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SUPERIOR COURT OF CALIFORNIA, COUNTY OF FRESNO

CENTRAL DIVISION

BRENTON R. SMITH, M.D., Petitioner, v. SELMA COMMUNITY HOSPITAL; DOES 1 through 5, inclusive, Respondents.	No. 05CECG02293 Dept. 73 ORDER RE PETITIONER'S MOTION FOR ISSUANCE OF AN OSC RE CONTEMPT AND RELATED MATTERS

On September 27, and October 17, 2006, the above-referenced matter came on for hearing in Department 73 of the above-entitled court, the Honorable Mark W. Snauffer, Judge, presiding. The appearances of counsel were noted on the record. The matter was taken under advisement. The Court, having considered the papers on file and the arguments of counsel, rules as follows.

I. INTRODUCTION

Petitioner requests that an OSC issue, ordering respondent to show cause why it should not be held in contempt for failing to comply with the writ of mandate issued by this court.

The court issued a writ of mandate, commanding

respondent to reinstate the decision of the hospital's Judicial Review Committee, which found that Selma Community Hospital's termination of petitioner's hospital privileges was neither reasonable nor warranted. Respondent has appealed that decision; this court has determined that the appeal did not automatically stay enforcement of the writ. Respondent's request to the Court of Appeal for a writ of supersedeas was denied. Thus, the writ of mandate may be enforced despite the appeal.

Petitioner requested reinstatement of his hospital privileges pursuant to the writ of mandate. Respondent has refused to restore those privileges. Respondent asserts, among other things, that the writ of mandate did not require respondent to reinstate petitioner's privileges and that it can no longer grant petitioner hospital privileges in any event.

II. DISCUSSION

Acts constituting contempt of court include "[d]isobedience of any lawful judgment, order, or process of the court." (Code Civ. Proc., § 1209, subd. (a)(5).) When a contempt is not committed in the immediate view and presence of the court, a contempt proceeding is initiated by presenting to the court an affidavit of the facts constituting the contempt. (Code Civ. Proc., § 1211, subd. (a).) The affidavit need only make a prima facie showing of the elements of contempt. (*Crawford v. Workers' Comp. Appeals Bd.* (1989) 213 Cal.App.3d 156, 169.) Those elements are: (1) that the court made a lawful order, (2) that the person cited for contempt had knowledge or notice of the order, (3) that the person was able to comply, and (4) that the person willfully disobeyed the court order. (*Id.*) If the prima facie showing is

made, an order to show cause why the person should not be adjudged in contempt for his disobedience is issued. (*In re Morelli* (1970) 11 Cal.App.3d 819, 832-833.)

A. Lawful Order.

The declaration of Barbara Hensleigh establishes that the court issued the writ of mandate on June 15, 2006. This court determined that enforcement of the writ has not been stayed by appeal. The court has not been given any notice of a stay by the appellate court, and respondent concedes in its paper that its request for a writ of supersedeas was denied. Thus, it appears the writ of mandate is a lawful judgment or order of the court.

B. Knowledge of Order.

As petitioner argues, respondent's knowledge of the order is demonstrated by its filing of a return to the writ with this court on July 17, 2006, its filing of the request for writ of supersedeas, and its notice of appeal. The Hensleigh declaration sets out the facts of the filing of a notice of appeal and a return to the writ of mandate. (Hensleigh declaration, ¶ 10.) It also states that Hensleigh sent a letter to respondent's attorney, Jerry Casheros, on June 22, 2006, in which she asked that Casheros advise her when petitioner could resume practicing medicine at Selma Community Hospital (SCH) pursuant to the judgment granting the writ. (Hensleigh declaration, ¶ 7.) On the same date, she received a letter from Casheros in which he asserted petitioner could not become a member of the medical staff until he applied for privileges with the new consolidated medical staff and his application was approved. (Hensleigh declaration, ¶ 8.) Thus, it appears petitioner has made a prima facie showing of respondent's

knowledge of the order.

C. Willful Disobedience.

The fourth element petitioner must show to obtain contempt is disobedience of the order. Respondent asserts that it did not disobey the writ, because the writ did not require it to reinstate petitioner's staff privileges. The peremptory writ of mandate (Ex. C to Hensleigh declaration) provides:

> "YOU ARE HEREBY COMMANDED immediately on receipt of this writ to set aside your decision of July 7, 2005, in the administrative proceedings entitled In re: The Matter of Brenton R. Smith, M.D. and to reinstate the decision of the Judicial Review Committee of March 31, 2005 as the final decision by you."

The court also commanded respondent to file a return to the writ by July 17, 2006, setting forth what it had done to comply.

Respondent asserts the writ did not mandate that petitioner be immediately reinstated at SCH. It argues that the effect of the writ was simply to place petitioner in the same position he was in prior to termination of his hospital privileges. At the time of termination of his hospital privileges, however, petitioner was a member of the medical staff at SCH, with privileges to practice there. Thus, reinstating the JRC's decision that termination was improper would return petitioner to the position of having privileges at SCH. Accordingly, immediate reinstatement of those privileges was implicit in the writ. Respondent apparently recognized this. In its return to the writ (Ex. G to Hensleigh declaration), respondent noted petitioner's request to commence to practice at SCH, but asserted it "cannot comply with the Writ of Mandate in

the manner of reinstating Dr. Smith to SCH." It did not assert that reinstating petitioner's privileges is not required by the writ, but only that it could not do so.

Respondent now contends that the writ only required SCH to put petitioner in the same position he was in prior to termination of his hospital privileges, and, if his privileges had not been terminated, he would have been required to apply for privileges with the Consolidated Medical Staff, which is the medical staff of SCH after consolidation of the SCH medical staff with the staffs of two hospitals in Hanford, which occurred while the writ proceeding was pending (in the fall of 2005). Respondent contends immediately reinstating his privileges at SCH without requiring petitioner to apply for privileges with the Consolidated Medical Staff would put petitioner in a better position than if his privileges had not been terminated.

However, it appears that requiring petitioner to apply would put him in a worse position than if he had not been terminated. If he had not been terminated, he would have had privileges at SCH. He would have continued practicing at SCH while his application with the Consolidated Medical Staff was pending. If he is required to apply with the Consolidated Medical Staff and receive a decision on that application before he can practice at SCH, he may have to wait 120 to 240 days for final action on his application. (Bylaws, Ex. E to the return, which is Ex. E to the Hensleigh declaration, § 4.5-11(e).) The current bylaws provide for temporary clinical privileges while an application for permanent medical staff privileges is pending, "provided ... that the applicant has … no involuntary termination

of medical staff membership at any other organization." (Bylaws, § 5.6-3.) Thus, respondent's contention that petitioner would be in a better position if allowed to immediately return to the SCH staff than if he had not been terminated is without merit.

D. Ability to Comply with Order.

The more difficult issue is whether petitioner has made a prima facie showing that respondent has the ability to comply with the order. In his motion, petitioner states that respondent had, and continues to have, the ability to reinstate petitioner to the SCH medical staff. The supporting declaration, however, does not contain any specific facts showing an ability to comply.

At the time petitioner's privileges at SCH were terminated, he held privileges only at SCH. His privileges at two Hanford hospitals, Hanford Community Medical Center and Central Valley General Hospital, had already been terminated. Those terminations are currently the subject of an action filed in Kings County Superior Court. All three hospitals have the same owner, Adventist Health. (Rawson declaration, p. 2, n. 1.) Respondent's return to the writ of mandate, which is submitted as an exhibit to the Hensleigh declaration, asserts (as does respondent's opposition to the current motion) that, in the fall of 2005, SCH and the Hanford hospitals "consolidated into one medical staff." Respondent asserts the SCH medical staff no longer exists, so petitioner cannot be reinstated as a member of that medical staff.

The declaration of Richard Rawson, submitted in opposition to this motion, states that he was President of SCH until September 2004, and from then to the present he has been Chief Executive Officer for Hanford Community Medical Center

(HCMC). He states that, from 1999 to 2003, SCH was operating at a significant financial loss. (Rawson declaration, ¶ 2.) To avoid closure, a sale of the facility was attempted, but no buyer could be found. (Rawson declaration, ¶ 3.) Rawson then approached the Adventist Health Board of Directors and proposed the consolidation of SCH into the Hanford license. (Rawson declaration, ¶¶ 4, 5.) The process ultimately decided upon involved SCH voluntarily retiring its license as a health care facility and then leasing its facilities to HCMC. SCH would not merge with HCMC, but would stop functioning as a health care hospital, with HCMC handling the operations of the facility under HCMC's hospital license. (Rawson declaration, ¶ 7.) The medical staff of SCH would not be merged into the HCMC medical staff; it would be dissolved. Prior to final dissolution, each physician was advised that if he or she wanted to continue to practice at SCH, he or she would need to apply for privileges to the Consolidated Medical Staff. (Rawson declaration, ¶ 8.) New medical staff bylaws were prepared and approved by the Consolidated Medical Staff. (Rawson declaration, ¶ 9.)

Respondent makes the following arguments:

(1) There is no independently licensed facility known as SCH and no separate SCH medical staff to which petitioner can return.

(2) Petitioner cannot be granted privileges at SCH without becoming a member of the Consolidated Medical Staff; if he is placed on the Consolidated Medical Staff, he will have privileges at all three hospitals, including the two Hanford hospitals where his privileges have already been terminated.

(3) Arranging for petitioner to have privileges only at SCH would create two classes of medical staff and require new bylaws; a single consolidated facility like HCMC cannot legally have more than one medical staff.

(4) Granting petitioner privileges with the Consolidated Medical Staff would usurp the authority of the Kings County Superior Court to determine whether petitioner's privileges were properly terminated at the Hanford hospitals.

(5) Returning petitioner to practice without a review of his skills would potentially jeopardize patient care at SCH.

(6) This court should defer to the Court of Appeal, which respondent contends denied its writ of supersedeas because the time during which petitioner applied for privileges with the Consolidated Medical Staff and the application was considered and acted on would sufficiently delay his reinstatement so that a stay of enforcement of the writ would not be required.

1. Reorganization of hospitals.

The fundamental issue is respondent's first argument, which is mentioned in its preliminary statement, but not expanded on. The implications are discussed only briefly in the argument portion of respondent's points and authorities, which states:

> "Furthermore, the Motion for Contempt would have this Court adjudicate the rights of, and issue orders to an entity, HCMC, not a party to these proceedings. As SCH no longer carries an independently (sic) license to operate an acute care facility, Petitioner can only be allowed to practice at SCH under HCMC's license. Issuing an order compelling HCMC to allow Petitioner to practice under its medical license would ask this Court to reach far beyond the scope of the Selma Writ Proceeding, i.e., a determination of the propriety of Petitioner's termination at SCH."

(Opposition, 7:22-27.)

The issue is whether circumstances have changed so that respondent is not the proper entity to compel to restore petitioner's privileges at SCH, and the proper entity is not a party to this proceeding and therefore cannot be compelled by the writ of mandate to grant him privileges. This is arguably the effect of SCH ceasing to function as a hospital under its own license and continuing to operate under the HCMC license, and of the dissolution of the SCH medical staff and creation of a Consolidated Medical Staff.

The respondent named in the writ proceedings is "Selma Community Hospital" and the Rawson declaration states that SCH and the two Hanford hospitals are all owned by Adventist Health. Rawson does not discuss what sort of entities the hospitals are or in what manner the business of SCH passed to HCMC, if it did. Thus, it cannot be determined whether HCMC is a successor of SCH, so that it could have been treated as a continuation of the same business entity and added as a party. SCH never raised this issue prior to entry of the judgment granting the writ of mandate, although the change in the organization of the hospital apparently took place in October of 2005. (Opposition, 4:17.) Petitioner was not alerted to the change in time to seek to join HCMC as a party, if appropriate, prior to judgment.

It is undisputed that Selma Community Hospital continues to operate. In his reply, petitioner argues that SCH is still defending itself in this proceeding and in the Court of Appeal, and it continues to exist as a "free standing separately identified hospital." He submits a copy of a record of the

Secretary of State, from its website, which indicates "Selma Community Hospital, Inc." is an active corporation, and a page from SCH's website, which petitioner contends shows Selma Community Hospital, Inc. is continuing to operate as a full service hospital with over 100 physicians on staff. The page from the website shows a picture captioned "Selma Community Hospital," and contact information is listed as "Selma Community Hospital, Inc.," with an address and phone number. The description of the hospital, however, includes the statement: "A rural 57-bed acute care community hospital … that operates as a service of Hanford Community Medical Center as of October 2005."

Thus, there is a serious question regarding whether SCH is the proper entity to command to reinstate petitioner's privileges at SCH, and whether SCH currently has the ability to comply with the writ of mandate. There also appears to be a question regarding whether respondent failed to provide this information to petitioner and the court and continued to defend itself, so that petitioner would continue to expend his resources and waste his time obtaining a meaningless victory.

2. Consolidation of medical staffs.

Respondent's second and third arguments are essentially facets of the same argument. Respondent contends that petitioner cannot be granted privileges only at SCH, and not at the two Hanford hospitals, and to do so would require revision of the bylaws and impermissible classes of physicians. Respondent contends that the Consolidated Medical Staff is governed by bylaws which grant staff members privileges at all three hospitals. There are no provisions for granting privileges only at one or

another of the three hospitals. Respondent asserts that granting petitioner privileges only at SCH would violate Health and Safety Code section 1250.8, subdivision (b), which provides:

> "(b) The issuance of a single consolidated license shall be based on the following criteria:
>
> > "(1) There is a single governing body for all of the facilities maintained and operated by the licensee.
> >
> > "(2) There is a single administration for all the facilities maintained and operated by the licensee.
> >
> > "(3) There is a single medical staff for all of the facilities maintained and operated by the licensee, with a single set of bylaws, rules, and regulations, which prescribe a single committee structure. ..."

Respondent seems to argue that, to return petitioner to the medical staff at SCH, which no longer exists, would require creating a separate medical staff for SCH or two separate classes of medical staff for HCMC (one for petitioner and one for all other staff physicians), which would violate the requirement that the hospitals operated under a consolidated license have a single medical staff. Respondent also argues it would require a separate governing body with separate bylaws, because the consolidated bylaws "do not contemplate such an arrangement."

However, the statute does not proscribe separate classes of staff members, just separate medical staffs. SCH is not being asked to create a separate medical staff for petitioner to join.

The consolidated bylaws in fact provide for "categories of membership." (Bylaws, § 3.1) The categories include "active, consulting, courtesy, provisional, administrative, honorary and retired." (*Id.*) The bylaws also provide for temporary privileges, which may be granted "during pendency of that person's application for permanent medical staff membership and privileges." (Bylaws, §§ 5.6, 5.6-3.)

If petitioner's hospital privileges at SCH had not been denied, petitioner would have continued to practice at SCH until, in the course of consolidation, he and all the other physicians with hospital privileges there were told the SCH medical staff was being dissolved and to continue practicing at SCH they would have to apply for privileges with the Consolidated Medical Staff. Like the other physicians with privileges at SCH, he would have continued to practice at SCH while his application for privileges with the Consolidated Medical Staff was pending. Thus, petitioner can be returned to the same position he would have been in had his privileges not been improperly terminated by granting him temporary privileges at SCH while his application for permanent privileges is pending, conditioned on his submitting an application within a specified period of time.

It does not appear granting petitioner temporary privileges only at SCH would violate the bylaws. The bylaws define "clinical privileges" as "the permission granted to a medical staff member to provide patient care." (Bylaws, Definitions, ¶ 5.) "Hospital" is defined to mean "either Central Valley General Hospital, Selma Community Hospital or Hanford Community Medical Center, or both as applicable under the

circumstances." (Bylaws, Definitions, ¶ 6.) The bylaws provide that, "a member providing clinical services at this hospital shall be entitled to exercise only those clinical privileges specifically granted. Said privileges and services must be hospital and campus specific, . . . and consistent with any restrictions thereon." (Bylaws, § 5.1.) Thus, contrary to respondent's representations, the bylaws appear to permit privileges that are limited to one hospital ("hospital and campus specific") or are limited in other respects. Temporary clinical privileges may be granted "for the care of specific patients." Presumably, such privileges would be limited to the facility where that patient was located.

Thus, it does not appear granting petitioner temporary privileges only at SCH would be impermissible under the bylaws or would violate Health and Safety Code section 1250.8, so long as there is only one medical staff, governed by one set of bylaws, rules and regulations.

3. Usurping the authority of the Kings County court.

Respondent contends granting petitioner privileges to practice at the Hanford hospitals would usurp the authority of the Kings County Superior Court to determine whether the termination of petitioner's privileges at those hospitals was proper. As previously discussed, however, respondent is not being asked to grant petitioner privileges at any hospital other than SCH. Consequently, this argument does not demonstrate an inability to comply with the writ of mandate.

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4. Review of petitioner's skills.

Respondent contends that returning petitioner to practice without a review of his skills would potentially jeopardize patient care at SCH, because petitioner has not practiced at a hospital in over a year. However, it was only because of respondent's improper termination of petitioner's privileges and the litigation that ensued that petitioner was denied the opportunity to continue to practice while the review process was proceeding. In any event, SCH can oversee and evaluate petitioner's skills and performance in the same manner it does with every member of its medical staff. This argument does not demonstrate an inability to comply with the writ.

5. Deferring to Court of Appeal.

Respondent asserts this is the second time petitioner has asked the court for immediate reinstatement. The first time was when petitioner asked for a ruling that the writ was not automatically stayed by respondent's appeal. Respondent states that the court held there was no stay "and jurisdiction lies with the Fifth District Court of Appeal." In that prior ex parte application, petitioner did not ask for immediate reinstatement, but only for a determination that no stay was in effect. The result was that the writ was immediately enforceable. How respondent construes this as a denial of an order to immediately reinstate petitioner is unclear.

Respondent asserts it was asked by personnel of the Court of Appeal for information concerning its then pending application for a writ of supersedeas, and after being told

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> "that Judge Snauffer had not immediately reinstated Petitioner to SCH, that Petitioner had not yet applied to the Consolidated Staff, and that his reinstatement would occur, at the earliest, in 60-90 days from the unspecified date of filing of the application, that the Fifth District Court Appeal determined that there was no 'imminent harm' to the hospital and denied the Writ of Supersedeas."

(Opposition 9:13-17.) From this, respondent concludes that its anticipated delays in reinstating petitioner were construed by the Court of Appeal as showing there would be no imminent harm to respondent requiring a stay of the writ of mandate. Respondent contends that, if the court now orders immediate reinstatement of petitioner, there will be imminent harm and, rather than "undo the careful balance struck by the Court of Appeal, this Court should defer to the Fifth District."

The Casheros declaration states that he received a call from a clerk at the Fifth District, asking "the pointed question" of when at the earliest petitioner could be reinstated to SCH. (Casheros declaration, ¶ 13.) He wrote a letter to the Fifth District. Instead of answering that "pointed question," however, he told the court that petitioner's ex parte application to prevent a stay of execution was pending, that if petitioner were allowed to resume immediate practice at SCH, the Hanford proceedings would be mooted. (Casheros declaration, ¶ 14.) The Fifth District deferred its ruling until after this court's ruling on the ex parte. (Casheros declaration, ¶ 15.) He informed the appellate court of this court's ruling on the ex parte, that there was no stay. (Casheros declaration, ¶ 17.) The next day, a clerk from the appellate court called and asked when was the earliest time petitioner could be reinstated if he filed an application to

the Consolidated Medical Staff. (Casheros declaration, ¶ 18.) Casheros sent a letter stating petitioner had not applied, but if he did, and his application was granted, he could be returned to practice as early as 60 to 90 days from the filing of the application. (Casheros declaration, ¶ 19.) The appellate court then issued its order (Ex. M). (Casheros declaration, ¶ 20.)

The appellate court's order states:

> "The 'Writ Of Supersedeas ...' filed on July 19, 2006, is denied. When asking for a writ of supersedeas, appellant must convincingly show substantial questions will be raised on appeal. ... Appellant must demonstrate it will suffer irreparable harm absent a stay ..., and that its harm outweighs the harm that will be suffered by respondent. ... Appellant Selma Community Hospital has failed to carry its burden."

Contrary to respondent's characterization, the ruling does not indicate it was based solely on a finding of no imminent harm to SCH. It sets out three elements that needed to be proved and states respondent did not carry its burden. It does not indicate which element was decisive; it may have found proof of all elements was lacking. It may have found that the burden on petitioner if the stay was granted would outweigh any harm to respondent, because petitioner was already being delayed in enforcing his remedy.

In any event, the Court of Appeal was not asked to determine either whether SCH was in contempt for failing to comply with the writ or whether petitioner was entitled to have his hospital privileges immediately reinstated. Thus, the appellate court's determination does not address the issues now before this court, and certainly does not demonstrate that respondent was

unable to comply with the writ of mandate or was otherwise not in contempt of court.

III. ANALYSIS

On balance, it appears that contempt should not issue, because petitioner has not made a prima facie showing of respondent's ability to comply with the writ of mandate. Petitioner simply asserts that respondent can comply, and is not prevented by the fact that the medical staffs have been consolidated. He has presented no specific facts and made no showing that SCH remains in charge of the hospital and can cause his privileges to be reinstated.

Admittedly, this result appears inequitable, because it effectively denies, or at least seriously delays, the means by which petitioner can enforce his remedy. All the facts respondent now argues make it unable to comply with the writ were known to respondent months ago, long before final argument and entry of judgment. Yet respondent never mentioned that its status had changed so that any relief granted to petitioner might be useless to him in his effort to restore his hospital privileges.

It is well settled that the court which issues a writ of mandate retains continuing jurisdiction to make any order necessary to its enforcement. (*City of Carmel-by-the-Sea v. Board of Supervisors* (1982) 137 Cal.App.3d 964, 971; Code Civ. Proc., § 1097.) Therefore, the court makes the following orders which are necessary to enforce the writ of mandate previously issued herein:

ORDERS

1. The court finds that no contempt should lie against

respondent, or any individual associated therewith, including counsel;

2. Respondent is ordered to reinstate the March 31, 2005 decision of the Judicial Review Committee ("JRC") of Respondent, as required by the June 15, 2006 writ;

3. Respondent is ordered to file a report superseding the previous reports, if any, filed by it with the National Practitioner Data Bank and the Medical Board of California as to the results of the writ issued on June 15, 2006 by this Court and the judgment in favor of Petitioner issued by this Court;

4. Within fifteen (15) days hereof, Respondent is ordered to reinstate Petitioner's privileges, provisionally, on the Consolidated Medical Staff. Petitioner has agreed to practice only at Respondent Selma Community Hospital.

5. Petitioner is ordered to complete and submit an application for Consolidated Medical Staff privileges within ten (10) days of his reinstatement.

6. Petitioner shall be permitted to practice on the Consolidated Medical Staff at Respondent Selma Community Hospital for a period of one (1) year following the submission of his application, and then must reapply for privileges, as would any other physician practicing there;

7. Except as specifically set forth herein, Petitioner shall be subject to the Medical Staff Bylaws of the Consolidated Medical Staff and the Rules and Regulations of the Consolidated Medical Staff;

8. Petitioner shall be subject to ongoing peer review pursuant to California Business & Professions Code section 809(7)

and the Consolidated Medical Staff Bylaws and shall be subject to all of the corrective action procedures applicable to a member of the Consolidated Medical Staff, including but not limited to the limitation or termination of his privileges based upon his conduct at Respondent hospital;

9. Petitioner shall be subject to California Business & Professions Code section 809 and the Consolidated Medical Staff Bylaws and rules regarding the summary suspension of his privileges.

IT IS SO ORDERED.

DATED this 5th day of December, 2006.

MARK W. SNAUFFER
JUDGE OF THE SUPERIOR COURT

SUPERIOR COURT OF CALIFORNIA • COUNTY OF FRESNO Civil Unlimited Department, Central Division 1100 Van Ness Avenue Fresno, California 93724-0002 (559) 488-3352	*FOR COURT USE ONLY*
TITLE OF CASE: **Brenton R. Smith M.D. - vs - Selma Community Hospital**	
CLERK'S CERTIFICATE OF MAILING	CASE NUMBER: **05cecg02293**

I certify that I am not a party to this cause and that a true copy of the **minute order** was mailed first class, postage fully prepaid, in a sealed envelope addressed as shown below, and that the notice was mailed at Fresno, California 93724-0002, California, on:

Date: **December 5, 2006** Clerk, by C. Brown, Deputy

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