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## **S.C. Limits Authority of Hearing Officers in Medical Review Process**

By KENNETH OFGANG, Staff Writer

A hearing officer in a medical peer review proceeding cannot impose terminating sanctions for failure to provide discovery, the California Supreme Court ruled yesterday.

In a 5-2 decision, the high court affirmed this district's Court of Appeal and reinstated Dr. Gil Mileikowsky's challenge to the decision to end his staff privileges at West Hills Hospital and Medical Center.

Mileikowsky is a board-certified obstetrician and gynecologist who has had conflicts with other hospitals, including Encino-Tarzana Regional Medical Center. His privileges there were suspended for "dangerous, disruptive, threatening, abusive and unprofessional conduct in relation to [hospital] personnel, Medical Staff officers, and

patients," and a 2005 Court of Appeal decision upheld the imposition of terminating sanctions that ended his bid to regain his privileges through the peer review process.

### **Opposition to Application**

At West Hills, his 2001 applications for obstetrical privileges and for renewal of gynecological privileges were opposed by a peer review committee and by the medical executive committee. The latter body found that he had failed to notify the staff that his privileges at Century City Hospital had been terminated, that he had misrepresented the circumstances of his suspension from Encino-Tarzana, and that he had attempted to perform a cesarean section at West Hills despite his lack of obstetrical privileges.

The committee later added an additional finding, that he failed to cooperate with an investigation into charges of professional negligence or incompetence at Cedars-Sinai Medical Center.

Mileikowsky exercised his right, under Business and Professions Code Sec. 809.2(b) and the hospital bylaws, to a hearing before the hospital's judicial review committee and a hearing officer appointed by the medical executive committee.

In February 2003, nine months after the hearing had been requested, the hearing officer ordered Mileikowsky to comply with discovery demands related to the Cedars-Sinai investigation. After Mileikowsky wrote that he was occupied with "other matters" but would respond after March 14, but did not do so as of March 18, the hearing officer ordered him to comply by March 24.

On March 27, the hearing officer found that the doctor had not complied, despite being twice warned that terminating sanctions would be imposed if he did not. He found that West Hills was unable to proceed without the documents and directed that

Mileikowski's request for a hearing be dismissed and the executive committee's recommendation be adopted, effective immediately.

### **Writ of Mandate**

The doctor's appeal was rejected by the hospital governing board, and his petition for writ of mandate was denied by Los Angeles Superior Court Judge Dzintra Janavs, who has since retired. The Court of Appeal reversed, however, and ordered that a hearing be held in accordance with the statute.

Justice Kathryn M. Werdegar—whose husband is a physician—wrote for the Supreme Court in affirming the Court of Appeal.

Werdegar noted that both the statute and the hospital bylaws limit the authority of the hearing officer, who is supposed to maintain decorum at the hearing and ensure that all parties have an opportunity to present evidence at the hearing.

The justice rejected the hospital's claim that Sec. 809.2(d), by providing for discovery under the supervision of the hearing officer, implicitly

grants the officer authority to impose terminating sanctions. Werdegar noted that the only sanction that the officer specifically has the authority to impose is a continuance, and said it was “dubious” that the Legislature intended to authorize hearing officers to impose greater sanctions.

Sec. 809.2(b), she noted, says that the officer “shall not be entitled to vote” on the substantive issues before the panel. “Yet, in effect, a hearing officer who prevents the reviewing panel from conducting its review ‘votes’ by ensuring that the peer review committee’s recommendation will be the final decision,” the justice reasoned.

### **Peer Review Violation**

By effectively allowing the hearing officer to make the final decision on Mileikowski’s right to practice there, Werdegar concluded, the hospital “violated both the letter and the underlying principles of the statutory peer review process.”

Justice Joyce L. Kennard, joined by Justice Marvin Baxter, dissented. She argued that the statutory provision allowing the

hearing officer to “impose any safeguards” to protect the peer review process and to advance justice should be read expansively.

The case was argued in the Supreme Court by Charles M. Kagay of San Francisco for the doctor, H. Thomas Watson of Encino’s Horvitz & Levy for the hospital, and Lowell C. Brown of the Los Angeles office of Arent Fox for Kaiser Foundation Health Plan and the California Hospital Association as amici supporting West Hills.

Amicus briefs supporting the doctor were filed by groups representing physicians—including the American and California medical associations—as well as trial lawyers and patients.

The case is *Mileikowsky v. West Hills Hospital and Medical Center*, 09 S.O.S. 1970.