S196830

IN THE SUPREME COURT OF CALIFORNIA

OSAMAH EL-ATTAR, M.D.,
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

REPLY BRIEF ON THE MERITS

HORVITZ & LEVY LLP
DAVID S. ETTINGER (BAR NO. 93800)
H. THOMAS WATSON (BAR NO. 160277)
15760 VENTURA BOULEVARD, 18TH FLOOR
ENCINO, CALIFORNIA 91436-3000
(818) 995-0800 • FAX: (818) 995-3157
dettinger@horvitzlevy.com
htwatson@horvitzlevy.com

CHRISTENSEN & AUER
JAY D. CHRISTENSEN (BAR NO. 65446)
ANNA M. SUDA (BAR NO. 199378)
225 SOUTH LAKE AVENUE, SUITE 860
PASADENA, CALIFORNIA 91101
(626) 568-2900 • FAX: (626) 568-1566
jdc@ca-healthlaw.com
ams@ca-healthlaw.com

ATTORNEYS FOR DEFENDANT AND RESPONDENT
HOLLYWOOD PRESBYTERIAN MEDICAL CENTER

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules of Court

Miscellaneous

IN THE
SUPREME COURT OF CALIFORNIA

OSAMAH EL-ATTAR, M.D.,
Plaintiff and Appellant,

v.

HOLLYWOOD PRESBYTERIAN MEDICAL CENTER,
Defendant and Respondent.

REPLY BRIEF ON THE MERITS

INTRODUCTION

The Court of Appeal held that the results of a two-year-long medical peer review proceeding are reversible per se because the medical staff's Medical Executive Committee (MEC) delegated to the hospital's governing board the task of appointing the hearing officer and physician members of the judicial review committee (JRC), and the hospital's bylaws specified that the medical staff is to make those appointments. As explained in Hollywood Presbyterian Medical Center's opening brief on the merits (OBOM), a per se reversal rule for bylaw deviations is both unprecedented and unwise and reversal is improper in this case.

In response, Dr. El-Attar filed an answer brief on the merits (ABOM) that contains more rhetoric than substance. Ignoring the

proper standard of review, he claims that the MEC may not have actually delegated to the governing board the task of appointing the hearing officer and JRC members for Dr. El-Attar's peer review proceedings. He also seeks to address issues beyond the issue accepted for review, which this court should ignore. In addition, Dr. El-Attar cites snippets of the legislative history of one peer review statute, showing only the California Medical Association's reason for supporting a pending peer review bill, and improperly extrapolates that as evidence of the *Legislature's* intent that hospital governing boards not participate in peer review proceedings. However, the full legislative history of California's peer review statutes, which Hollywood Presbyterian Medical Center (HPMC or Hospital) is asking this court to judicially notice, proves just the opposite.

In this reply brief, we focus on the actual issue presented for review, and demonstrate why Dr. El-Attar's arguments fail to rebut HPMC's reasons for reversing the Court of Appeal and upholding the trial court's decision. Under the correct standard of review, the record plainly shows that the MEC delegated to the governing board the task of appointing the hearing officer and the JRC panel for Dr. El-Attar's peer review proceedings. The delegation of that task violated no peer review statute or Dr. El-Attar's right to fair procedure. Moreover, the common law rule of necessity allowed the governing board to make these appointments after the MEC didn't. Accordingly, this court should reverse the Court of Appeal, and affirm the trial court's judgment denying Dr. El-Attar's petition for writ of administrative mandamus.

LEGAL ARGUMENT

I. THE STANDARD OF REVIEW.

As explained in HPMC's opening brief, a "challenge to the procedural fairness of the administrative hearing is reviewed de novo on appeal because the ultimate determination of procedural fairness amounts to a question of law." (*Nasha v. City of Los Angeles* (2004) 125 Cal.App.4th 470, 482; accord, *Southern Cal. Underground Contractors, Inc. v. City of San Diego* (2003) 108 Cal.App.4th 533, 542 ["The ultimate determination whether an administrative proceeding was fundamentally fair is a question of law to be decided on appeal"]; see OBOM 24.)

On factual matters, however, as HPMC also explained, when reviewing a judgment denying a petition for administrative mandamus, the appellate court's review of the record must indulge in all reasonable inferences in favor of the trial court's judgment. (*Lake v. Reed* (1997) 16 Cal.4th 448, 457 [an appellate court must " ' "resolve all evidentiary conflicts and draw all legitimate and reasonable inferences in favor of the trial court's decision [in an administrative proceeding and] . . . [w]here the evidence supports more than one inference, we may not substitute our deductions for the trial court's . . . [but instead] may overturn the trial court's factual findings only if the evidence before the trial court is insufficient as a matter of law to sustain those findings" ' "];

LaGrone v. City of Oakland (2011) 202 Cal.App.4th 932, 940; see OBOM 50.)

Thus, as explained below, it is inappropriate for Dr. El-Attar to cite in his ABOM only the evidence favorable to his appeal, and ignore the substantial contrary evidence supporting the trial court's decision to deny his petition for writ of administrative mandamus.

II. THE HOSPITAL BOARD'S SELECTION OF THE HEARING OFFICER AND MEMBERS OF THE JUDICIAL REVIEW COMMITTEE (JRC) DID NOT VIOLATE ANY PEER REVIEW STATUTE OR DR. EL-ATTAR'S FAIR PROCEDURE RIGHTS.

A. The governing board's initiation of Dr. El-Attar's peer review proceedings, after the Medical Executive Committee (MEC) failed to do so, violated no peer review statute.

1. California's peer review statutes ensure that both the medical staff and the hospital governing board participate in the peer review process.

Dr. El-Attar attaches a couple pages of legislative history of one peer review bill (Sen. Bill No. 1211 (1989-1990 Reg. Sess.) (S.B. 1211), which he claims show that the Legislature intended for the medical staff to have exclusive control over all aspects of medical staff peer review, while the governing board is to be excluded from

the peer review process. (ABOM 16-18 & appen. II.) He gives only a selective history of the legislation, however. The full history of California's peer review statutes, which HPMC is concurrently asking this court to judicially notice, reflects numerous compromises that led to enactment of a statutory scheme designed to recognize a hospital governing board's right to oversee the peer review process and ensure that it functions properly. [1]

California's peer review statutes were enacted in response to the federal Health Care Quality Improvement Act of 1986 (HCQIA), in which Congress mandated "effective professional peer review." (42 U.S.C.A. § 11101(3).) The legislation also sought to "restrict the ability of incompetent physicians to move from State to State without disclosure or discovery of the physician's previous damaging or incompetent performance" (*Id.* § 11101(2)) by establishing a national database of adverse information about individual physicians (*Id.* §§ 11131-11134) and requiring hospitals to check the database before granting medical staff privileges (*Id.* § 11135). HCQIA also gave qualified civil liability immunity to peer review participants. (See *Id.* § 11111; see also *Id.* § 11115(a) [HCQIA does

---

[1] HPMC's concurrently filed Second Motion for Judicial Notice (SMJN) includes the complete legislative history of Senate Bill No. 2565 (1987-1988 Reg. Sess.) (S.B. 2565) (which was vetoed by Governor Deukmejian) in exhibit volumes 1A and 1B, and the legislative history of S.B. 1211 (which was enacted into law) in exhibit volumes 2A and 2B. This legislative history was consecutively paginated by Legislative History & Intent, however both volume 1A and volume 2A begin with page 1. Accordingly, we cite this legislative history using both the volume number and the page number, e.g. 1B SMJN 337.

not "preempt[] or overrid[e] any State law which provides incentives, immunities, or protection for those engaged in a professional review action that is in addition to or greater than that provided by this subchapter"].)

As initially enacted, HCQIA allowed states to opt out of its qualified immunity provision. (Pub.L. No. 99-660, Title IV, § 411, subd. (c)(2)(B) (Nov. 14, 1986) 100 Stat. 3785; see Pub.L. No. 101-239, Title VI, § 6103(e)(6)(A) (Dec. 19, 1989) 103 Stat. 2208 [repeal of the opt-out provision].)

Before enactment of the legislation which Dr. El-Attar discusses, the governor vetoed an opt-out bill sponsored by the California Medical Association (CMA), which the California Hospital Association (CHA) [2] and others opposed. (1B SMJN 383-384; see 1A SMJN 5; 1B SMJN 299, 327, 337, 347, 381.)

The following year, the Legislature enacted CMA's new opt-out bill, 1989 S.B. 1211, upon which Dr. El-Attar relies. (ABOM 16-18 & appen. II; 2B SMJN 298.) But the Legislature did so only after making significant amendments in response to CHA criticisms. (See, e.g., 2B SMJN 249, 270.) CHA opposed the initial version of S.B. 1211 on the ground it "does not contain any explicit statutory recognition of the legitimate role that governing boards of hospitals have in the peer review process. Since a hospital remains liable for its 'failure to insure the competence of its medical staff through

---

[2] At that time, CHA was known as the California Association of Hospitals and Health Systems (CAHHS). Wherever Legislative history documents use the term CAHHS, we have substituted the term CHA for consistency.

careful selection and review' it is only fair to expressly acknowledge a hospital's legitimate function in statute . . . . [¶] *This issue of 'governance' is particularly important in those instances in which the peer review process fails and the hospital is required to initiate action.*" (2A SMJN 159, emphasis added [July 11, 1989 report by the Assembly Committee on Administration of Justice regarding S.B. 1211, as amended May 2, 1989]; see also 2A SMJN 31, 49, 55, 66-68, 85, 88-89 [CHA urged the Board of Medical Quality Assurance (BMQA) to oppose an early version of S.B. 1211 because "[t]here are instances in which the hospital governing board or management must instigate action due to timing or the inability or refusal of the medical staff to do so. SB 1211 contains no provision authorizing such action, which will undermine the historic role of the hospital governing board"], 139-142; 2B SMJN 199, 219, 227.)

In response to CHA's criticisms, S.B. 1211 was amended to include a statement that peer review procedures shall be included in the medical staff bylaws approved by the hospital's governing board and to authorize the governing body of an acute care hospital to immediately suspend physician privileges under certain circumstances. (2A SMJN 163; 2B SMJN 175-176, 180; see 2B SMJN 193, 244, 248.) Importantly, S.B. 1211 also was amended to expressly state that "[t]he governing bodies of acute care hospitals have a ligitimate [sic] function in the peer review process," and that "[i]n those instances in which the peer review body's failure to investigate, or initiate disciplinary action, is contrary to the weight of the evidence, the governing body shall have the authority to direct the peer review body to initiate an investigation or a

disciplinary action, but only after consultation with the peer review body." [3] (2B SMJN 210-211; see 2B SMJN 202-203, 222, 244.) Thus, when the entire legislative history of California's peer review statutes is considered, it becomes clear that the Legislature intended for the governing board to have an active and meaningful role in peer review proceedings. (See 2B SMJN 185, 249, 267, 270.)

---

[3] See 2A SMJN 133-134 [CMA's June 15, 1989 letter to Congressman Waxman, Chairman of the Subcommittee on Health and the Environment (and the author of HCQIA)], 2B SMJN 185 [July 18, 1989 staff memo to Senator Keene stating that, Assemblyman "Isenberg's plan is to use the amendment strategy to demonstrate that we made every reasonable effort to accommodate [CHA's] concerns"], 187-188 [July 18, 1989 statement by Senator Keene], 201-203 [July 19, 1989 letter from CMA to Speaker Willie Brown stating the SB 1211 addressed the major concerns that led to the defeat of SB 2565, that "[a]mendments were adopted by the Assembly Judiciary Committee to further address the concerns of hospitals," and that the "power of the hospital governing board has been expressly set forth in the bill"], 235 [August 2, 1989 letter from Assemblyman Isenberg to the Director of Medical Staff Affairs at Merrithew Memorial Hospital, stating, "the major changes involved the question of governance and the role of a board of directors in the peer review process. That certainly turned out to be the issue most disputed by the parties"], 267 [August 29, 1989 letter from CMA to Governor Deukmejian stating that the "Assembly Judiciary Committee spent nearly six hours hearing SB 1211" and "[m]uch of the hearing centered on discovery rights and the role of the governing board. These amendments are not ambiguous. In fact, for the first time, the role of the governing board in peer review is specifically set forth in statute"].

2. The governing board's appointment of the hearing officer and JRC members did not violate either section 809.05 or section 809.6 of the Business and Professions Code.

In its opening brief, HPMC explained why the appointment of the hearing officer and JRC members by the Hospital's governing board violated no peer review statute. (OBOM 30.) The relevant statutes required that the peer review hearing be held as "determined by the peer review body." (Bus. & Prof. Code, § 809.2, subd. (a).) Here, the hearing was conducted as determined by the MEC, which indisputably is a peer review body (*Id.* § 805, subd. (a)(1)(B)(i)), and by an ad hoc committee (AHC) appointed by the Hospital's governing board to initiate the peer proceeding against Dr. El-Attar. The AHC was itself a peer review body because it was acting as the MEC's designee (*Id.* § 809, subd. (b) [defining " 'peer review body' " to include "*any designee* of the peer review body" (emphasis added)]).

In response, Dr. El-Attar disputes whether the MEC actually voted on or otherwise approved the procedure that was used in this case,[4] contending instead that the Hospital's governing board "manipulated the peer review process" and " 'stacked the deck'

---

[4] See ABOM 2 [referring to the MEC's "claim[ed]" and "purported" delegation of its authority and duty to select the JRC and hearing officer], 25, footnote 9 [disputing whether substantial evidence supports the rulings by both the trial court and Court of Appeal that the MEC in fact delegated the duty to select the JRC panel members and hearing officer].

against Dr. El-Attar by appointing the JRC and its hearing officer . . . and removing from the process the MEC, which was the peer review body for the Hospital" [5] (ABOM 1).

Here, substantial evidence—the written minutes of the MEC's own meetings—supports the trial court's determination that the MEC delegated to the governing board's AHC the task of selecting the hearing officer and the members of the JRC. (9 AR 1890-1891, 1894; see 8 CT 1723, 1729; RT B-46 to B-47, D-17.) Under the appropriate standard of review (*ante*, Part I), that's all that matters—regardless of how shrilly Dr. El-Attar contends that this

---

[5] The rhetoric does not stop there—to the contrary, Dr. El-Attar's ABOM is laced with it. (See, e.g., ABOM 2 ["the MEC did not refuse to participate in the peer review process; rather, the Hospital took the MEC's authority to make the selections of the JRC and hearing officer"], 3 ["the Hospital seized the authority to appoint the JRC and hearing officer from the MEC"; "The Hospital manipulat[ed] . . . the hearing process . . . [by] remov[ing] the MEC . . .from the peer review hearing"; "the Hospital set up a system . . designed to bypass the MEC"], 4 ["the system created by the Hospital effectively eliminated the MEC . . . from the peer review process"], 25 [the Hospital "usurp[ed] the MEC's authority in selecting the JRC"], 27 ["the Hospital's reason for taking the selection power away from the MEC" was to prevent an outcome favorable to Dr. El-Attar], 28 ["the Hospital seized the MEC's power to appoint the JRC and hearing officer"], 29 ["the Hospital made a strategic decision to seize the MEC's authority to make these selections"], 30 ["the Hospital's manipulation of the Bylaws to obtain an advantage" was "inherent[ly] unfair[]"], 31 ["the Hospital's manipulation of the Bylaws created a system designed to remove the MEC . . . from the peer review process"], 32 ["The Hospital . . . hijack[ed] the peer review process and skew[ed] it against [Dr. El-Attar] by removing the medical staff's executive committee from the process"], 34 [Hospital "manipulation" of peer review].)

delegation never took place or that the Hospital somehow forced the MEC to abdicate its peer review responsibilities.

Dr. El-Attar also contends that, even if the MEC delegated its appointment responsibilities, that delegation violated two peer review statutes. (ABOM 21-23, 32, 35, citing Bus. & Prof. Code, §§ 809.05 and 809.6, subd. (a).) He is wrong.

Business and Professions Code section 809.05, subdivision (a), states: "The governing bodies of acute care hospitals have a legitimate function in the peer review process. In all peer review matters, the governing body shall give great weight to the actions of peer review bodies and, in no event, shall act in an arbitrary or capricious manner." Dr. El-Attar contends that the Hospital violated this statute when it "disregarded the recommendations of its peer review body—the MEC . . . ." (ABOM 23; see ABOM 33, 35.) Not so.

To begin with, this appeal concerns only the procedural aspect of Dr. El-Attar's peer review proceeding and any claim that the Hospital failed to follow the procedure specified by the MEC is clearly wrong. The MEC requested that the Hospital appoint the hearing officer and JRC panel members for Dr. El-Attar's peer review proceedings (see OBOM 12-14; fn. 7, *post*) and that request was followed to the letter.

But substantively, too, the Hospital did not disregard the MEC. Although the MEC did not recommend disciplining Dr. El-Attar, once its own ad hoc committee reported on its investigation,

the MEC also never recommended that Dr. El-Attar should retain his medical staff membership. [6]

Business and Professions Code section 809.05, subdivision (a), requires the governing board to give great weight to actions of peer review bodies. Here, not only did the governing board *not* disregard the MEC, it also *gave* great weight to actions of the JRC, which is a peer review body. The JRC found that Dr. El-Attar exhibited patterns of dangerous medical practice, of substandard medical record documentation, and of inappropriate interpersonal relations with staff members. (17 AR 3736-3742; see OBOM 19-20 & fn. 17.) Based on those findings the JRC unanimously ruled that the board's recommendation to deny Dr. El-Attar reappointment to the medical staff was reasonable and warranted. (17 AR 3742-3743; see 8 CT 1726; OBOM 20-21.) The JRC's ruling was then upheld by an administrative appeal board and adopted by the Hospital's governing board. (OBOM 21-22.) Contrary to Dr. El-Attar's contentions, nothing the Hospital's governing board did violated

---

[6] After the governing board decided to deny Dr. El-Attar's application for reappointment to the medical staff, the MEC formed an ad hoc committee to determine whether Dr. El-Attar should be disciplined. (1 CT 63.) The MEC's ad hoc committee reported that it agreed in part and disagreed in part with the Mercer and Hirsch reports that formed the basis of the governing board's decision, but it did not make any recommendation regarding whether Dr. El-Attar should retain his medical staff membership or be disciplined. (9 AR 1892-1893; see 9 AR 1890, 1894.) The MEC reviewed its ad hoc committee's report and determined only that Dr. El-Attar should be granted a judicial review hearing regarding the "actions by the Governing Board" and that "the Medical Executive Committee leaves the actions relating to the Judicial Review Hearing procedures to the Governing Board." (9 AR 1890.)

Business and Professions Code section 809.05, subdivision (a). [7] Rather, it took the only possible action that could have given effect to the JRC's peer review decision.

Business and Professions Code section 809.6, subdivision (a), states that "[t]he parties are bound by any additional . . . hearing provisions contained in any applicable . . . medical staff bylaws which are not inconsistent with Sections 809.1 to 809.4, inclusive." Dr. El-Attar claims the MEC's delegation violated this statute because the bylaws specified that the MEC should appoint the hearing officer and JRC members. (ABOM 21-22.) However, the statute does not make an immaterial bylaw deviation grounds for negating a thorough and fair peer review proceeding. [8] (See OBOM 31-36.)

---

[7] Dr. El-Attar argues—once again without any support in the record—that the JRC simply rubber stamped the governing board's decision to deny Dr. El-Attar's application for reappointment to the medical staff and improperly disregarded the MEC's recommendation to approve that reappointment. (See, e.g., ABOM 32-33.) Besides the fact that the MEC never made such a recommendation after its own ad hoc committee's investigation, the trial court found that the JRC conducted thorough and fair hearings and that it rendered a decision based on the evidence, and the record supports those findings and the board's decision. (See 8 CT 1723-1727, 1742-1770; OBOM 18-21.)

[8] Dr. El-Attar contends that the "Hospital concedes that its selection of the JRC and hearing officer for Dr. El-Attar's hearing was contrary to the Bylaws, which vest in the MEC the authority to make those selections." (ABOM 20.) The Hospital accurately reported what the bylaws say, and what transpired. (OBOM 12-14.) The Hospital never conceded that the bylaws prohibited the MEC from delegating its appointment responsibilities. (See, e.g., OBOM 34-50; see also, p. 15 & fn. 10, *post.*) The bylaws are silent

(continued...)

In sum, no peer review statute prohibited what occurred here—the MEC's delegation to the Hospital's governing board of its responsibility under the medical staff bylaws to appoint the hearing officer and JRC panel members for Dr. El-Attar's peer review proceedings.

B. No bylaw deviation deprived Dr. El-Attar of a fair procedure.

1. The MEC's delegation to the Hospital's governing board of the responsibility for selecting the hearing officer and JRC panel members did not violate fair procedure.

As explained in HPMC's opening brief, fair procedure principles may be satisfied by any procedure that affords notice of the charges and a fair opportunity to defend against them. (OBOM 34-36.) The procedure used here, while not precisely contemplated by the medical staff bylaws, was nonetheless a fair procedure. (OBOM 39-46.)

Dr. El-Attar complains that the MEC's delegation to the Hospital of the responsibility for appointing the hearing officer and

---

(...continued)
regarding whether the MEC may *delegate* to an AHC of the governing board those appointive tasks when the peer review proceeding concerns action initiated by the governing board. (See 11 AR 2355, 2358-2359, 2361.)

JRC members was an unauthorized amendment of the bylaws to which Dr. El-Attar never consented. [9] (ABOM 25-26.) Not true. The action taken in one peer review proceeding is not an amendment of the bylaws, regardless whether that action complied with or was contrary to the bylaws; it is at most a deviation from the bylaws. [10] The issue is whether that alleged deviation is material or immaterial—i.e., whether it violated the physician's right to a fair procedure. (See OBOM 31-36; pp. 16-21, *post.*)

The delegation of duties is common in administrative law. Indeed, the courts have allowed more substantive delegations than occurred here. For example, public agencies may delegate "*the investigation and determination of facts preliminary to agency action.*" (*California Sch. Employees Assn. v. Personnel Commission* (1970) 3 Cal.3d 139, 144, emphasis added.) Thus, where a city ordinance establishes a Police Review Commission, that Commission may properly appoint subcommittees composed of persons who are not Commission members to investigate and determine facts regarding complaints against the police. (*Brown v. City of Berkeley* (1976) 57 Cal.App.3d 223, 236; see also *Reaves v.*

---

[9] As a member of the medical staff, Dr. El-Attar was required to abide by the bylaws regardless whether he specifically consented to them. (11 AR 2318 [Bylaw III.C.2].)

[10] Moreover, here the bylaws are silent regarding whether the MEC may or may not delegate to the Hospital any of its obligations under the bylaws, such as the obligation to select the hearing officer and JRC members for peer review of actions initiated by the Hospital. (See 11 AR 2355, 2358-2359, 2361; *ante*, fn. 8.) The bylaws would have to be amended if they were to prohibit the MEC from delegating this appointment obligation to the governing board.

Superior Court (1971) 22 Cal.App.3d 587, 596 [court may appoint district attorney to investigate the merits of petitions for habeas corpus].) Here, the appointment of the hearing officer and JRC members for a peer review proceeding, which the MEC delegated to the Hospital governing board, is more ministerial than the reviewing of evidence and the making of recommendations based on that evidence.

In sum, no public policy, statute, or court decision prohibited the MEC from delegating its appointment duty to the governing board. Dr. El-Attar was given appropriate notice of the charges against him, and a full opportunity to mount a defense. (OBOM 14-19.) Fair procedure requires no more.

2. It is not inherently unfair for the governing board to select the hearing officer and JRC members.

Dr. El-Attar claims that allowing the governing board to select the hearing officer and JRC panel members was inherently unfair because the board will invariably select people who are likely to rule in its favor. (ABOM 27-30.) The argument, while endorsed by the Court of Appeal, is unsustainable.

Although it is the MEC that typically selects the hearing officer and members of the JRC, the JRC is usually reviewing a recommendation of adverse action against a physician that has been made by the MEC itself. Thus, the MEC commonly picks the reviewers of its own actions. (OBOM 40-41.) If it is fair for the

MEC to appoint JRC members for peer review of action initiated by the MEC, it cannot be inherently unfair for the governing board to make those same appointments for peer review of action it initiated.

No peer review statute prohibits a hospital governing board from appointing the hearing officer and JRC panel members for peer review proceedings. (See OBOM 25-30; 8 CT 1729.) Instead, the statutes leave that type of procedural specification to the hospital bylaws. (See OBOM 27-29.) As explained in the opening brief, many hospital bylaws, including the current CHA Model Bylaws, expressly authorize the governing board to make these appointments regarding adverse actions initiated by the governing board. (See OBOM 44-45.)

There is no inherent unfairness simply because the same administrative body investigates, brings the charges, prosecutes the charges, and selects the adjudicator—indeed, that happens all the time. (See 2 Cal.Jur.3d (2007) Administrative Law § 491, pp. 559-560 ["[I]t is in the nature of administrative regulatory agencies that they function both as accuser and adjudicator on matters within their particular jurisdiction, and a party to an administrative proceeding is not denied an impartial adjudicator merely because an administrative entity performs both the functions of prosecutor and judge; overlapping investigatory, prosecutorial and adjudicatory functions do not necessarily deny a fair hearing and are common before most administrative boards. [¶] Thus, due process does not, without more, forbid the combination of judging and prosecuting in the same person or agency in an administrative proceeding or the combination of adjudicative and investigative functions in one

person or agency" (footnotes omitted)]; OBOM 41-44.) Hospital governing boards are no different—they often are the administrative body responsible for initiating the adjudication of peer review proceedings. (See OBOM 44-45.)

Dr. El-Attar has no meaningful response to these arguments. His reliance on *Taboada v. Sociedad Espanola etc.* (1923) 191 Cal. 187, 191, is misplaced. (See ABOM 29.) In *Taboada*, "the by-laws were suspended, and thereupon, *without hearing*, the plaintiffs were, by *viva voce votee*, ordered expelled from membership in the society." (*Taboada*, at p. 189, emphasis added.) Of course fair procedure principles are violated if there's no hearing whatsoever. (See OBOM 39, fn. 20.) But that's not what happened here. Dr. El-Attar presented evidence at 30 peer review hearings stretching over two years. (OBOM 16-19.) That more than satisfied fair procedure.

Dr. El-Attar attempts to distinguish *Hongsathavij v. Queen of Angels etc. Medical Center* (1998) 62 Cal.App.4th 1123 and *Weinberg v. Cedars-Sinai Medical Center* (2004) 119 Cal.App.4th 1098 because they involved different bylaw deviations than the one in the present case. (ABOM 23-25.) But HPMC cited these two cases to show that immaterial bylaw violations are not per se reversible error, and that deviations from bylaws may be excused by the common law rule of necessity. (OBOM 31-32, 46-49.) The particular bylaw deviations are irrelevant to the general legal principles that are common to those cases and this one. Indeed, Dr. El-Attar cites no authority contrary to those principles.

In addition to the *Hongsathavij* and *Weinberg* decisions, to establish that any bylaw deviation here was immaterial and did not

deprive Dr. El-Attar of a fair procedure, HPMC cited a large body of analogous administrate law, including state and federal statutes, and decisions by the United States Supreme Court, this court, and the Court of Appeal. (OBOM 34-46.) Dr. El-Attar does not mention any of this authority.

Dr. El-Attar relies on a law review article (ABOM 28-29 & fn. 11), but the article complains that "the Business and Professions Code and the CMA Model Bylaws give the *MEC* far too much control over important hearing decisions [such as the appointment of hearing officer JRC members], thereby creating the danger of unfairness." (Philip L. Merkel, *Physicians Policing Physicians: The Development of Medical Staff Peer Review Law at California Hospitals* (2004) 38 U.S.F. L.Rev. 301, 330, emphasis added; see ABOM 28-29 & fn. 11.) It is puzzling that Dr. El-Attar relies on a commentator stating that it is unfair for the MEC to appoint the hearing officer and JRC members as support for his argument that the MEC should have made those appointments here.

Dr. El-Attar also cites *Smith v. Selma Community Hospital* (2008) 164 Cal.App.4th 1478, 1519-1520, to support his contention that "[f]air procedure in peer review hearings is determined by whether 'the procedures contained in the bylaws were followed.' " (ABOM 29.) He misreads the decision. In *Smith*, the Court of Appeal held that the "governing board's decision . . . misinterpreted the decision of the judicial review committee, misapplied the collateral estoppel or the exhaustion of remedies doctrine, erroneously decided certain evidence was irrelevant, and misapplied the substantial evidence test." (*Smith*, at p. 1519.) To correct these

errors, the court looked to the bylaws, determining that they required the governing board "to affirm the decision of the judicial review committee if two conditions are met—the decision is supported by substantial evidence and fair procedures have been used." (*Id.* at 1519-1520.) The court then affirmed the trial court's writ directing reinstatement of the JRC decision because substantial evidence supported the decision and because the procedures in the Bylaws, which the JRC followed, were fair. (*Id.* at p. 1520.)

Thus, *Smith* did *not* hold that fair procedure is always measured by the terms of the bylaws. It simply held that the bylaws in that case were fair. Indeed, as numerous cases have held, immaterial bylaw deviations do not offend fair procedure principles, but fair procedure may be offended even by procedures that comply with bylaws. (See OBOM 31-33.)

Dr. El-Attar similarly misconstrues *Rosenblit v. Superior Court* (1991) 231 Cal.App.3d 1434, 1448, as holding that his right to voir dire could not assure him of a fair proceeding. (ABOM 30.) *Rosenblit* held that a "secret voir dire of the hearing panel" at the outset of the peer review proceedings without the affected physician's attorney "impermissibly compromised his ability to obtain a fair hearing." [11] (*Rosenblit,* at p. 1448; *id.* at p. 1449

---

[11] *Rosenbilt* did not consider whether an affected physician has the right to conduct *additional* voir dire—after the JRC members have been empanelled and conducted numerous evidentiary hearings—to identify possible reasons why seated JRC members might need to recuse themselves. The trial court ruled that the hearing officer properly allowed the JRC to deliberate and reach a decision after (continued...)

["Rosenblit was denied any semblance of fairness by the secret unreported voir dire conducted by the members themselves"].) That's not what happened here. (See OBOM 15-16; see also 8 CT 1732-1734 [trial court's ruling that Dr. El-Attar was given a reasonable opportunity to voir dire the JRC members].)

3. Substantial evidence supports the trial court's determination that the JRC members were not biased against Dr. El-Attar.

Dr. El-Attar argues that he presented substantial evidence proving that certain JRC members were biased against him due to their financial relationships with the hospital. (ABOM 33-34, 37-43.) Although not presented as an issue for review in HPMC's petition or in Dr. El-Attar's answer to the petition (see PFR 1; APFR 1-3; see also Cal. Rules of Court, rule 8.504(b)(1), (c)) and not reached by the Court of Appeal (see typed opn. 3, fn. 1), Dr. El-Attar's argument responds to the fair procedure argument made in HPMC's opening brief (see OBOM 36-39). Accordingly, we address the issue below.

It is irrelevant whether substantial evidence could support Dr. El-Attar's argument. The only relevant issue on appeal is

---

(...continued)
Dr. Mynatt realized that "he was mistaken as to his conflict with Tenet and that he could be impartial, and the remaining JRC members . . . also agreed to deliberate and reach a decision." (8 CT 1739-1742.) That issue was not reached by the Court of Appeal, and is not before this court. (See Part IV, *post.*)

whether substantial evidence supports the trial court's judgment. Here the trial court expressly found, based on substantial evidence in the record, that there were no disabling financial conflicts regarding any of the JRC members, including Dr. Mynatt. [12] (8 CT 1736-1738, 1741-1742.)

Moreover, Dr. El-Attar presented no evidence that any of the JRC members would *actually* benefit financially from a peer review finding against Dr. El-Attar. (ABOM 33-34, 37-43.) Rather, he argues that the JRC member's financial ties to the hospital created an impermissible *possibility* of bias that deprived him of a fair procedure. (*Ibid.*) He is wrong.

The "mere appearance of bias" is insufficient to support disqualification; rather, "there must exist ' "the probability of actual bias on the part of the judge or decision maker [that] is too high to be constitutionally tolerable." ' " (*People v. Freeman* (2010) 47 Cal.4th 993, 996; see *Gai v. City of Selma* (1998) 68 Cal.App.4th 213, 219 [the "standard of impartiality required at an administrative hearing is *less exacting* than that required in a judicial proceeding" (emphasis added)]; see also OBOM 37-38.) Dr. El-Attar's "unilateral perception of an appearance of bias" in an administrative proceeding is inadequate, even if well founded. (*Andrews v. Agriculture Labor Relations Bd.* (1981) 28 Cal.3d 781, 792.) This is because, "[u]nless they have a *financial interest in the outcome* [citation], adjudicators are presumed to be impartial."

---

[12] The JRC panel members met all criteria specified in the bylaws. (See OBOM 15-16; see also OBOM 13, fn. 6.)

(*Morongo Band of Mission Indians v. State Water Resources Control Bd.* (2009) 45 Cal.4th 731, 737, emphasis added; see OBOM 38.)

The fact that the JRC members had various financial relationships with the hospital is immaterial. Indeed, *all* members of the medical staff have financial relationships with the hospital, and all members might be said to benefit from an adverse peer review action against another member practicing the same specialty at the same hospital. [13] Thus, if Dr. El-Attar's position were correct, a physician's medical "peers" at the hospital could not participate in any "peer review" proceeding. That is plainly not the law. (See Bus. & Prof. Code, §§ 805, 809.2, subd. (a); *Mileikowsky v. West Hills Hospital & Medical Center* (2009) 45 Cal.4th 1259, 1267-1269.)

Accordingly, the trial court's ruling that no JRC member had a disabling conflict of interest stemming from their financial ties to the hospital was correct and supported by the evidence, especially when the facts are correctly viewed in the light most favorable to that ruling. (See OBOM 36-39.)

---

[13] See 2A SMJN 90 [the CHA urged the BMQA to oppose an early version of S.B. 1211 because "[i]t is difficult to conceive of a situation in which a person practicing the same specialty would not be a potential beneficiary of the outcome if adverse to the licentiate, especially in small to medium-sized hospitals"]; 11 AR 2359 [HPMC's Medical Staff Bylaw required that the JRC "shall consist of at least one member [of the active medical staff] who shall have the same specialty as the petitioner"].

III. ANY DEVIATION FROM STATUTES, BYLAWS, OR FAIR PROCEDURE IS EXCUSED BY THE COMMON LAW RULE OF NECESSITY.

In the opening brief, HPMC explained that any deviation from a statute, bylaw, or fair procedure principle was excused under the common law rule of necessity. (OBOM 46-50.) Dr. El-Attar does not quarrel with HPMC's presentation of the law. Rather, he simply claims that no "necessity" existed to justify the governing board's appointment of the hearing officer and JRC members. (See *ante*, pp. 9-11 & fns. 4, 5.)

We have already established the fallacy of Dr. El-Attar's attempt to rewrite the record by disregarding the standard of review and evidence that does not support his theory of the case. (See *ante,* p. 10.) And because Dr. El-Attar presents no legal argument to rebut, there is no need to repeat what HPMC already said in its opening brief.

IV. THE EXTRANEOUS ISSUES RAISED BY DR. EL-ATTAR ARE NOT PROPERLY BEFORE THIS COURT.

Dr. El-Attar makes numerous extraneous arguments seeking to taint the result of his peer review proceeding. They should be ignored because they were not presented for review in HPMC's petition or Dr. El-Attar's answer, nor were they identified by this court as issues being reviewed. (See Cal. Rules of Court, rules 8.504(b)(1), 8.504(c), 8.516(b); PFR 1; APFR 1-3.)

In any event, Dr. El-Attar's arguments have no merit.

1. Dr. El-Attar suggests that the governing board's decision to deny his application for reappointment to the medical staff stemmed from ulterior motives unrelated to the Center for Medicare and Medicaid Services (CMS) investigation and the follow-up audits that identified Dr. El-Attar as a physician who regularly performed unnecessary consultations. (ABOM 7.) The trial court specifically found otherwise (8 CT 1718-1723, 1730), and substantial evidence supports that decision (see OBOM 4-11). Accordingly, under the appropriate standard of review (see *ante,* Part I), Dr. El-Attar's argument must be rejected.

2. Dr. El-Attar complains that the hearing officer acted without authority by conducting a "secret voir dire" and then reconstituting the JRC after one of the members (Dr. Mynatt), who had recused himself, determined that there was in fact no basis for recusal. (ABOM 4-5, 43-45.) The trial court once again expressly rejected Dr. El-Attar's argument, and substantial evidence supports the court's ruling. (8 CT 1739-1741.) Accordingly, that decision must be affirmed under the correct standard of review. (See *ante,* Part I.)

3. Dr. El-Attar complains that the Notice of Charges he received "was contrary to the Bylaws . . . which provides [sic] that the charges shall be clear and 'concise.' " (ABOM 10.) The trial court ruled that the Notice of Charges complied with California law and the bylaws. (8 CT 1723-1724, 1731-1732.) The Court of Appeal agreed. (Typed opn. 18-21.) And they were correct. (See *Unnamed Physician v. Board of Trustees* (2001) 93 Cal.App.4th 607, 623-624.)

4. In its opening brief, HPMC notes that the 2004 version of its medical staff bylaws—like the current CHA model bylaws—expressly authorize the governing board to appoint the hearing officer and JRC members where the peer review proceeding concerns action initiated by the governing board. (OBOM 44-45.) In response, Dr. El-Attar points to what he perceives as internal inconsistencies in the 2004 bylaws, and speculates that those bylaws might not be authentic since they lack an executed signature page. (ABOM 36-37.)

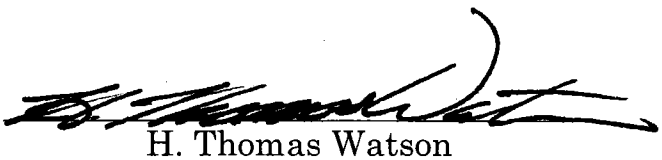
The 2004 bylaws are not inconsistent. Rather, they simply specify that, whenever peer review concerns action by the governing board, the governing board "shall fulfill the functions assigned . . . to the Medical Executive Committee." (18 AR 3876 [Bylaw 8.3-6].) And although this copy of the 2004 bylaws does not include an executed signature page, there is no indication in the record that Dr. El-Attar ever objected to them on that (or any other) ground. Moreover, the 2004 bylaws are consistent with similar provisions in the current CHA Model Medical Staff Bylaws. (See OBOM 44-45.) Thus, HPMC's point—that "if Dr. El-Attar's peer review proceedings were to be redone under either the Hospital's 2004 bylaws or the CHA model bylaws, the governing board will be expressly allowed to appoint the hearing officer and JRC panel members, just as it did the first time" (OBOM 45)—remains completely valid.

CONCLUSION

For the above reasons and the reasons articulated in HPMC's opening brief on the merits, this court should reverse the Court of Appeal's judgment and direct the Court of Appeal to affirm the trial court's decision denying Dr. El-Attar's petition for writ of administrative mandamus. At the very least, this court should reverse the Court of Appeal's judgment and remand for further proceedings to allow the Court of Appeal to address issues it did not reach when it initially decided the appeal.

July 13, 2012

HORVITZ & LEVY LLP
DAVID S. ETTINGER
H. THOMAS WATSON
CHRISTENSEN & AUER
JAY D. CHRISTENSEN
ANNA M. SUDA

By: 
H. Thomas Watson

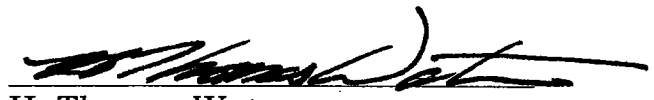
Attorneys for Defendant and Respondent,
HOLLYWOOD PRESBYTERIAN MEDICAL CENTER

CERTIFICATE OF WORD COUNT

(Cal. Rules of Court, rule 8.520(c)(1).)

The text of this brief consists of 6,680 words as counted by the Microsoft Word version 2007 word processing program used to generate the brief.

Dated: July 13, 2012



H. Thomas Watson

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 July 13, 2012, I served true copies of the following document(s) described as **REPLY BRIEF ON THE MERITS** 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 July 13, 2012, at Encino, California.

Robin Steiner

SERVICE LIST

El-Attar v HPMC
Case Nos. BS105623/B209056

Kurt L. Schmalz, Esq. LURIE, ZEPEDA, SCHMALZ & HOGAN A Professional Corporation 9107 Wilshire Boulevard, Suite 800 BeverlyHills, California 90210-5533 Tel: (310) 274-8700	Attorneys for Appellant, **Osamah El-Attar, M.D.**
Jay D. Christensen, Esq. Anna M. Suda, Esq. Christensen & Auer 225 S. Lake Avenue, Suite 860 Pasadena, California 91101 Tel: 626 568-2900	Attorneys for Defendant and Respondent, **Hollywood Presbyterian Medical Center**
Astrid G. Meghrigian, Esq. California Medical Association 1201 J. Street, Suite 200 Sacramento, California 95814 Tel: 415 931-6029	Attorney for Amicus Curiae for Appellant, **California Medical Association**
California Court of Appeal Second District/Division 4 300 South Spring Street Second Floor, North Tower Los Angeles, California 90013-1213 Tel: 213 830-7000	B209056
Los Angeles Superior Court Hon. Mary Ann Murphy Department 25 111 North Hill Street Los Angeles, California 90012 Tel: 213 974-5627	BS105623