US Certified Mail with encl.)
Debbie Miller, CMSC (facsimile and US Mail with encl.)
Richard Wulfsberg, M.D. (facsimile and US Mail with encl.)

APPENDIX F

Telephone message left by Lawrence Pleet, M.D. on the message machine of Debbie Miller on 3/19/02 at 12:33 p.m.

Debbie, this is Dr. Pleet calling, my opinion is that Mr. Willick's request to deny Gil from questioning witnesses is outrageous, absolutely outrageous, to change in the middle of the rulings in the middle of the procedure I just, and the legal things behind it, I think it is an outrageous thing to do to him

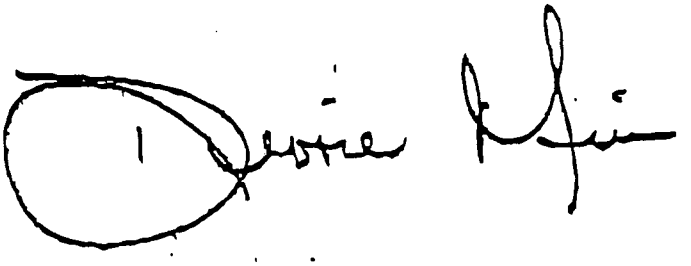
Good Bye.

This was followed by a call from Dr. Pleet asking if we are having a meeting tomorrow and that I call him in this regard.

3/19/02 – Returned Dr. Pleet's call as requested at which time he told me he had received a fax of a brief from Dr. Mileikowsky which I should have also gotten since it was sent to me and to the hearing committee members as well as Mr. Willick. He said it was dated March 15, 2002 and had attached, among other things, a letter from Dr. Wiseman and Spiwak that they were not comfortable questioning witnesses. He went on to say that if the three stipulations, the first being the requirement that Dr. Mileikowsky can not ask his own questions and his representatives would need to do this, the second being that it would be videotaped and the last that a guard would be required to be in the room. He said, "Based on this brief and the information in it, if Mr. Willick has made these requirements he is out to lunch and should be replaced."

He went on to say that Dr. Mileikowsky has submitted a very detailed brief citing various cases and that it was very well done and should be taken very seriously. He said that he thought the stipulations as stated in the letter were outrageous and that is shows how very far apart they are.

I told him that I could not speak to what he was referring to and that I would not comment. He replied that he knew that I would be getting this document if I had not already since he got his this morning. I thanked him and told him that there would not be a meeting tomorrow night and that he would be getting a memo from me, as per requested by Mr. Willick indicating the same.



APPENDIX F

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: **PETITION FOR REVIEW OF DECISION OF COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION FOUR, AFFIRMING JUDGMENT OF SUPERIOR COURT**

on interested parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

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

Clerk
Court of Appeal
300 S. Spring Street
Los Angeles, CA 90013

Jay D. Christensen, Esq
Christensen & Auer
225 South Lake Ave., 9th Floor
Pasadena, Ca 91101
(Tenet's Attorney)

Catherine I. Hanson
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San Francisco, CA 94105

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AMA Litigation Center
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Los Angeles, CA 90017
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770 L Street, Suite 1200
Sacramento, CA 95814
(Consumer Attorneys of California)

I caused such envelope with postage thereon fully prepaid to be placed in the United States Mail at Santa Monica, California on May 26, 2005

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 26 day of May 2005.

Judith A. Burgdorf

JUDITH A. BURGDORF