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Guns, But No Bullets: California Supreme Court Limits Powers Of Medical Staff Peer Review Hearing Officer In Mileikowsky V. West Hills Hospital & Medical Center

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In *Mileikowsky v. West Hills Hospital & Medical Center,* No. S-156986 (Cal. April 6, 2009), the California Supreme Court affirmed an appellate decision that a hearing officer may not terminate a medical staff peer review hearing based on the physician's failure to produce documents even where discovery was mandated by statute and medical staff bylaws. Specifically, only the trier of fact (in California, either an arbitrator acceptable to both sides or a panel of physicians) may terminate a hearing. Although a hearing officer has the statutory authority to impose certain discovery safeguards, he lacks the authority to terminate the hearing, even if the physician refuses to cooperate and repeatedly fails to produce documents. To find otherwise, reasoned the supreme court, would instill the hearing officer with the power to singlehandedly uphold the adverse action against a physician, concluding the hearing process without a substantive adjudication on the merits of the charges.

This California case provides important national guidance for peer review bodies, hearing officers, and the medical staff peer review process in cases where a physician facing corrective action refuses to participate and/or intentionally delays the hearing process. Proponents of the ruling contend it further safeguards a physician's right to have his peer review issues adjudicated on the merits by a qualified review panel. However, critics point out the ruling may weaken the integrity of the peer review process by stripping the hearing officer of tools designed to prevent delays, promote full disclosure of documents and information, and control obstructive behavior by physicians.

The primary implication of *Mileikowsky* is that medical staffs need to enforce their bylaws and legal requirements for discovery. In California, this enforcement must be conducted

by the trier of fact (usually the hearing panel). Hearing officers should not unilaterally terminate a medical staff peer review hearing, either before it begins or during the hearing process.

Factual Background and Peer Review Ruling

In May 2001, Gil Mileikowsky, M.D., applied for medical staff membership and privileges at West Hills Hospital Medical Center (Hospital).[1] The Medical Staff recommended the Hospital's Board deny Mileikowsky's application because he: (1) failed to disclose his privileges had been terminated at a nearby hospital; (2) claimed he voluntarily resigned at a second hospital (though records indicated he had been summarily suspended); and (3) failed to meet the Medical Staff's professional and ethical standards. On May 23, 2002, Mileikowsky requested a hearing under California's peer review statute (California Business and Professions Code Section 809 *et seq*.) and the Hospital's Medical Staff Bylaws (Bylaws). A Judicial Review Committee (JRC) composed of physicians and a hearing officer was appointed.

The Bylaws required both parties exchange documents and specified that hearings were to be held, if possible, no later than 45 days from the date a request for a hearing was received. In Mileikowsky's case, however, "month after month went by without a hearing, largely because Dr. Mileikowsky refused to produce documents requested by the Hospital, challenged the hearing officer's authority, and refused to comply with the officer's directions or orders."

Despite multiple requests and extensions, Mileikowsky refused to produce the documents in his possession, including documents the Medical Staff originally requested two years before when evaluating his application for appointment. After eight months of delay and multiple warnings, the hearing officer granted the Medical Staff's request for sanctions based on Mileikowsky's failure to produce the requested documents.

On March 27, 2003, the hearing officer issued an order dismissing Mileikowsky's request for a hearing, concluding that his continued failure to produce documents equated to a refusal to participate in the hearing process and, therefore, constituted voluntary acceptance of the Medical Staff's recommendation to deny his application. The order effectively terminated the hearing before presentation of evidence commenced and Mileikowsky appealed the order to the Hospital's Governing Board (Board). The Board found the hearing officer's ruling was reasonable and warranted, and that Mileikowsky had been afforded an opportunity to a fair hearing. The Board accepted the order as the Hospital's final decision.

Mileikowsky Challenges The Hearing Officer's Decision in Trial Court

Mileikowsky petitioned the trial court for a writ of administrative mandate and sought judicial review of the Hospital's decision on the ground the hearing officer was not empowered to issue an order terminating the hearing as a sanction for Mileikowsky's failure to produce the documents. The trial court denied his petition for four reasons.

First, the trial court found the hearing officer's decision was authorized by the Bylaws, which provided that the hearing officer "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." Second, the trial court found Mileikowsky's failure to produce documents prevented the JRC from properly performing its function of evaluating his fitness to practice medicine. Third, the trial court referred to the fact that Mileikowsky *himself* had demanded sanctions because the Medical Staff refused to turn over documents. Fourth, the trial court held that the interests of justice warranted termination of the hearing, because termination ensured Mileikowsky would not benefit from his refusal to furnish the documents. Mileikowsky challenged the ruling in the court of appeal.

Court of Appeal Reverses Trial Court Decision

The court of appeal reversed the trial court's decision and held the hearing officer did not have the power to "prematurely" terminate the hearing. The appeals court reasoned that, under California's peer review statutes, procedural matters should be consigned to the hearing officer, but all decisions affecting the merits must be made by the trier of fact (in this case the JRC). The appeals court held that a hearing officer's decision to terminate a hearing before a final decision by the trier of fact on the merits, with the attendant effect of allowing the final proposed action to stand, is not merely a procedural decision; it is, effectively, a decision on the merits.

According to the court of appeal, whether peer review could be adequately performed without the requested documents was a matter of medical judgment, requiring the expertise of the trained medical professionals on the JRC. The hearing officer's discretion to control the proceedings does not extend so far as to become a "surrogate decision maker" in lieu of the JRC, reasoned the court of appeal. The problem, according to the appeals court, was that the hearing officer's decision to terminate the hearing allowed the Hospital to deny Mileikowsky's application without affording him any hearing or a decision by the trier of fact.

Although the appeals court agreed that a physician may forfeit, through his conduct, his right to a hearing, it distinguished prior cases where a medical staff hearing was

terminated based on a physician's refusal to participate or cooperate. In those cases, the hearing already had commenced, so the physician was not entirely denied his statutory right to a hearing (*i.e.*, it was not a "premature termination"). Also in those cases, noted the court of appeal, the JRC (not the hearing officer) issued the decision to terminate the hearing.

The court of appeal flatly rejected the Hospital's contention that peer review bodies simply make recommendations and only the Board makes the actual decision. The appeals court found there was no support in the statutes for the proposition that only the Board can make a decision regarding privileges. Instead, according to the court of appeal, it is only when the peer review body has failed to take action that the Board has a statutory mandate to intervene. That distinction, stated the court of appeal, is "no mere technicality."

The fact that the Hospital's Board approved the *hearing officer's* decision is no substitute for a full hearing and plenary discussion *by the JRC* of the issue posed by the missing documents, the court of appeal reasoned. Thus, "the trial court's conclusion that withholding the documents prevented the JRC from performing its function of evaluating [Dr. Mileikowsky's] fitness to practice medicine is not based on facts found by the body that is charged with the responsibility of determining this issue in the first instance." The court of appeal characterized the Hospital's action as "reflect[ing] only the decision of a single person [the hearing officer], a lawyer by training and profession, that [Dr. Mileikowsky] has not complied with 'discovery orders' and that, for this reason, 'terminating sanctions' were warranted." Further, the court of appeal wrote, "It does not help the situation that this hearing officer had no authority to issue 'discovery orders' under the Civil Discovery Act and/or to award 'terminating sanctions.'"

The appeals court reversed and remanded the decision and instructed the trial court to enter a judgment directing the Hospital to: (1) set aside the decision upholding the hearing officer's termination of the hearing; (2) convene a hearing pursuant to Business & Professions Code Section 809.1(c); and (3) conduct the hearing and further proceedings in accordance with Business & Professions Code Sections 809.2 *et seq*. The trial court also was directed to hear and determine whether Mileikowsky was entitled to injunctive relief with regard to his privileges. On October 5, 2007, the Hospital sought review by the Supreme Court of California.

Supreme Court Ruling Affirms Court of Appeal Decision

On April 6, 2009, the California Supreme Court affirmed and expanded on the discussion originally set forth by the court of appeal. The supreme court concluded that a peer review hearing officer not only "lacks authority to prevent the [JRC] from reviewing a

case by dismissing it on his own initiative before the hearing has been convened," but furthermore, the hearing officer "lacks authority to terminate the hearing after it has been convened without first securing the approval of the [JRC]."

The supreme court's principal addition to the court of appeal's written opinion consists of its discussion of California's peer review statutes, in particular the Section 809.2 provisions that address a hearing officer's authority. A hearing officer, the supreme court found, has authority "to maintain decorum at the hearing and ensure that all parties have a reasonable opportunity to be heard and to present oral and documentary evidence." However, a hearing officer may not "act as a prosecuting officer or advocate" and "shall not be entitled to vote." The JRC—not the hearing officer—"resolves any conflict in the evidence, determines its sufficiency, and determines the reasonableness of the recommended disciplinary action." Thus, reasoned the supreme court, a hearing officer lacks the authority to determine sufficiency of the evidence, and by dismissing the proceedings before an evidentiary hearing is convened, the hearing officer improperly eliminates the JRC's role in the decision making process.

The Hospital argued that a hearing officer's statutory power to "impose any safeguards the protection of the peer review process and justice requires" under Section 809.2(d) "embraced the authority to issue terminating sanctions for a party's failure to comply with requests for information." The supreme court rejected the Hospital's argument and instead found the authority to impose safeguards is narrowly directed at situations regarding the need to protect confidential information while simultaneously providing the parties with access to the documents (*e.g.*, authorizing the hearing officer to redact or otherwise limit information to protect confidentiality). To grant a hearing officer the power to issue terminating sanctions, the supreme court stated, is inconsistent with the goals of the statutory review process and strips the JRC of its duty to review the MEC's recommendation. The supreme court reasoned as follows:

"The purpose for providing a physician with a review of the peer review committee's recommendation is to secure for the physician an independent review of that recommendation by a qualified person or entity, here the reviewing panel. That purpose is defeated if the matter is dismissed before the reviewing panel becomes involved. Further, irrespective of a hearing officer's authority at the hearing or over the evidence adduced there, the officer, who "shall not be entitled to vote," has no part in the decision making process and no authority to prevent the reviewing panel from reviewing the recommendation. Yet, in effect, a hearing officer who prevents the reviewing panel from conducting its review "votes" by ensuring that the peer review committee's recommendation will be the final decision."

The Hospital also argued that any error by the hearing officer was cured when the Hospital's Board subsequently voted to affirm the hearing officer's order that dismissed the hearing. The Supreme Court rejected the Hospital's argument, finding although the Board makes the ultimate decision to grant or deny privileges, it must do so based on the recommendation of the MEC and JRC with "great weight to the actions of peer review bodies." In this case, the Hospital's Board affirmed the order of the hearing officer (not the JRC), a procedure the supreme court found "violated both the letter and underlying principles of the statutory peer review process" because "decisions relating to clinical privileges are the province of a hospital's peer review bodies and not its governing body."

Noteworthy Supreme Court Dicta And Existing Medical Staff Law

Although the heart of the *Mileikowsky* decision centers on the scope of a hearing officer's authority, the supreme court included a number of statements worthy of discussion. Although dicta, some statements do not precisely square with current peer review processes and medical staff case law. Other statements indicate potential approaches for medical staffs in the wake of the decision. Either way, the *Mileikowsky* decision is ripe with material likely to be cited by legal counsel for hospitals and physicians in subsequent peer review matters. Some of the highlights are addressed below.

1. When discussing the far-reaching impact on a physician who is the subject of an adverse action, the supreme court noted that the California Medical Board "must maintain a historical record that includes any reports of disciplinary information." While true, the Medical Board of California expunges adverse action reports after three years, a fact that serves to mitigate the lasting negative impact on physicians.

2. Because adverse actions are reported to the Medical Board and the National Practitioner Data Bank, the supreme court reasoned that "a hospital's decision to deny staff privileges […] may have the effect of ending [a] physician's career." A physician with a demonstrated history of severe violations or significant quality failures might, understandably, find it difficult to obtain staff privileges. But in a great number of other cases, physicians are able to obtain privileges at a new hospital after an adverse action elsewhere. During the application process, the physician may explain or cure the deficit that led to the adverse action at the other hospital. Furthermore, if the applicant is denied medical staff membership and privileges, he has an opportunity to present his side of the story, challenging the decision in a medical staff hearing.

3. The supreme court's technical argument regarding when a hearing officer may impose safeguards ultimately concludes that safeguards are limited to protect information and confidentiality. But, as the supreme court dissent illuminates, the full language of the statute states that a hearing officer may impose "*any* safeguards the protection of the

peer review process and justice require." (emphasis added). A right to discovery from the physician is part of the peer review process and serves the interests of justice. It is easy to draw parallels to state court litigation or information disclosure requirements under the federal rules of civil procedure. But, unlike the many tools courts have to curtail discovery abuses, in the medical staff peer review context the supreme court views a hearing continuance as the primary remedy for most discovery abuses.

4. The supreme court does not appear to view delay of peer review proceedings as a significant or likely problem, writing "Even when there is no summary suspension, a physician generally would wish to have the hearing held as soon as possible, if only to resolve uncertainty about his or her status at the hospital." However, delay is a common occurrence, particularly when the physician is already a medical staff member, against whom corrective action is recommended but not yet imposed. The supreme court suggested that a physician would be damaged economically during a long hearing. But if the physician is already on the medical staff, he will continue to work and faces little to no economic pressure to move the hearing forward. Such dicta could trigger a more aggressive desire on the part of medical staffs to summarily suspend their members (rather than simply recommend termination) to protect patients from potential harm and avoid protracted hearing delays. Before doing so, medical staffs are advised to exercise significant caution, particularly in light of the higher standard of proof required in a summary suspension (*i.e.*, "imminent danger").

5. The supreme court, in dicta, reaffirmed two cases regarding the standard for termination of a physician on the basis of his argumentativeness and disruptive behavior (*i.e.*, there must be a nexus between the physician's disruptive behavior and substandard quality of patient care).[2] In light of that standard, the supreme court opened the possibility that "a physician's obstructiveness in connection with the reviewing process might, but will not necessarily, support a conclusion the physician is unable to function in a hospital setting." However, the supreme court cautions, it is the JRC—not the hearing officer—that determines whether the MEC's recommendation is reasonable and warranted, and therefore the JRC should decide whether or not the physician's refusal to participate in the peer review hearing process justifies termination of the hearing.

6. The supreme court suggests that protections against obstructive behavior and a mechanism for a hearing officer's recommendation to a JRC can be placed in what the supreme court generally refers to as "hospital bylaws." The point is well-taken and presents an opportunity for medical staffs to obtain a greater degree of control over peer review hearings. However, it is important to remember that hospital bylaws and medical staff bylaws are separate documents. The medical staff bylaws (not the hospital bylaws) govern medical staff peer review hearings. Additionally, the medical staff must first

recommend to the hospital's board any revisions in medical staff bylaws; a hospital cannot unilaterally change medical staff bylaws.

7. The supreme court suggests an existing medical staff member's appointment can expire during a lengthy corrective action hearing. In a footnote, the supreme court extends this idea to contemplate a medical staff allowing a physician's appointment to expire during the hearing "when the proceedings are delayed by the physician's obstructive conduct." However, the supreme court does not mention *Sahlolbei v. Providence Healthcare, Inc.*, which states that if a medical staff member's appointment expires during a corrective action, that action is converted to a summary action.[3] Once that happens, the medical staff will need to prove the higher standard of "imminent danger." If the supreme court sought to carve a narrow exception to *Sahlolbei*, it did not do so explicitly, nor did it offer any suggestion to define the term 'obstructive.'

8. When discussing whether or not the Hospital could have proceeded with the hearing without Mileikowsky's documents, the supreme court opines on the sufficiency of evidence regarding adverse action reports from other hospitals (known in California as "805 reports"). For example, the supreme court stated that an 805 report, by itself, is adequate evidence of an action taken at a hospital. While it may be true that an 805 report evidences the mere existence of an adverse action, the substantive content of such a report often contains little detail as to what actually happened in the matter. Another problem of relying solely on an 805 report from another hospital is that such evidence is hearsay. In order to use it as proof in support of the MEC's recommendation, the evidence must meet the Bylaws' definition of admissible hearsay (typically defined as that information on which reasonable people are accustomed to rely in the conduct of serious affairs). Even then, it is best to introduce other supporting documentation.

9. The decision concludes with the surprising phrase, "As decisions relating to clinical privileges are the province of a hospital's peer review bodies and not its governing body …" Although likely to have little (if any) precedential impact, the statement seems to disregard federal requirements under the Medicare Conditions of Participation and accreditation standards (*e.g.*, The Joint Commission) that privileges are granted by a hospital's governing board, not the peer review body.

Practical Advice for Peer Review Bodies

1. Do not allow a hearing officer to issue terminating sanctions before or during a peer review hearing. Any such order ought to be made, if at all, by the hearing panel.

2. Appoint a hearing panel early and utilize it, whether or not the physician cooperates with *voir dire* of hearing panel members.

3. Instruct the hearing panel that it is responsible for issues beyond making medical decisions and might, for example, need to enforce Bylaw provisions concerning the hearing rights of the parties.

4. Strictly adhere to and enforce deadlines in the Bylaws and, if necessary, ask the hearing panel to make definitive decisions as to whether deadlines are not met and what remedial action, if any, should be implemented.

5. Define, in the Bylaws, the term "obstructive" and apply it to a situation of lack of cooperation in a peer review hearing.

6. Work to develop and implement medical staff bylaws provisions that empower the hearing officer to, at the least, make recommendations to the hearing panel on procedural and other non-medical matters. That way, the hearing panel can more easily decide to order or deny the recommendation.

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[1] We recite the facts here as described in the appeals court and supreme court decisions.

[2] *Miller v. Eisenhower Med. Ctr.,* 27 Cal.3d 614, 627-629 (1980); *Rosner v. Eden Township Hosp. Dist.,* 58 Cal.2d 592, 598 (1962).

[3] 112 Cal.App.4th 1137 (2003).