LIU, J.

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IN THE SUPREME COURT OF CALIFORNIA

OSAMAH EL-ATTAR
Plaintiff and Appellant,

v.

HOLLYWOOD PRESBYTERIAN MEDICAL CENTER,
Defendant and Respondent.

AFTER A DECISION BY THE COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION FOUR
CASE NO. B209056

PETITION FOR REVIEW

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ISSUE PRESENTED

When formal peer review is needed to determine whether a physician is competent to continue practicing in a hospital, may the hospital's governing board initiate the peer review by selecting the medical staff physician reviewers and a hearing officer if the medical staff does not, where the medical staff's bylaws specify the medical staff as the selecting body?

INTRODUCTION
WHY REVIEW SHOULD BE GRANTED

Dr. Osamah El-Attar, a physician with staff privileges to practice at Hollywood Presbyterian Medical Center (Hospital), was accused of providing unnecessary and substandard care. The unnecessary and substandard care threatened not only patient health, but also the Hospital's eligibility for Medicare and Medi-Cal funding that was essential to the Hospital's very existence. The Hospital thus recommended the denial of Dr. El-Attar's application for readmission to the medical staff.

To prevent Dr. El-Attar from treating patients at the Hospital if the charges were accurate, formal peer review of his practice had to be conducted by the Hospital's medical staff. The medical staff's bylaws specified that the Medical Executive Committee (MEC) — the medical staff's leadership — initiate the peer review process by appointing the necessary physician reviewers and a hearing officer.

Instead of appointing the reviewers and hearing officer, the MEC told the Hospital's governing board to do it. The board responded by appointing 5 physician members of the medical staff and a hearing officer who conducted 30 peer review sessions over a two-year period, examining thousands of exhibits and hospital records and hearing testimony from percipient and 7 expert witnesses. The physician reviewers then concluded that Dr. El-Attar should not be practicing at the Hospital.

The trial court denied Dr. El-Attar's petition for writ relief, but the Court of Appeal reversed. The appellate court did not find

that the peer review conclusions were substantively flawed, but held that the medical staff's bylaws prohibited the Hospital's board from initiating the needed peer review even though the medical staff's MEC didn't do so. (*El-Attar v. Hollywood Presbyterian Medical Center* (2011) 198 Cal.App.4th 664, typed opn., 12-18.)

Review by this court is necessary both "to secure uniformity of decision" and "to settle an important question of law." (Cal. Rules of Court, rule 8.500(b)(1).)

Before the Court of Appeal's published decision here, it seemed settled that a hospital's governing board could arrange for peer review when the medical staff failed to do so. (See, e.g., Bus. & Prof. Code, § 809.05, subd. (c) ["[i]n the event the peer review body fails to take action in response to a direction from the governing body, the governing body shall have the authority to take action against a licentiate"].) And it seemed settled that the board's necessary deviation from the medical staff's bylaws did not violate a physician's fair procedure rights even though it might have affected the composition of the peer review panel. (See *Hongsathavij v. Queen of Angels etc. Medical Center* (1998) 62 Cal.App.4th 1123, 1142-1144 (*Hongsathavij*) [holding that, because the Hospital's governing board has ultimate responsibility for peer review decisions, the common-law rule of necessity requires the board to "align its authority with its responsibility" regarding peer review proceedings, and such actions are not "a material deviation from the bylaws"]; *Weinberg v. Cedars-Sinai Medical Center* (2004) 119 Cal.App.4th 1098, 1112-1114 (*Weinberg*) [hospital's governing board is permitted, under the rule of necessity and Business and

Professions Code section 809.05, to terminate a physician's medical staff privileges regardless of an alleged conflict of interest and the MEC's contrary recommendation]; *Rhee v. El Camino Hospital Dist.* (1988) 201 Cal.App.3d 477, 497-501 (*Rhee*) [hospital's violation of bylaws by failing to provide physician with the decision of an initial peer review panel did not infringe on the doctor's fair procedure rights, even though he claimed it deprived him of an opportunity to reject certain members of a subsequent peer review panel]; see also *Kaiser Foundation Hospitals v. Superior Court* (2005) 128 Cal.App.4th 85, 107-109 (*Kaiser*) [physician's claim that a hospital's "unilateral selection of a hearing officer and the [peer review panel] violates due process" was insufficient to excuse his duty to exhaust that administrative remedy before filing suit].)

However, the Court of Appeal's published opinion here creates uncertainty as to the circumstances when a hospital's governing board may act in place of the medical staff. The Court of Appeal's opinion hamstrings the Hospital. The Hospital's governing board, faced with a threat to patient health and to Medicare and other funding necessary to keep the Hospital's doors open, acted only after the medical staff's MEC specifically told the board that the board and not the MEC should appoint the peer review panel and hearing officer. Yet, regardless of the medical staff's directions, the Court of Appeal deemed the board's action inconsistent with the medical staff's bylaws and a violation of Dr. El-Attar's right to fair procedure. (Typed opn., 15 ["Allowing the Governing Board to select the hearing officer and [peer review] panel is not an inconsequential violation of the Bylaws. Rather, it undermines the purpose of the

peer review mechanism"], 17 [the Court of Appeal refused to allow "the Governing Board to turn the peer review process on its head, which would be the result if the MEC were permitted to abrogate its right and duty with respect to the peer review procedure"].)

The Court of Appeal's opinion exalts form over substance, to the detriment of the public health. Instead of voiding the detailed peer review proceedings, the opinion should have concluded, as the *Hongsathavij* court did, "the hospital did what was appropriate. It provided a [peer review] hearing, and the governing body reviewed the results of that hearing to determine whether the conclusions were supported by substantial evidence. Given the peculiar dynamics and procedural posture of the situation, the governing body fairly interpreted the bylaws and dealt with the matter consistent with its ultimate responsibility for the activities of the medical staff and the hospital." (*Hongsathavij, supra,* 62 Cal.App.4th at p. 1144.)

The issue about a hospital's authority to act when the medical staff does not is not only suddenly unsettled by the Court of Appeal's opinion, but it is also an important one affecting the public welfare. As this court has explained, "peer review of physicians . . . serves an important public interest. Hospital peer review, in the words of the Legislature, 'is essential to preserving the highest standards of medical practice' throughout California." (*Kibler v. Northern Inyo County Local Hosp. Dist.* (2006) 39 Cal.4th 192, 199 (*Kibler*), quoting Bus. & Prof. Code, § 809, subd. (a)(3); see *Kibler*, at p. 200 ["peer review procedure plays a significant role in protecting the public against incompetent, impaired, or negligent physicians"].)

And the Legislature has expressly stated its goal to use "efficient[]" peer review to protect the public from "those healing arts practitioners who provide substandard care or who engage in professional misconduct." (Bus. & Prof. Code, § 809, subd. (a)(6) & (7); see *Medical Staff of Sharp Memorial Hospital v. Superior Court* (2004) 121 Cal.App.4th 173, 181-182 ["the overriding goal of the state-mandated peer review process is protection of the public"].)

The issue is not an isolated one. In 2010 the California Medical Association (CMA) published a new version of its model medical staff bylaws, which conditions the initiation of a peer review hearing on the MEC recommending appointments to the peer review panel. (See typed opn., 14 [citing the CMA model bylaws as support for its conclusion that, even when the MEC has expressly declined to do so, "the power to appoint the JRC panel remains in the hands of the MEC"].) Under the Court of Appeal's opinion, the governing board of any hospital whose medical staff adopts the CMA's model bylaws could be stymied from acting on peer review matters if, as happened here, the MEC declines to act. And that is true even where, as here, the peer review proceedings are critical to patient protection and the Hospital's continued viability.

The Court of Appeal's opinion in this case creates uncertainty regarding the scope of hospital authority and, given the crucial importance of peer review to the public health, the issue needs to be definitively resolved one way or the other by the Supreme Court. Otherwise, hospitals and their governing boards may face unnecessary liability — and a loss of critical federal funding —

because of dysfunctional peer review systems. That is not a just outcome for hospitals, or the patients they serve.

STATEMENT OF THE CASE [1]

A. A federal investigation identifies serious deficiencies in the Hospital's peer review process, which threaten the Hospital's eligibility to receive Medicare and other funding it needs to stay in business. The Hospital's governing board and its medical staff disagree about how to respond to the audit.

In 2002, representatives of the Center for Medicare and Medicaid Services (CMS) — the administrator for the federal Medicare and Medi-Cal programs — conducted an unannounced investigation of the Hospital. (21 AR 4478-4479; 27 AR 5795.) The CMS investigation would determine whether the Hospital could continue participating in the Medicare and Medi-Cal programs, and continue serving managed healthcare patients. (21 AR 4479; 27 AR

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[1] This Statement of the Case includes uncontradicted evidence in the record on appeal that was not mentioned in the Court of Appeal's opinion. The Hospital discussed the evidence in its respondents brief and filed a rehearing petition calling to the court's attention the opinion's omission of the evidence. (See RB 1-4; PFRH 7-11; see also Cal. Rules of Court, rule 8.500(c)(2) [Supreme Court normally will accept the Court of Appeal opinion's statement of facts "*unless* the party has called the Court of Appeal's attention to any alleged omission . . . of a[ ] . . . fact in a petition for rehearing" (emphasis added)].)

5796.) Without payments from Medicare, Medi-Cal, and managed healthcare providers, the Hospital would lose 90 percent of its funding and could not stay in business. (27 AR 5796-5797; see 21 AR 4480.) The CMS investigators found deficiencies in the Hospital's peer review process and concluded that the process needed to be restructured. (21 AR 4482-4483.) In particular, the audit criticized the Hospital's governing board for failing to adequately oversee the peer review programs. (21 AR 4483; 27 AR 5799.)

In meetings with the Hospital's administrators and physician medical staff leaders, the head CMS physician stated that he would recommend the Hospital be removed from the Medicare and Medi-Cal programs unless immediate corrective actions were taken. (27 AR 5798-5799.) The investigator also said he would strongly recommend to Medicare that outside reviews be conducted of the Hospital's peer review cases. (27 AR 5799.)

CMS required the Hospital's governing board to submit a written plan of correction in order to maintain its Medicare and Medi-Cal eligibility. (27 AR 5800.) In preparing its corrective plan, the Hospital, among other things, followed the CMS recommendation and retained outside review companies to look at the Hospital's peer review processes and assess how it could be improved. (21 AR 4484.)

The medical staff at the Hospital, however, objected to the entire assessment procedure. The MEC — comprised of the medical staff's leadership — complained that the CMS investigators were biased and demanded that the Hospital's governing board file an

objection with the federal government regarding the nature of the CMS investigation and the qualifications of the investigators. (27 AR 5801.) The governing board declined to do so. (*Ibid.*) The MEC then demanded that no outside reviewers be used, but the board determined that was not a viable option. (*Ibid.*) The MEC then demanded that it have exclusive control over the selection of any outside auditors. (*Ibid.*) The board responded that the MEC was free to retain whatever outside auditors it wanted, but the board was likewise going to select its own outside auditors. (27 AR 5801-5802.)

B. After later audits uncover unnecessary and substandard care by Dr. El-Attar, the Hospital's governing board recommends denial of his application for reappointment to the medical staff.

In September 2002, the Hospital's board formed an ad hoc committee (AHC), headed by the Hospital's CEO, to oversee the review process and assist the Hospital in reforming the peer review system. [2] (27 AR 5806; see 21 AR 4484; 27 AR 5818.) The board directed the AHC to obtain outside audits. (21 AR 4485.) The AHC retained two different review organizations to assess the Hospital's

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[2] At this point, there was an extremely high level of friction, and no degree of cooperation, between the MEC and the governing board. (27 AR 5802.) Indeed, about a week after the board formed its AHC and refused to allow the MEC to control the outside auditors, the medical staff voted that it had no confidence in the CEO and called for his firing. (12 AR 2505; 27 AR 5833-5834.)

quality management department and audit medical cases that had been subjected to peer review. [3] (21 AR 4485-4487; 27 AR 5802.)

Reports both from the outside auditors and from the Hospital's compliance department identified problems with the peer review system. The auditors' conclusions about various specific cases differed dramatically from the peer review results. (21 AR 4487-4488; see 27 AR 5804 [one of the auditors said that, if the Hospital's peer review process were operating correctly, the audit and the peer review results should agree about 80 percent of the time].)

The auditors also raised significant concerns about the quality of care provided in certain departments, including the emergency department. One auditor's report identified a pattern of unnecessary consultations where emergency on-call physicians referred patients to each other despite a lack of documented need. (27 AR 5809-5810; see 21 AR 4489-4490 [the Hospital's quality management department independently reviewed the consultations and procedures performed on emergency patients, and likewise found an overuse of consultants].)

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[3] The Court of Appeal's opinion states incorrectly that the Hospital's board formed the AHC to "review and make recommendations relating to the quality of care by certain medical staff members" and that the AHC retained the auditors "to review [Dr. *El-Attar*'s] practice." (Typed opn., 5.) In fact, the auditors were not directed to review any particular physicians initially; that focused review only came later, after the initial audits identified physicians whose practices required closer scrutiny. (See PFRH 7-11; pp. 11-13, *post*.)

Based on the auditor's report, the AHC identified Dr. Osamah El-Attar, a cardiologist, as one of the on-call physicians who regularly did unnecessary consultations. (21 AR 4489; 27 AR 5811, 5816; see 21 AR 4490 [the Hospital's quality management department's independent review likewise identified a pattern of unnecessary consultations by Dr. El-Attar].) The vast majority of Dr. El-Attar's patients in 2002 came from his emergency room consultations and in 41 percent of these cases there was no documentation of any need for a cardiology consultation. (27 AR 5812, 5816.)

The AHC was very concerned about this pattern of unjustified emergency consultations, because it unnecessarily put patients at risk during invasive procedures, and because it created potential problems with third-party payers such as Medicare and Medi-Cal. [4] (27 AR 5812-5813; see 27 AR 5823.) The AHC therefore requested that the auditors review Dr. El-Attar's practice, as well as the practices of several other emergency on-call physicians identified by the initial audits. (21 AR 4488-4489, 4491; 27 AR 5816.)

The AHC did not participate in the selection of the physician reviewers used by the auditors, other than to request that at least two reviewers be used and that reviewers from Southern California

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[4] A sister hospital had recently paid a $54 million fine to the federal government after auditors identified a pattern of unnecessary cardiac procedures and threatened to revoke the Hospital's Medicare eligibility status. (27 AR 5813.)

not be used, in order to minimize the chance of a reviewer knowing the doctor being reviewed. [5] (27 AR 5817, 5819.)

The outside auditors' reports on Dr. El-Attar, completed in January 2003, were highly negative. (10 AR 2149-2160; 27 AR 5818-5819.) All 17 of Dr. El-Attar's cases that were reviewed by one auditor were found "below generally accepted practice standards," including 11 which exhibited "major deficienc[ies] in care." (27 AR 5819; accord, 9 AR 1822-1824; typed opn., 5.)

The report also identified 31 instances of medically unnecessary services performed or ordered by Dr. El-Attar (27 AR 5822), and it identified charting deficiencies in 16 of the 17 cases (27 AR 5824; see 27 AR 5825 [the federal government and other third-party payers will not authorize payment for medical services unless the medical record documents a need for such services]). It also confirmed continual behavior problems by Dr. El-Attar. (27 AR 5826; see 27 AR 5783, 5789, 5839 [in 1997-1998, Dr. El-Attar had gone through disciplinary proceedings and a peer review hearing at the Hospital involving a long list of documented behavioral issues].)

The other auditor's report made similar findings. (27 AR 5827.) It was critical of Dr. El-Attar's cardiologic care and found his

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[5] The reviewers the auditor selected to investigate Dr. El-Attar's practice included three board-certified cardiologists, including (a) the director of cardiology at University of California, San Francisco, (b) a professor of cardiology a Vanderbilt University Medical Center, and (c) the chief of cardiology at San Francisco General Hospital. (10 AR 2158-2159.) The fourth reviewer was an internal medicine physician holding three board certifications who teaches as a clinical professor at the University of Arizona College of Medicine. (10 AR 2159.)

behavior to be unacceptable and unprofessional. (9 AR 1828; 27 AR 5829.) The report stated that Dr. El-Attar's patients were undergoing risky procedures needlessly, which put the Hospital at risk for being a part of a conspiracy to cheat Medicare and Medi-Cal. (27 AR 5829.)

Based on the auditors' reports, the AHC unanimously decided that the only way to protect patients and the Hospital was to summarily suspend Dr. El-Attar and have him removed from the medical staff. (27 AR 5827, 5831-5832.) Following the AHC's recommendation, the Hospital board recommended the denial of Dr. El-Attar's application for reappointment and summarily suspended his clinical privileges. (9 AR 1829, 1835; 27 AR 5831; typed opn., 6.)

C. The MEC grants Dr. El-Attar a judicial review hearing regarding the board's recommendation, but delegates to the Hospital board the responsibility for conducting that hearing.

The Hospital's CEO asked the MEC to confirm the Hospital board's summary suspension of Dr. El-Attar, but the MEC refused and the suspension thus ended. (9 AR 1860; 27 AR 5831; see 9 AR 1836 [the MEC questioned why it was not consulted during the selection of outside auditors]; 11 AR 2350 [under the bylaws, the board's summary suspension of Dr. El-Attar's privileges terminated when the MEC refused to ratify that decision]; see also 3 CT 2744 [hospital's letter to Dr. El-Attar stating that his medical staff

membership and clinical privileges would continue during his administrative hearing]; typed opn., 6.) The MEC then formed its own ad hoc committee to review 16 of the cases reviewed by one of the auditors. (9 AR 1890.)

On March 12, 2003, the MEC reviewed the findings of its ad hoc committee, which agreed with the board's outside reviewers that there were documentation problems in Dr. El-Attar's cases but did not recommend any adverse peer review action. (9 AR 1890.) The MEC then granted Dr. El-Attar's request for a judicial review hearing regarding the board's recommended denial of his application for reappointment to the medical staff. (*Ibid.*, typed opn., 6.)

The Hospital's medical staff bylaws state it is the MEC that appoints the members of a judicial review committee (JRC) and the hearing officer.[6] (11 AR 2358, 2361.) The MEC concluded, however, that, "since the MEC did not summarily suspend [Dr. El-Attar's] privileges, did not recommend any adverse action relating to [Dr. El-Attar] and has not filed any Section 805 report relating to [Dr. El-Attar];[7] and since the requested hearing would be to review actions by the Governing Board; *it should be the Governing Board*

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[6] The JRC acts as the trier of fact for peer review. (See Bus. & Prof. Code, § 809.2, subd. (a); 11 AR 2355.)

[7] Business and Professions Code section 805, subdivision (b), "requires that hospitals report certain disciplinary actions, including denial of staff privileges, to the [State's] Medical Board . . . [and usually] to the National Practitioner Data Bank . . . ." (*Mileikowsky v. West Hills Hospital & Medical Center* (2009) 45 Cal.4th 1259, 1268 (*Mileikowsky*).)

and not the MEC which arranges and prosecutes the requested hearing." (9 AR 1890-1891, emphasis added; accord, 9 AR 1890 ["the Medical Executive Committee *leaves the actions relating to the Judicial Review Hearing procedures to the Governing Board*" (emphasis added)].)

D. Acting in place of the MEC, the Hospital board's ad hoc committee initiates the judicial review hearing, which affirms the board's decision to deny staff privileges to Dr. El-Attar. The Hospital's appeals board affirms.

After the MEC left further action to the board, the board's AHC arranged for Dr. El-Attar's judicial review hearing. It issued a Notice of Hearing Charges, appointed six members of the medical staff to serve on the JRC, and appointed an attorney to act as the hearing officer. (9 AR 1895-1907; 11 AR 2358-2359, 2361; see typed opn., 6; 27 AR 5864.)

Following voir dire,[8] the JRC held 30 sessions over the next two years, at which it examined thousands of exhibits and medical

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[8] The bylaws provide that the "member shall be entitled to a reasonable opportunity to question and challenge the impartiality of Judicial Review Committee members and the hearing officer." (11 AR 2360.) Following Dr. El-Attar's voir dire of the hearing officer and JRC members appointed by the AHC, "[o]ne member [of the JRC] was excused and two other members resigned prior to the commencement of the evidentiary hearings. Subsequently, in July 2003, [two new physicians] were appointed by the Governing Board (continued...)

records and heard testimony from percipient and seven expert witnesses. (16 AR 3505-3543; 17 AR 3550-3731; see 1 CT 85; 8 CT 1725; typed opn., 7-8.) The JRC then issued its decision, finding patterns by Dr. El-Attar of dangerous, substandard medical practice, of inadequate, substandard medical record documentation, and of inappropriate interpersonal relations with staff members. (17 AR 3737-3743.) The JRC unanimously ruled that the board's recommendation to deny Dr. El-Attar reappointment to the medical staff was reasonable and warranted. (*Ibid.*)

Dr. El-Attar had yet another hearing when he appealed the JRC's ruling to the Hospital's appeal board. (35 AR 7746-7846.) After reviewing the record of the JRC hearing, the appeal board concluded Dr. El-Attar had received a fair hearing that substantially complied with the bylaws and applicable law. (19 AR 4110-4113.) In particular, the appeal board ruled that "[t]he appointment of the JRC and Hearing Officer by the [board] was not specifically authorized by the Bylaws but did not violate any rule of fair procedure and was approved by the MEC. The appointment of the JRC and the Hearing Officer by the [board] was also in substantial compliance with the Bylaws and resulted in no demonstrable prejudice to Dr. El-Attar, because he had the right to voir dire these appointees for bias and lack of impartiality in the same manner as if they had been appointed by the MEC." (19 AR 4111 [Conclusions And Recommendations, ¶ 2].)

(...continued)
to serve on the JRC as replacements, bringing the number of panel members to five." (Typed opn., at 7.)

On the merits, the appeal board concluded that substantial evidence supported the JRC's findings, that the JRC's decision was not arbitrary or capricious but reasonable and warranted, and that the board should uphold the JRC decision. (19 AR 4111-4113.) The board followed the appeal board's recommendation, affirming the JRC's ruling and terminating Dr. El-Attar's medical staff membership. (19 AR 4109.)

E. The trial court denies Dr. El-Attar's petition for writ relief. The Court of Appeal reverses, holding that only the MEC could appoint the members of the peer review committee and its hearing officer.

"Following a lengthy hearing on the merits, the trial court denied [Dr. El-Attar's] petition" for writ relief. (Typed opn., 8; accord, 8 CT 1718-1770 [trial court's statement of decision].) The Court of Appeal reversed, holding that the 2-year peer review regarding Dr. El-Attar's loss of privileges must be redone because the board's AHC, rather than the MEC, appointed the JRC panel and hearing officer. (Typed opn., 12-18.)

LEGAL ARGUMENT

THIS COURT SHOULD GRANT REVIEW TO RESOLVE THE CONFLICT CONCERNING THE IMPORTANT ISSUE OF A HOSPITAL GOVERNING BOARD'S AUTHORITY TO INITIATE NECESSARY PEER REVIEW PROCEEDINGS WHEN THE HOSPITAL'S MEDICAL STAFF DOES NOT.

A. The conduct of necessary medical peer review proceedings presents an important public health issue.

This is the quintessential case for Supreme Court review, presenting an issue of statewide importance about which the Courts of Appeal are in disagreement.

Before a physician can be barred from practicing at a hospital, his competence must be reviewed by his peers. In this case, a hospital's organized medical staff did not want to arrange for the review of a physician who had been accused of providing unnecessary and substandard care. Although the medical staff's bylaws provides that the medical staff — through its MEC — is to initiate the review by appointing the reviewing physicians and the hearing officer, the MEC decided that the Hospital's governing board should do it. The board then did so, although the review itself was nonetheless still conducted by medical staff physicians.

The Court of Appeal here concluded that the Hospital board's action is a structural defect in the peer review proceedings that is inconsistent with the physician's fair procedure rights. (Typed opn., 12-18.) As we explain, this decision conflicts with other Court of Appeal opinions. This court should resolve the conflict.

The issue concerning a hospital board's authority with respect to peer review is vitally important. Hospital peer review is critical to, and the legislatively chosen method for, maintaining quality healthcare at every hospital in the state. (See *Arnett v. Dal Cielo* (1996) 14 Cal.4th 4, 11-12; *Kaiser, supra,* 128 Cal.App.4th at pp. 96-98; *Unnamed Physician v. Board of Trustees* (2001) 93 Cal.App.4th 607, 616-617; Bus. & Prof. Code, §§ 805, 809, 809.05, subd. (d).) It is thus not surprising that this court has frequently granted review to address hospital peer review issues. (E.g., *Mileikowsky, supra,* 45 Cal.4th 1259; *Kibler, supra,* 39 Cal.4th 192; *Hassan v. Mercy American River Hospital* (2003) 31 Cal.4th 709; *Arnett,* at p. 4; *Alexander v. Superior Court* (1993) 5 Cal.4th 1218; *Miller v. Eisenhower Medical Center* (1980) 27 Cal.3d 614; *Anton v. San Antonio Community Hosp.* (1977) 19 Cal.3d 802; *Rosner v. Eden Township Hospital Dist.* (1962) 58 Cal.2d 592.)

"[T]he peer review process serves the important social interest in public health and safety by continually scrutinizing medical and health care operations in order to correct any potential problems with procedure or staff which might threaten the individual patient with disproportionate risk of danger." (*People v. Superior Court (Memorial Medical Center)* (1991) 234 Cal.App.3d 363, 373 [the peer review committee serves "as a *quasi-public functionary*"(emphasis

added)]; *Ellison v. Sequoia Health Services* (2010) 183 Cal.App.4th 1486, 1494, 1498 (*Ellison*) [the primary purpose of peer review is to protect public health; the protection of a physician's right to practice medicine is secondary].)

A hospital's governing board has a legitimate need to participate in the peer review process in addition to the medical staff. (*Ellison, supra,* 183 Cal.App.4th at p. 1499; *Weinberg, supra,* 119 Cal.App.4th at p. 1114; see Stats. 2001, ch. 614, § 1, p. 361 [Legislative finding that " '[p]eer review is an essential component' " of health care regulation, and both "health care practitioners *and the administrators of the facilities* within which these licentiates practice are in the best position to observe the quality of health care services being provided to the public" (emphasis added)].) The Hospital's governing board makes the final decision regarding peer review matters (*Mileikowsky, supra,* 45 Cal.4th at p. 1272), and the Hospital may be liable to its patients if it fails to adequately oversee medical staff peer review (*Rhee, supra,* 201 Cal.App.3d at p. 489 [the "hospital has 'a direct and independent responsibility to its patients of insuring the competency of its medical staff and the quality of medical care provided' "]; accord, *Elam v. College Park Hospital* (1982) 132 Cal.App.3d 332, 346 (*Elam*)).

Accordingly, an "important public interest exists in preserving a hospital's ability to make managerial and policy determinations and to retain control over the general management of the hospital's business. A hospital is under an obligation to remedy any situation which threatens or jeopardizes patient care." (*Mateo-Woodburn v. Fresno Community Hospital & Medical Center* (1990) 221

Cal.App.3d 1169, 1184-1185; see also *O'Byrne v. Santa Monica-UCLA Medical Center* (2001) 94 Cal.App.4th 797, 811.)

It follows that the issue presented here is an important one which warrants this court's attention.

B. This court should resolve the conflict in the Court of Appeal decisions by holding that the Hospital governing board may act in place of the medical staff to initiate peer review proceedings when appropriate under the common law rule of necessity.

This case presents the ideal vehicle for resolving the circumstances under which hospital governing boards have the authority to arrange medical staff peer review proceedings under the common law rule of necessity.

This court has explained that the common law rule of necessity allows an officer or administrative body, who would otherwise be disqualified from proceeding, to act whenever a "failure to act would necessarily result in a failure of justice." (*Mosk v. Superior Court* (1979) 25 Cal.3d 474, 482, fn. 5; see also *Olson v. Cory* (1980) 27 Cal.3d 532, 537; *Caminetti v. Pac. Mutual L. Ins. Co.* (1943) 22 Cal.2d 344, 365-366.)

Consistent with the common-law rule of necessity, the Legislature has provided that, "[i]n the event the peer review body fails to take action in response to a direction from the governing body, the governing body shall have the authority to take action against a licentiate." (Bus. & Prof. Code, § 809.05, subd. (c).)

Two Court of Appeal opinions have expressly applied the rule of necessity to validate action by a hospital governing board with respect to medical staff peer review proceedings. (*Hongsathavij, supra,* 62 Cal.App.4th at pp. 1142-1143; *Weinberg, supra,* 119 Cal.App.4th at pp. 1112-1113.)

The *Hongsathavij* court explained that, under *Elam, supra,* 132 Cal.App.3d at page 346, a "hospital itself may be responsible for negligently failing to ensure the competency of its medical staff and the adequacy of medical care rendered to patients at its facility." (62 Cal.App.4th at p. 1143.) Accordingly, a "hospital has a duty to ensure the competence of the medical staff by appropriately overseeing the peer review process." (*Ibid.,* citing *Elam,* at pp. 338, 341-342, 347.) Because the Hospital "assets are on the line" the "hospital's governing body must remain empowered to render a final medical practice decision which could affect those assets." (*Ibid.*) For this reason, a "*hospital's governing body must be permitted to align its authority with its responsibility* and to render the final decision in the hospital administrative context." (*Ibid.,* emphasis added; accord, *Weinberg, supra,* 119 Cal.App.4th at pp. 1112-1113.)

Also, until the Court of Appeal decision in this case, a hospital's governing board's authority to take necessary action in connection with the peer review process was not limited by the terms of the medical staff's bylaws. In *Hongsathavij*, the court noted that "[f]or whatever reason, the medical staff bylaws [there] provide no specific right [for the Hospital] to appeal [the results of] actions initiated by the governing body. Nonetheless, we find the review sought by the Medical Center in the present case did not

constitute a material deviation from the bylaws." (*Hongsathavij, supra,* 62 Cal.App.4th at p. 1143.) The court explained:

> The Medical Center's medical staff bylaws apparently did not envision a situation, as occurred here, where the superior court directed the hospital to conduct a hearing, but where the tension between the hospital and its medical staff was such that the MEC would not assume a role in such proceedings. Under such circumstances, the hospital did what was appropriate. It provided a JRC hearing, and the governing body reviewed the results of that hearing to determine whether the conclusions were supported by substantial evidence. *Given the peculiar dynamics and procedural posture of the situation, the governing body fairly interpreted the bylaws and dealt with the matter consistent with its ultimate responsibility for the activities of the medical staff and the hospital.*

(*Id.* at pp. 1143-1144, emphasis added.)

The physician seeking to overturn an adverse peer review decision in *Hongsathavij* argued that, if the Hospital's "governing body believes an action against a physician is necessary, and if the medical staff disagrees, then the medical staff gets to make the final decision, since the governing body is tainted by its initial position on the matter." (62 Cal.App.4th at p. 1143.) The Court of Appeal rejected the physician's argument as "untenable" because "[u]timate responsibility [for peer review decisions] is not with the medical staff, but with the governing body of the hospital." (*Ibid.*; see *id.* at pp. 1142-1143 ["where an administrative body has a duty to act, and is the only entity capable of acting, the fact that the body may have an interest in the result does not disqualify it from acting"].)

Weinberg, supra, 119 Cal.App.4th at pages 1112-1113, reached the same conclusion, holding that a hospital's governing board is permitted under the rule of necessity to terminate a physician's medical staff privileges regardless of an alleged conflict of interest and the MEC's contrary recommendation.

The Court of Appeal opinion here cannot be squared with the decisions in *Hongsathavij* and *Weinberg*. Here, the Hospital was threatened with potential liability for harm to patients and the loss of federal funding needed to stay in business due to flaws in the MEC's peer review proceedings and the governing board's past failure to more actively police those proceedings. When the MEC declined to arrange peer review proceedings for a physician whose misconduct threatened patient health and necessary hospital funding, the governing board had to make those arrangements. This was no usurpation of medical staff power by the governing board (as the Court of Appeal paints it), but an abdication of responsibility by the medical staff to the governing board. The appellate court should have presumed — as the trial court apparently did — that the board had accurately determined, based on the realities of the situation, that the MEC was unwilling to initiate the peer review proceeding (see 8 CT 1723, 1728-1730), and affirmed the results of the two-year peer review proceeding, holding there was substantial compliance with the bylaws that did not materially affect Dr. El-Attar's fair proceeding rights. [9]

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[9] In a footnote, the Court of Appeal claims the minutes of the MEC's March 12 meeting do "not demonstrate an active refusal on the part of the MEC to fulfill its duties under the Bylaws" to appoint (continued...)

Instead, the court held that, because a peer review panel selected by the board is presumed to be biased, physicians have an inherent right to have the MEC select JRC members and the hearing officer. (Typed opn., 15 ["Allowing the Governing Board to select the hearing officer and JRC panel . . . undermines the purpose of the peer review mechanism"], 17-18 [allowing the MEC to delegate the selection of JRC members to the Hospital's governing board would "turn the peer review process on its head" because a "procedure that enables the Governing Board to tip the scales in its favor, leaving the physician to uncover and cure any potential inequality on his or her own, does not comport with the fair procedure envisioned in the statute and Bylaws"].)

Contrary to the Court of Appeal's premise, fair procedure is not denied when the body initiating adverse peer review action is involved in the peer review proceedings. (*Hongsathavij, supra,* 62 Cal.App.4th at p. 1142 ["bias in an administrative hearing context

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(...continued)
the hearing officer and JRC members for Dr. El-Attar's peer review. (Typed opn., 18, fn. 10.) But there was nothing equivocal about the MEC's express refusal to make arrangements for the peer review proceedings, or its express direction that those proceedings were to be arranged by the governing board. (9 AR 1890; see *ante*, pp. 14-15.) In essence, the Court of Appeal's opinion unwinds two years of peer review proceedings, representing a significant time commitment for numerous physicians and attorneys, all because the Hospital allegedly failed to adequately document the obvious fact that the MEC would not arrange for Dr. El-Attar's peer review. The court should have deferred to the governing board regarding that issue. (See *Weinberg, supra,* 119 Cal.App.4th at pp. 1108-1109 [courts should defer to hospital administrators regarding issues within their area of expertise].)

can never be implied, and the mere suggestion or appearance of bias is not sufficient. [Citation.] It is also well established that a party is not denied an impartial adjudicator merely because an administrative entity performs both the functions of prosecutor and judge. [Citation.] Overlapping investigatory, prosecutorial and adjudicatory functions do not necessarily deny a fair hearing and are common before most administrative boards"].) Otherwise, *the MEC* could never initiate peer review proceedings after recommending adverse peer review action against a physician. That argument was rejected years ago. (See *Rhee, supra,* 201 Cal.App.3d at pp. 490-494.)

The Court of Appeal also rejected the Hospital's argument that the board's action, at the MEC's request, was consistent with statutes governing medical staff peer review. (See Bus. & Prof. Code, §§ 809, subd. (b) [" 'peer review body' means a peer review body as specified in paragraph (1) of subdivision (a) of Section 805,[10] and *includes any designee* of the peer review body" (emphasis added)], 809.05, subd. (c) ["In the event the peer review body fails to take action in response to a direction from the governing body, the governing body shall have the authority to take action against a licentiate"].) The court stated that, while section 809.05 authorized the board to "initiate a corrective action" against

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[10] Business and Professions Code section 805, subdivision (a)(1)(B)(iv), states: the term " '[p]eer review body' includes . . . [a] committee organized by any entity consisting of or employing more than 25 licentiates of the same class that functions for the purpose of reviewing the quality of professional care provided by members of that entity."

Dr. El-Attar, it did not allow the board "to appoint the hearing officer and JRC . . . ." (Typed opn., 12.) And the court narrowly construed Business and Professions Code section 809 as not allowing the MEC to "delegate its appointment powers to the Governing Board . . ." (Typed opn., 14.) In sum, the court concluded that allowing the Hospital's governing board to select the hearing officer and JRC members was inconsistent with the peer review statutes, "undermines the purpose of the peer review mechanism" and "turn[s] the peer review process on its head." (Typed opn., 12-18.)

But when the MEC fails to act, Business and Professions Code section 809.05, subdivision (c), expressly authorizes the board to take action, so long as it "fully compl[ies] with the procedures and rules applicable to peer review proceedings established by Sections 809.1 to 809.6, inclusive." The only one of those statutes discussing the appointment of the hearing officer and JRC members is section 809.2, which requires only that the appointees be unbiased individuals who do not directly benefit from the outcome of the proceeding. However, the statute does not prohibit the board from appointing the hearing officer or JRC members, any more than it prohibits the MEC from doing so. (See *Hongsathavij, supra,* 62 Cal.App.4th at p. 1142; *Rhee, supra,* 201 Cal.App.3d at p. 490.)

The Court of Appeal should have construed the peer review statutes consistent with the Legislature's expressed intent that hospitals take action to ensure needed peer review is not thwarted by the medical staff's failure to act. (See *Mileikowsky, supra,* 45 Cal.4th at pp. 1270-1271; *Weinberg, supra,* 119 Cal.App.4th at p.

1114; see also *People v. Shabazz* (2006) 38 Cal.4th 55, 67-68 [courts should construe statutes in a manner that furthers legislative intent].) Had it done so, it would have affirmed the trial court's decision to deny Dr. El-Attar writ relief.

CONCLUSION

For the reasons explained above, this court should grant review and reverse the Court of Appeal's judgment.

September 28, 2011

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CERTIFICATE OF WORD COUNT

(Cal. Rules of Court, rule 8.504(d)(1).)

The text of this petition consists of 6,705 words as counted by the Microsoft Word version 2007 word processing program used to generate the petition.

Dated: September 28, 2011

H. Thomas Watson

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

OSAMAH A. EL-ATTAR, Petitioner and Appellant, v. HOLLYWOOD PRESBYTERIAN MEDICAL CENTER, Defendant and Respondent.	B209056 (Los Angeles County Super. Ct. No. BS105623)

APPEAL from a judgment of the Superior Court of Los Angeles County, Mary Ann Murphy, Judge. Reversed and remanded.

Lurie, Zepeda, Schmalz & Hogan, Kurt L. Schmalz, and Neeru Jindal for Petitioner and Appellant.

Christensen & Auer, Jay D. Christensen, and Anna M. Suda for Defendant and Respondent.

Francisco J. Silver and Astrid G. Meghrigian for California Medical Association as Amicus Curiae on behalf of Defendant and Respondent.

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* Pursuant to California Rules of Court, rules 8.1105(b) and 8.1110, this opinion is certified for publication with the exception of part II of the Discussion.

This case concerns a hospital's peer review procedure in the case of a physician who is denied reappointment to the medical staff. The hospital bylaws governing peer review hearings in such cases call for a hearing panel made up of physicians selected by an elected executive committee of the medical staff. We hold that in the absence of a bylaw provision to the contrary, the elected committee must appoint the hearing panel, and cannot delegate this task to the governing board of the hospital.

Appellant Osamah El-Attar, M.D., was a medical staff member at respondent Hollywood Presbyterian Medical Center (Hospital). In fall 2002, he applied for reappointment to the medical staff. His application was reviewed by the medical staff's Medical Executive Committee (MEC), which recommended that his application be approved. The Governing Board of Hospital denied the application, and appellant requested a peer review hearing to challenge the Governing Board's discussion.

The Queen of Angels-Hollywood Presbyterian Medical Center Medical Staff Bylaws (Bylaws), adopted by the medical staff and approved by the Governing Board of Hospital, provided that in a case such as this, the peer-elected MEC appoints the members of the hearing panel to hear the case. Nevertheless, in this instance, the MEC acted to delegate that authority to the Governing Board. That body appointed a hearing panel which ultimately ruled against appellant.

Following the hearing, the appellant's medical staff membership and privileges were terminated. Appellant petitioned for a writ of admin0istrative mandate, pursuant to Code of Civil Procedure section 1094.5. His petition was denied. On appeal, he makes several claims of error with respect to the selection of the hearing panel and the procedures it followed in hearing the case. We decide only one: whether the panel was properly constituted. We hold that it was not because selection of the hearing panel by

the Governing Board violated the Bylaws, depriving appellant of the hearing to which he was entitled. We therefore reverse the trial court's ruling denying relief.[1]

FACTUAL AND PROCEDURAL SUMMARY

Pursuant to Business and Professions Code section 809,[2] Hospital employs a peer review process to evaluate a physician's performance and conduct for various purposes, including applications for appointment and reappointment to the medical staff and disciplinary action against a physician. The Bylaws prescribe the structure of the peer review process. The Bylaws outline the respective roles of Hospital's Governing Board and the medical staff in that process. The Governing Board has final say on appointment applications (Bylaws, art. V, § A-1) and corrective actions against physicians. (art. VIII, § A-(1)(a)-(b).) The medical staff is represented by the MEC, which is comprised of medical staff officers, members, and department chairperson, all elected by the medical staff. (art. XII, § B.) Among other duties, the MEC makes recommendations to the Governing Board for medical staff appointment and reappointment, and takes "all reasonable steps to ensure professional ethical conduct and competent clinical performance on the part of all members of the Medical Staff. . . ." (*Ibid.*)

The Bylaws authorize the MEC to investigate complaints against a physician (art. VII, § C), and, when appropriate, to recommend to the Governing Board that corrective action be taken against the physician. (art. VII, § D.) Article VII, section F provides that in the event the MEC "fails to investigate or take disciplinary action, contrary to the

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[1] We do not reach appellant's substantial evidence argument or other issues concerning the conduct of the Judicial Review Hearing. For the guidance of counsel, the unpublished portion of our opinion addresses appellant's argument that he did not receive an adequate notice of charges.

[2] All statutory references are to the Business & Professions Code, unless otherwise indicated.

weight of evidence, the Governing Board may direct the [MEC] to initiate . . . disciplinary action, but only after consultation with the [MEC]. If the [MEC] fails to take action in response to the Governing Board's directive, the Governing Board may initiate corrective action, but this corrective action must comply with Articles VII and VIII of these Bylaws."

A physician facing an adverse MEC recommendation or Governing Board decision is entitled to a "Judicial Review Hearing" (art. VIII, § A) before a Judicial Review Committee (JRC) "appointed by the [MEC] and composed of at least five (5) members of the Active [medical] Staff who shall gain no direct financial benefit from the outcome; who have not acted as an accuser, investigator, fact finder or initial decision maker; and who otherwise have not actively participated in the matter leading up to the recommendation or action." (art. VIII, § C, subd. (8).) The JRC panel must include at least one member who has the same specialty as the physician challenging the action. In the event that it is not feasible to appoint a JRC completely composed of active medical staff members, the MEC may appoint members from other staff categories or practitioners who are not members of the medical staff. (art. VIII, § C, subd. (8).) The hearing is overseen by a hearing officer selected by the MEC, who rules on "questions which pertain to matters of law, procedure, or the admissibility of evidence." (art. VIII, § C, subd. (11)(c).)

If the JRC's decision is adverse to the physician, he or she is entitled to appellate review by the Governing Board before a final decision is rendered. (art. VIII, § A, subd. (1)(a)-(b).) The Governing Board must affirm the JRC's decision if it is supported by substantial evidence. If the Governing Board finds that the decision is not supported by substantial evidence, it "may modify or reverse the decision . . . and may instead, or shall, where a fair procedure has not been afforded, remand the matter to the [JRC] for reconsideration. . . ." (art. VIII, § C, subd. (12)(f).)

Appellant is a physician licensed to practice medicine in the State of California and is board certified in internal medicine and cardiology. In 1975, he established a clinical practice in cardiology in Los Angeles, where he became a member of Hospital's medical staff. Appellant used Hospital extensively for the care of his patients, admitting over 800 patients in the two-year period from October 1, 2000 to October 1, 2002. During that time he became a frequent critic of Hospital's practices regarding patient care, and was one of the medical staff members who signed a petition in 2002 to remove Albert Greene as Hospital's chief executive officer.

In 2002, the Governing Board formed an ad hoc committee (AHC) to review and make recommendations relating to the quality of care by certain medical staff members. The AHC identified appellant as one of several practitioners on staff who appeared to be involved in a pattern of clinically unnecessary, inappropriate, and opportunistic consultations involving patients who had been admitted to Hospital through the Emergency Department.

Hospital contracted with two independent medical review groups, National Medical Audit (Mercer) and Steven Hirsch and Associates (Hirsch) to review appellant's practice. Mercer reviewed 13 randomly selected patient file records and classified the problems into four categories: unacceptable care, overuse of services, substandard documentation and inadequate initial evaluation, and patient relationship issues. Hirsch reviewed 30 randomly selected records and concluded that appellant performed numerous high risk procedures, engaged in a pattern of disruptive conduct with screaming episodes and profane language, and refused to reasonably participate as a member of the patient treatment team. Hirsch also concluded that appellant's clinical management, professional conduct, and medical recordkeeping were below professional standards.

In fall 2002, appellant submitted a periodic application for reappointment, as his existing appointment was due to expire on January 31, 2003. In December 2002, the MEC recommended that appellant be reappointed. However, on January 28, 2003, the

Governing Board recommended that the application be denied and directed Greene to summarily suspend appellant's privileges. On January 29, Greene attended a MEC meeting to present the AHC's findings and to request that MEC ratify the Governing Board's decision to suspend appellant. The MEC refused to do so.

On January 30, Greene notified appellant by letter that, at the direction of the Governing Board, he was summarily suspending appellant's clinical privileges. The MEC again refused to ratify the suspension and the suspension was automatically terminated, pursuant to Article VII, section G, subdivision (4) of the Bylaws. The MEC notified appellant of its decision on January 31.

The following month, the Governing Board voted to deny appellant's application for reappointment. On March 7, 2003, appellant filed a timely request for a judicial review hearing to contest the Governing Board's decision.

The MEC met on March 12, 2003. The minutes of the meeting state that a "motion was made, seconded and carried that [appellant] should be granted a Judicial Review Hearing; and that the [MEC] leaves the actions relating to the Judicial Review Hearing procedures to the Governing Board." Subsequently, the Governing Board's AHC issued a notice of charges on March 25, 2003, listing six charges of misconduct and substandard practice. The notice stated that the Governing Board selected Jesse D. Miller as the hearing officer and appointed six members of the medical staff to serve as the JRC. The chosen members were Drs. Harry Mynatt as JRC Chairman, Myunghae Choi, Thomas Goodwin, Bradley Landis, Stephanie Hall, and Dr. Cecilia Lev as the alternate.

On April 18, 2003, appellant filed a petition for writ of mandate and a temporary stay with the Los Angeles Superior Court, challenging the Governing Board's authority under the Bylaws to select the hearing officer and the JRC. In light of this, Miller announced on April 23 that he would postpone the start of the hearing "until the litigated matters have been clarified." On April 24, 2003, the trial court denied the writ on the grounds that a final administrative decision had not been rendered, and therefore, a writ

was not proper under Code of Civil Procedure section 1094.5.[3] The court also denied the writ on the merits, ruling that "[o]n the face of the pleading and documents thus far, the court does not find that the procedure implemented to appoint the judicial review committee or the hearing officer is in error. . . ."[4]

The judicial review hearing commenced on May 8, 2003, with appellant's voir dire of Miller and the panel members. One member was excused and two other members resigned prior to the commencement of the evidentiary hearings. Subsequently, in July 2003, Drs. James Getzen and John Triantafyllos were appointed by the Governing Board to serve on the JRC as replacements, bringing the number of panel members to five. Evidentiary hearings began in September 2003. In January 2005, after approximately 20 hearing sessions, one of the JRC members resigned for personal reasons, leaving the JRC with only four members: Drs. Mynatt, Lev, Getzen, and Triantafyllos. Appellant objected to proceeding with only four members in violation of the Bylaws, but was overruled. After approximately 30 sessions, evidentiary proceedings closed on July 18, 2005. The four remaining panel members attended all 30 evidentiary sessions.

The JRC issued its decision on October 25, 2005. The JRC made specific findings on all six of the charges, finding that three charges were substantiated by a preponderance

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[3] Code of Civil Procedure section 1094.5 specifies the procedures applicable to a petition brought for the "purpose of inquiring into the validity of any final administrative order or decision made as the result of a proceeding in which by law a hearing is required to be given, evidence is required to be taken, and discretion in the determination of facts is vested in the inferior tribunal, corporation, board, or officer . . . ." (Code Civ. Proc., § 1094.5, subd. (a).)

[4] Appellant makes several procedural error arguments which we do not reach. Those include allegations that Miller improperly limited appellant's voir dire of the JRC panel members, Dr. Mynatt had a disqualifying conflict of interest, Miller erred in allowing Dr. Mynatt to return to the panel after recusing himself, and that Miller improperly reconstituted the JRC after it had momentarily disbanded in response to Dr. Mynatt's recusal.

of evidence.[5] It concluded that "under all the circumstances of this case . . . the . . . decision of the Governing Board to deny [appellant's] application for reappointment to the Medical Staff of this Hospital was reasonable and warranted, but the Committee notes that if it had been the initial decision maker, it would have pursued an intermediate resolution."

Appellant appealed the JRC decision on procedural and substantive grounds. He argued there was "substantial non-compliance with the procedures required by the [B]ylaws and/or California and/or Federal law which caused demonstrable prejudice" and the decision was "not supported by substantial evidence based upon the hearing record." The Governing Board affirmed the JRC's decision and ordered that appellant's medical staff membership and privileges be terminated as of September 8, 2006.

Appellant filed an administrative mandate petition, seeking to have the JRC decision vacated on the grounds stated in his administrative appeal.[6] Following a lengthy hearing on the merits, the trial court denied appellant's petition. At appellant's request, the court prepared a proposed statement of decision. Following a hearing on appellant's objections to the proposed statement of decision, the court issued a revised statement rejecting all of appellant's procedural claims. The court held that Hospital's decision to

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[5] Article VIII, section C-11(g) provides that the standard of proof in the judicial review hearing is proof by a preponderance of evidence.

[6] Appellant filed a motion to conduct discovery to augment the administrative record, under Code of Civil Procedure section 1094.5, subdivision (e). He sought to depose two physicians, Drs. Al-Jazarly and Latif, who were members of the MEC at the time of its March 12, 2003 meeting. Appellant alleged the two physicians would testify that the MEC did not vote to delegate its authority to select the hearing officer and the JRC to the Governing Board. The motion included sworn declarations by both physicians and Dr. El-Attar's sworn declaration stating what they told him about the March 12 meeting. The trial court denied the motion, finding: "The declarations of Drs. Al-Jazarly and Latif do not state that a vote was not taken. [Appellant's] declaration filed on 2/26/07 . . . that states what [they] told [him] . . . is hearsay and is not considered."

terminate his membership was supported by substantial evidence. The court entered judgment denying appellant's petition and this timely appeal followed.

DISCUSSION

I

Under common law, a private organization with an important public role may not deprive an individual of fundamental interests without affording the individual a fair proceeding on the merits of the issue. (*Pinsker v. Pacific Coast Society of Orthodontists* (1974) 12 Cal.3d 541, 549-552 (*Pinsker*).) "A physician's access to a hospital, whether public or private, is such a fundamental interest." (*Tiholiz v. Northridge Hospital Foundation* (1984) 151 Cal.App.3d 1197, 1202, citing *Anton v. San Antonio Community Hosp.* (1977) 19 Cal.3d 802; see also *Sahlolbei v. Providence Healthcare, Inc.* (2003) 112 Cal.App.4th 1137, 1155 [right to retain medical staff privileges is a vested right meriting greater protection than that afforded to an initial applicant].) What constitutes a fair procedure is not fixed or judicially prescribed and "the associations themselves should retain the initial and primary responsibility for devising a method which provides an applicant adequate notice of the 'charges' against him and a reasonable opportunity to respond. In drafting such a procedure . . . the organization should consider the nature of the tendered issue and should fashion its procedure to insure a *fair* opportunity for an applicant to present his position. Although the association retains discretion in formalizing such procedures, the courts remain available to afford relief in the event of the abuse of such discretion." (*Pinsker*, *supra*, 12 Cal.3d at pp. 555-556.)

In 1989, the Legislature codified the common law requirement by enacting Business and Professions Code section 809, et seq. Section 809 provides that "[p]eer review, fairly conducted, is essential to preserving the highest standards of medical practice," and "[p]eer review that is not conducted fairly results in harm to both patients and healing arts practitioners by limiting access to care." (§ 809, subd. (a)(3)-(4).) "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* (2001) 93 Cal.App.4th 607, 616-617.)

The statutory scheme provides a legal baseline for what constitutes fair procedure, but ultimately recognizes the responsibility of the private sector to provide a fair peer review procedure. (*Unnamed Physician v. Board of Trustees*, *supra*, 93 Cal.App.4th at pp. 616-617.) Accordingly, each hospital must have an organized medical staff responsible to the governing body for the adequacy and quality of the care rendered to patients. (Cal. Code Regs., tit. 22, § 70703, subd.(a).) The medical staff must adopt written bylaws setting the procedures and criteria for evaluating applicants for staff appointments, credentials, privileges, reappointments, and other matters that the medical staff and governing body deem appropriate. (Cal. Code Regs., tit. 22, § 70703, subd. (b); see also *Smith v. Selma Community Hospital* (2008) 164 Cal.App.4th 1478, 1482.) The bylaws must incorporate sections 809 through 809.8. (§ 809, subd. (a)(8).) "It is these bylaws that govern the parties' administrative rights." (*Unnamed Physician v. Board of Trustees*, *supra*, 93 Cal.App.4th at p. 617.)

A hospital's decision resulting from a peer review proceeding is subject to judicial review by administrative mandate under Code of Civil Procedure section 1094.5. (Bus. & Prof. Code, § 809.8; see also *Kumar v. National Medical Enterprises, Inc.* (1990) 218 Cal.App.3d 1050, 1054.) Code of Civil Procedure section 1094.5, subdivision (b), provides that the inquiry to be made by the administrative mandamus proceeding is "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 order or decision is not supported by the findings, or the findings are not supported by the evidence."

Thus, "[w]here, as here, the issue is whether a fair administrative hearing was conducted, the petitioner is entitled to an independent judicial determination of the issue. [Citation.] This independent review is not a 'trial de novo.' [Citations.] Instead, the [trial] court renders an independent judgment on the basis of the administrative record, plus such additional evidence as may be admitted under [Code of Civil Procedure] section 1094.5, subdivision (e). [Citations.]" (*Pomona Valley Hospital Medical Center v. Superior Court* (1997) 55 Cal.App.4th 93, 101.)

When reviewing a trial court's ruling on an administrative writ petition, we are "'ordinarily confined to an inquiry as to whether the findings and judgment of the trial court are supported by substantial evidence.'" (*Unnamed Physician v. Board of Trustees*, *supra*, 93 Cal.App.4th 607 at p. 618.) However, if the facts are undisputed, the fair hearing finding is a conclusion of law that requires a de novo review of the administrative record. (*Id.* at pp. 618-619; see also *Ellison v. Sequoia Health Services* (2010) 183 Cal.App.4th 1486, 1496 ["When the issue presented is whether the hospital's determination was made according to a fair procedure, the court will treat the issue as one of law, subject to independent review based on the administrative record."].)

Appellant argues that the Governing Board's selection of the hearing officer and JRC panel members deprived him of the peer review hearing to which he was entitled. We agree.[7]

Section 809.2, subdivision (a) generally provides that "[t]he hearing shall be held, as determined by the peer review body, before a trier of fact, which shall be an arbitrator or arbitrators selected by a process mutually acceptable to the licentiate and the peer review body, or before a panel of unbiased individuals . . . ." While the statute does not

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[7] Although appellant did not explicitly object during the administrative proceedings, he challenged the Governing Board's appointment power from the beginning, as evidenced by his attempt to seek judicial intervention. Hospital does not contend that appellant has forfeited this argument, and we treat it as being properly preserved.

articulate who shall appoint the hearing panel, Article VIII, section C, subdivision (8) of the Bylaws does. It states: "A hearing occasioned by a Medical Executive Committee recommendation or a Governing Board recommendation shall be conducted by a Judicial Review Committee appointed by the Medical Executive Committee . . . ." As to the hearing officer, Article VIII, section C, subdivision (11)(c) states that "[t]he Medical Executive Committee shall appoint a hearing officer to preside at the hearing."

Hospital asserts that, notwithstanding these provisions, the Governing Board has inherent power to select the JRC and the hearing officer. It cites no Bylaw provision giving it this authority. Instead, it argues that the MEC and the Governing Board disagreed over whether to extend or terminate appellant's staff privileges, and therefore, the Governing Board was authorized by section 809.05, subdivision (c) to take action against appellant. That section of the Business and Professions Code provides that "[i]n the event the peer review body fails to take action in response to a direction from the governing body, the governing body shall have the authority to take action against a licentiate. Such action shall . . . fully comply with the procedures and rules applicable to peer review proceedings established by [s]ections 809.1 to 809.6, inclusive." (§ 809.5, subd. (c).) Article VII, section F of the Bylaws similarly authorizes the Governing Board to initiate disciplinary action when the MEC fails to take action in response to the Governing Board's directive. However, any such action must still be in compliance with Articles VII and VIII of the Bylaws. (art. VII, § F.) Neither the statute nor the Bylaws support Hospital's position. That the Governing Board is authorized to initiate a corrective action against appellant says nothing about its authority to appoint the hearing officer and JRC once appellant requests a hearing to challenge that action. Rather, Article VIII, section C, subdivision (11) of the Bylaws contemplates the situation that occurred here and requires the *MEC* to appoint the JRC even when the corrective action is initiated by the Governing Board.

Alternatively, Hospital argues that the MEC properly delegated its appointment authority to the Governing Board during its March 12, 2003 meeting. As a preliminary matter, appellant challenges the trial court's finding that the MEC delegated its authority to the Governing Board. We disagree with appellant, concluding that the MEC did purport to delegate this authority to the Governing Board.

The minutes of the March 12 MEC meeting state that a "motion was made, seconded and carried that [appellant] should be granted a Judicial Review Committee Hearing; and that the [MEC] leaves the actions relating to the Judicial Review Hearing procedures to the Governing Board." The minutes further state: "It was felt that since the MEC did not summarily suspend [appellant's] privileges, did not recommend any adverse action relating to [appellant] . . . and since the requested hearing would be to review actions by the Governing Board; it should be the Governing Board and not the MEC which arranges and prosecutes the requested hearing. The MEC was informed that the hearing process outlined in [the Bylaws] would be followed with the Governing Board taking the place of the MEC in establishing and arranging the hearing."

Although the directive to establish and arrange the hearing does not specifically mention the appointment of the JRC and the hearing officer, nothing in the record suggests that the MEC objected to the Governing Board's selection. The record suggests that it did not. The AHC issued the notice of charges on March 25, which announced the selection of the hearing officer and the JRC panel. On April 9, 2003, the MEC approved its minutes from the March 12 meeting and restated that it "leaves the actions relating to the Judicial Review Hearing procedures to the Governing Board." Thus, the trial court's finding is supported by substantial evidence found in the administrative record.

The question remains whether the MEC was authorized to delegate its authority in this fashion. We conclude that it was not.

Article VIII, section C, subdivisions (8) and (11), specifically vest the authority to appoint the JRC and the hearing officer in the MEC. Nothing in the Bylaws allows the

MEC to delegate this authority to another body, let alone the Governing Board. In fact, the Bylaws require that even when the Governing Board is authorized to initiate an action against a physician due to the MEC's unwillingness to do so, the power to appoint the JRC panel remains in the hands of the MEC. Comparing the Bylaws to the California Medical Association Model Bylaws also illustrates the intent behind provisions such as Article VIII, section C, subdivisions (8) and (11). The California Medical Association Model Bylaws grants the MEC the broad power to select and recommend panel members and hearing officer to the governing board which selects the fact finders and hearing officer. The recommendation will be deemed to have been accepted by the governing board if the board does not reject it within five days. (See Merkel, *Physicians Policing Physicians: The Development of Medical Staff Peer Review Law at California Hospitals* (2004) 38 U.S.F. L.Rev. 301, 326-327.) Here, the medical staff had the opportunity to leave the final say over appointments to the Governing Board through a provision to that effect in its Bylaws, but did not do so. This suggests an intent to empower the MEC, and no other, with appointment powers.

Hospital cites section 809, subdivision (b), which generally expands "'peer review body'" to include "any designee of the peer review body." Hospital seems to advance this definitional paragraph as a general mandate to a peer review body to delegate its authority to a nonpeer designated entity. Section 809 et seq. is silent on the MEC's authority to appoint the JRC and the hearing officer or its authority to delegate that responsibility to another entity. It does not stand to reason that this general definitional paragraph may be applied to Article VIII, section C, subdivision (8) so as to grant the MEC the power to delegate its appointment powers to the Governing Board where the Bylaws make no such provision.[8] Rather, Article VIII, section C, subdivision (8) should

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[8] In a similar vein, Hospital argues that while the MEC delegated its authority to the Governing Board, it was the Governing Board's AHC that actually selected the JRC and the hearing officer, as evidenced by the notice of charges. Hospital contends that the

be read in contrast to portions of the Bylaws that *do* empower the MEC to delegate a specific function. In respect to the MEC's authority to initiate an investigation of a physician, Article VII, section C provides: "The [MEC] may conduct the investigation itself, or may assign the task to an appropriate Medical Staff Officer, Medical Staff Department, or Standing or [AHC] of the Medical Staff." Even this provision does not list the Governing Board as a potential designee. Thus, while no single provision in the Bylaws explicitly forbids the MEC from delegating its appointment authority to the Governing Board, Hospital's interpretation is inconsistent with a complete reading of the Bylaws.

Allowing the Governing Board to select the hearing officer and JRC panel is not an inconsequential violation of the Bylaws. Rather, it undermines the purpose of the peer review mechanism. The Supreme Court in *Mileikowsky v. West Hills Hospital & Medical Center* (2009) 45 Cal.4th 1259, 1267 (*Mileikowsky*), articulated the fundamental principles behind peer review. While noting that the primary purpose of the process is to protect the health and welfare of the public, the court held that "[a]nother purpose also, if not equally important, is to protect competent practitioners from being barred from practice for arbitrary or discriminatory reasons. . . . Peer review that is not conducted fairly and results in the unwarranted loss of a qualified physician's right or privilege to use a hospital's facilities deprives the physician of a property interest directly connected to the physician's livelihood." (*Ibid.*)

AHC falls into the definition of "'peer review body'" set out in section 805, subdivision (a)(1)(B), which defines "peer review body" to include "[a] committee organized by any entity consisting of or employing more than 25 licentiates of the same class that functions for the purpose of reviewing the quality of professional care provided by members or employees of that entity." Thus, Hospital argues that the AHC had the authority to select the JRC and the hearing officer on behalf of the Governing Board. The Bylaws make no mention of an AHC's ability to appoint the JRC or the hearing officer. Nor does a committee formed directly by the Governing Board constitute a designee of the MEC.

The critical importance of the peer review process is highlighted by the grave impact an adverse decision has on a physician's career. The *Mileikowsky* court continued: "As one author stated: 'It is almost impossible for a physician to practice medicine today unless she is a medical staff member at one or more hospitals. This is because a doctor cannot regularly admit or treat patients unless she is a member of the medical staff. Privileges are especially important for specialists, like surgeons, who perform the majority of their services in a hospital setting. For this reason, a hospital's decision to deny membership or clinical privileges, or to discipline a physician, can have an immediate and devastating effect on a practitioner's career.'" (*Mileikowsky*, *supra*, 45 Cal.4th at p. 1268, quoting Merkel, *Physicians Policing Physicians: The Development of Medical Staff Peer Review Law at California Hospitals* (2004) 38 U.S.F. L.Rev. 301, 302-303.) The court further noted that Business and Professions Code section 805, subdivision (b) requires hospitals to report certain disciplinary action to the state medical board, which maintains a historical record of such information. Thus, "[a] hospital's decision to deny staff privileges therefore may have the effect of ending the physician's career." (*Mileikowsky*, *supra*, 45 Cal.4th at p. 1268.)

An uncompromised peer review system protects physicians from undeservedly suffering these consequences. The *Mileikowsky* court continued: "Hospitals have a dual structure. The administrative governing body, which might not include health care professionals, takes ultimate responsibility for the quality and performance of the hospital. . . . It is not inconceivable a governing body would wish to remove a physician from a hospital staff for reasons having no bearing on quality of care. . . . Accordingly, although a hospital's administrative governing body makes the ultimate decision about whether to grant or deny staff privileges, it does so based on the recommendations of its medical staff committee [citation], giving 'great weight to the actions of peer review bodies. . . .'" (*Mileikowsky*, *supra*, 45 Cal.4th at p. 1272.) A working peer review system as established in the Bylaws, not only requires establishment of a dual structure, but also

requires preserving the separateness of those dual components. That structure promotes the goal of shielding physicians from arbitrary and discriminatory disciplinary action by effectively insulating a governing body bent on removing the physician from the hospital medical staff. Allowing the Governing Board to handpick the JRC members jeopardizes the integrity of the hearing from the beginning and it undercuts the medical staff's right and obligation to perform this self-governing function.

Hospital argues that the right to a fair hearing does not compel adherence to "'formal proceedings with all the embellishments of a court trial,'" and may be satisfied by a variety of procedures. (*Ezekial v. Winkley* (1977) 20 Cal.3d 267, 278.) We agree that "the concept of 'fair procedure' does not require rigid adherence to any particular procedure, to bylaws or timetables" (*Tiholiz v. Northridge Hospital Foundation*, *supra*, 151 Cal.App.3d at p. 1203), and that "the question is whether the violation resulted in unfairness, in some way depriving the physician of adequate notice or an opportunity to be heard before impartial judges." (*Rhee v. El Camino Hospital Dist.* (1988) 201 Cal.App.3d 477, 497.) But it does not allow the Governing Board to turn the peer review process on its head, which would be the result if the MEC were permitted to abrogate its right and duty with respect to the peer review procedure.[9] Hospital argues that any potential prejudice that could result from allowing the Governing Board to select the JRC members and the hearing officer was mitigated by appellant's ability to conduct

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[9] We contrast this with another violation claimed by the appellant: that Hospital denied him a fair hearing because it allowed the hearing to proceed with a JRC panel of only four members, when the Bylaws call for a five-member panel. As noted above, courts have rejected the notion that any violation of a hospital bylaws referring to the peer review process is a per se denial of a physician's right to a fair hearing. As we reverse the trial court's decision based on the Governing Board's selection of the JRC and hearing officer, we do not decide whether, or at what point, a number of panel members smaller than called for in the Bylaws fundamentally undermines the fairness of a hearing, so that an actual showing of prejudice is not needed.

voir dire. Hospital offers no support for this assertion and we find none. A procedure that enables the Governing Board to tip the scales in its favor, leaving the physician to uncover and cure any potential inequality on his or her own, does not comport with the fair procedure envisioned in the statute and Bylaws.[10]

II

For the guidance of the parties we also discuss appellant's next claims that the amended charges did not give him adequate notice of the misconduct with which he was charged. We do not agree. Notice of the charges sufficient to provide a reasonable opportunity to respond is basic to the common law right to a fair procedure. (*Rosenblit v. Superior Court* (1991) 231 Cal.App.3d 1434, 1445.) Section 809.1, subdivision (c)(1) requires that prior to a peer review hearing, the peer review body shall give the licentiate written notice stating "[t]he reasons for the final proposed action taken or recommended, including the acts or omissions with which the licentiate is charged." Similarly, Article VIII, section C, subdivision (7) of the Bylaws requires that the MEC state "clearly and concisely in writing the reasons for the adverse action taken or recommended, including the acts or omissions with which the member is charged and a list of the charts in question, where applicable."

Here, the six charges against appellant were divided into different sections. Each section stated the charge, listed specific patient medical records that illustrated the charged conduct, and referenced the Hirsh and Mercer reports for further information.

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[10] No issue is raised as to whether the Governing Board would be entitled to appoint the JRC and the hearing officer if the MEC refused to do so. The March 12 meeting minutes stated that the MEC "felt that since" it did not initiate the adverse action against appellant "it should be the Governing Board and not the MEC which arranges and prosecutes the requested hearing." The language used does not demonstrate an active refusal on the part of the MEC to fulfill its duties under the Bylaws. Absent any evidence to the contrary, we presume that the MEC would faithfully carry out its obligations under the Bylaws.

Section I charged appellant with demonstrating "a pattern of dangerous, unacceptable, substandard practice evidenced by your: failure to recognize serious medical conditions, failure to intervene as the attending physician in order to postpone a non-emergent procedure on a high risk patient, improper or inadequate diagnoses, improper clinical management of patients and/or by performing cardiac catheterizations without adequate clinical findings to justify the necessity of the procedure." The notice then listed 25 medical records, with a description of appellant's alleged misconduct or substandard practice in connection with each record.

Unlike section I, sections II through IV of the charges listed medical records without specific details about the record. Section II charged appellant with engaging "in a pattern of requesting unnecessary and inappropriate consultations without proper clinical findings to substantiate the need for such consultations," and listed five medical records. Section III charged appellant with demonstrating a "pattern of inadequate, substandard medical record documentation." The notice alleged that the records contained discrepancies, were "grossly inadequate and incomplete," "scantily described" patient symptoms, and omitted crucial data. As with section II, the notice referenced the Hirsch and Mercer reports and listed 20 medical records without further detail on how each record was inadequate or incomplete. Section IV alleged that appellant failed to "properly inform patients of the inherent risks involved in the particular procedures . . . . [Appellant] failed to take steps to seek a legal representative of patients unable to give informed consent as required by hospital policy and/or [appellant] failed to seek a translator for patients who had significant language barriers." Three medical records were listed. Section V charged appellant with a "pattern of inappropriate, interpersonal relations with staff members, patients and their families." The notice chronicled in detail, 25 individual events on specified dates in which appellant engaged in inappropriate behavior. And finally, Section VI stated that appellant had a long history of

abusive treatment of hospital staff, had been previously warned that future misconduct would result in corrective action, but continued to act abusively and inappropriately.

Appellant contends that the notice of charges, specifically sections I, II, III, and V, did not clearly and concisely set forth the specific acts or omissions with which he was charged. He cites *Rosenblit v. Superior Court, supra,* 231 Cal.App.3d 1434, in support of his position. In that case, Dr. Rosenblit's staff privileges were revoked after an adverse finding by a hearing panel. Dr. Rosenblit petitioned for a writ of administrative mandate but was denied. (*Id.* at p. 1444.) The appellate court reversed, finding several procedural errors in the peer review process, including improper notice of charges. The court held the notice inadequate because it simply charged that there were problems with Dr. Rosenblit's "'fluid management, diabetic management, or clinical judgment'" in 30 different cases. (*Id.* at p. 1445.) The notice then listed the 30 charts numerically without any indication as to which purported deficiency applied to which case. The court held "[i]t is impossible to speculate how [Rosenblit] might have defended [himself] had he been informed of the specific problems with each patient." (*Id.* at p. 1446.)

The facts here are distinguishable from those in *Rosenblit v. Superior Court, supra* 231 Cal.App.3d 1434. Unlike the blanket notice in *Rosenblit*, here, section I not only included a general statement of charge, but also detailed the specific mistake appellant committed with each patient and the consequences of his errors. Thus, while Dr. Rosenblit was left to mine through the records to uncover the charged conduct in respect to each patient, here, appellant was directly and adequately informed about the "specific problems with each patient." (*Id.* p. 1446; see also *Unnamed Physician v. Board of Trustees, supra,* 93 Cal.App.4th at pp. 623-624 [notice adequate when it ties each act or omission stated to specific patient chart].) Similarly, Section V of the charges described in detail 25 incidents in which appellant displayed inappropriate behavior with staff members, patients, and their families. It also cited to specific portions of the Hirsch report for further information on the incident in question. And while Sections II and III

did not provide detailed analysis of each medical record referenced therein, the sections pertained to a specific charge of substandard conduct. Section II charged appellant with "requesting unnecessary and inappropriate consultations without proper clinical findings" and Section III alleged that appellant engaged in a pattern of substandard documentation. Thus, unlike in *Rosenblit*, the notice in respect to sections II and III "clearly and concisely" informed appellant of what he was being charged with in relation to each referenced medical record.

Appellant, again relying on *Rosenblit v. Superior Court*, *supra*, 231 Cal.App.3d 1434, makes several references to the volume of attached documents when arguing that the notice of charges was inadequately clear and concise. However, the court's ruling in that case did not rest on the volume of charts and records alone, but rather, on the fact that the hospital did not provide adequate direction and focus to assist Dr. Rosenblit in navigating through the voluminous documents. Appellant cites no authority for the argument that the size of the attachments alone weighs against the adequacy of the notice. To the contrary, more information, in the form of medical charts and external review reports, such as the Hirsch and Mercer reports here, better ensures adequate notice. (See *Unnamed Physician v. Board of Trustees*, *supra*, 93 Cal.App.4th at p. 624.)

DISPOSITION

We reverse the judgment and remand to the trial court with instructions to issue a writ directing Hospital to vacate its decision against appellant and grant him a new judicial review hearing. Appellant to have his costs on appeal.

CERTIFIED FOR PARTIAL PUBLICATION.

EPSTEIN, P. J.

We concur:

WILLHITE, J.

MANELLA, J.

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

DIVISION 4

September 07, 2011

Anna M. Suda
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OSAMAH EL-ATTAR M.D.,
Plaintiff and Appellant,
v.
HOLLYWOOD PRESBYTERIAN MEDICAL CENTER,
Defendant and Respondent.

B209056
Los Angeles County No. BS105623

THE COURT:

Petition for rehearing is denied.

cc: All Counsel
File

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 15760 Ventura Boulevard, 18th Floor, Encino, California 91436-3000.

On September 28, 2011, I served true copies of the following document(s) described as **PETITION FOR REVIEW** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Horvitz & Levy LLP's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on September 28, 2011, at Encino, California.

Robin Steiner

SERVICE LIST

El-Attar v HPMC
Case Nos. BS105623/B209056

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