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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

[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.