S196830

IN THE SUPREME COURT OF CALIFORNIA

OSAMAH EL-ATTAR,
Plaintiff and Appellant,

v.

HOLLYWOOD PRESBYTERIAN MEDICAL CENTER,
Defendant and Respondent.

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

OPENING BRIEF ON THE MERITS

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HOLLYWOOD PRESBYTERIAN MEDICAL CENTER,
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OPENING BRIEF ON THE MERITS

ISSUE PRESENTED

The following issue is presented for review in this matter:

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

(PFR 1; see Cal. Rules of Court, rule 8.520(b)(2).)

INTRODUCTION

After the governing board of Hollywood Presbyterian Medical Center (the Hospital) concluded that Dr. Osamah El-Attar's medical practice threatened both patient safety and the Hospital's continued eligibility for Medicare and Medi-Cal funding, it denied his application for reappointment to its medical staff. The Hospital's medical staff disagreed. Thus, when Dr. El-Attar requested a review hearing of the board's decision, the medical staff leadership — the Medical Executive Committee (MEC) — determined that "it should be the Governing Board and not the MEC which arranges and prosecutes the requested hearing." (9 AR 1890-1891.)

The medical staff's bylaws at the time required the MEC to select the hearing panel members and the hearing officer. But, in light of the MEC's expressed preference to not be involved in the process, the board chose the hearing officer and the physician members of the peer review hearing panel, all of whom met every statutory and bylaw criteria for serving.

Dr. El-Attar twice challenged the selection procedure in superior court, before and after the peer review process that encompassed more than 30 hearings over more than two years and that ended with the board's decision against him being upheld. Both times the court rejected Dr. El-Attar's attacks on the procedure. The Court of Appeal, however, agreed with Dr. El-Attar. It overturned the two-year-plus peer review process solely because the selection of the hearing panel members and hearing officer by the board rather than the MEC violated the bylaws. (*El-Attar v.*

Hollywood Presbyterian Medical Center (2011) 198 Cal.App.4th 664, typed opn., 12-18 (*El-Attar*).)

This court should reverse the Court of Appeal's decision. A per se reversal rule for a bylaw violation is both unprecedented and unwise.

Dr. El-Attar's peer review proceeding violated none of California's peer review statutes, and it complied with established common law fair procedure principles. Dr. El-Attar did not show any actual bias, or circumstances demonstrating a probability of bias, by the hearing officer or panel members. Moreover, entities prosecuting administrative actions commonly select the adjudicators. Indeed, in the typical medical staff peer review proceeding, it is the medical staff's MEC that both recommends adverse action against a physician and selects the members of the hearing panel and the hearing officer, and it then prosecutes the charges before the hearing panel it appoints. It is also significant that the procedures followed for setting up Dr. El-Attar's peer review hearing are precisely what was authorized under the Hospital bylaws as they were revised before Dr. El-Attar's hearing even ended, and the Hospital's revised bylaws are consistent with the procedures recommended in the current model bylaws of the California Hospital Association.

Finally, we show that even if there were a deviation from a peer review statute or fair procedure principle it would be excused by the common law rule of necessity. This court therefore should reverse the Court of Appeal's judgment.

STATEMENT OF THE CASE

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

In July 2002, representatives of the Centers for Medicare and Medicaid Services (CMS) — the administrator for the federal Medicare and Medi-Cal programs — conducted an unannounced investigation of the Hospital. [1] (21 AR 4478-4479, 4481; 27 AR 5795, 5798; 28 AR 6002; see 8 CT 1718.) The CMS investigation would determine whether the Hospital could continue participating in the Medicare and Medi-Cal programs and continue serving managed healthcare patients. (21 AR 4479; 27 AR 5796; 28 AR 6002.) Without payments from Medicare, Medi-Cal, and managed healthcare providers, the Hospital would lose 90 percent of its funding and could not stay in business. (27 AR 5796-5797; see 21 AR 4480; 8 CT 1718.)

The CMS investigators found deficiencies in the Hospital's state-law-mandated peer review process — the "primary purpose" of

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[1] The CMS team also investigated on behalf of the California Department of Health Services (DHS), the state's hospital licensing entity, and the Institute for Medical Quality (IMQ), the state's physician evaluator. (21 AR 4478-4479; see <http://www.imq.org> and <http://www.dhs.ca.gov> as of February 23, 2012.)

which "is to protect the health and welfare of the people of California by excluding . . . 'those healing arts practitioners who provide substandard care or who engage in professional misconduct' " (*Mileikowsky v. West Hills Hospital & Medical Center* (2009) 45 Cal.4th 1259, 1267 (*Mileikowsky*)) — and concluded that the process needed to be restructured. (21 AR 4482-4483; see 27 AR 5793-5794; 8 CT 1718.) In particular, CMS criticized the Hospital's governing board for failing to adequately oversee the peer review programs. (21 AR 4483; 27 AR 5799; see 21 AR 4474-4477.) In meetings with the Hospital's administrators and medical staff, the head CMS physician threatened to recommend the Hospital's removal from the Medicare and Medi-Cal programs unless immediate corrective actions were taken. (27 AR 5798-5799.) The investigator also said he would strongly recommend to Medicare that outside reviews be conducted of the Hospital's peer review cases. (27 AR 5799.)

CMS required the Hospital's governing board to submit a written plan of correction in order to maintain its Medicare and Medi-Cal eligibility. (27 AR 5800.) In preparing its corrective plan, and following a CMS recommendation, the Hospital, among other things, retained outside review companies to look at the Hospital's peer review processes and assess how it could be improved. (21 AR 4484; 27 AR 5800-5801; 8 CT 1719.)

In contrast to the Hospital's cooperative response to the CMS investigation, the Hospital's medical staff objected to the entire assessment procedure. The MEC — comprised of the medical staff's leadership — complained that the CMS investigators were biased

and demanded that the Hospital's governing board file an objection with the federal government regarding the nature of the CMS investigation and the qualifications of the investigators. (27 AR 5801; see 11 AR 2387.) The governing board declined to do so. (27 AR 5801.) The MEC then demanded that no outside reviewers be used, but the board determined that was not a viable option. (*Ibid.*) The MEC then demanded that it have exclusive control over the selection of any outside auditors. (*Ibid.*; see 9 AR 1837) The board responded that the MEC was free to retain whatever outside auditors it wanted, but the board was likewise going to select its own outside auditors. (27 AR 5801-5802; see 9 AR 1837-1838.)

B. After outside audits corroborate the federal investigation's concerns and also uncover unnecessary and substandard care by Dr. El-Attar, the Hospital's governing board denies his application for reappointment to the medical staff.

In September 2002, the Hospital's board formed an ad hoc committee (AHC), headed by the Hospital's CEO, to oversee the review process and assist the Hospital in reforming the peer review system to meet the CMS requirements. [2] (21 AR 4484, 27 AR 5806;

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[2] At this point, there was an extremely high level of friction, and no degree of cooperation, between the MEC and the governing board. (27 AR 5802, 5880.) Indeed, about a week after the board formed its AHC and refused to allow the MEC to control the outside auditors, the medical staff voted that it had no confidence in the

(continued...)

see 27 AR 5818, 5864; 8 CT 1719.) The board directed the AHC to obtain outside audits. (21 AR 4485; see 8 CT 1719.) The AHC retained two different medical auditors, The Mercer Company (Mercer) and Hirsch & Associate (Hirsch), to assist the Hospital's quality management department and audit medical cases that had been subjected to peer review at the Hospital. (21 AR 4485-4487; 22 AR 4554, 4556-4557; 23 AR 4835; 27 AR 5802-5803, 5806, 5817; see 9 AR 1822; 8 CT 1719-1720 & fns. 1-2 [statement of decision].)

Reports from Mercer, Hirsch, and the Hospital's own compliance department all identified the medicine and surgery departments as the source of the peer review problems. (11 AR 2422-2425; 21 AR 4487-4490; 27 AR 5804; see 11 AR 2376; 15 AR 3247.) The auditors also raised significant concerns about the quality of care provided in the emergency department. Mercer's audit report identified a pattern of unnecessary treatment where emergency on-call physicians referred patients to each other despite a lack of documented need. (27 AR 5809-5810; see 21 AR 4489-4490 [similar finding from independent review by Hospital's quality management department]; 27 AR 5808-5811 [same], 5906-5908, 5917.)

Based on Mercer's audit report in particular, the AHC identified Dr. Osamah El-Attar, an internist and cardiologist, as one of the on-call physicians who regularly did unnecessary

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(...continued)
hospital's CEO and called for his firing. (12 AR 2505; 27 AR 5833-5834; 28 AR 6044; see 9 AR 1866.)

consultations. [3] (11 AR 2432; 21 AR 4488-4489; 23 AR 4835-4837; 27 AR 5811, 5816; see 15 AR 3247; 21 AR 4489-4490 [the Hospital's quality management department's independent review likewise identified a pattern of unnecessary consultations by Dr. El-Attar]; 23 AR 4836-4837, 4854; 27 AR 5811-5812; 28 AR 6034-6037; 8 CT 1719.) Dr. El-Attar had been a member of the Hospital's medical staff since the mid-1970s and had served on many of its committees, including the MEC. (1 AR 2; 27 AR 5790; 28 AR 6009; 32 AR 6921-6922; 1 CT 13-14, 175; 2 CT 271; see RT B-50; 9 AR 1820; 17 AR 3582.) The vast majority of Dr. El-Attar's patients in 2002 came from emergency room consultations, but in 41 percent of those cases there was no documentation of any need for a cardiology consultation. (27 AR 5812, 5816; see 27 AR 5814-5815.)

The AHC was very concerned about this pattern of unjustified emergency consultations because it put patients at risk during unnecessary invasive procedures and because it created potential (and actual) problems with third-party payers such as Medicare and Medi-Cal. [4] (27 AR 5812-5813, 5920; see 27 AR 5823.) The AHC therefore requested Mercer and Hirsch to review randomly selected medical records of Dr. El-Attar's patients during the prior three

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[3] Although Dr. El-Attar practices as an internist and a cardiologist, he is not board certified in either specialty. (34 AR 7571; see RT D-4.) He has taken the board examination in cardiology multiple times since 1976, but has never passed. (34 AR 7569-7571; see 12 AR 2497-2504; 35 AR 7599.)

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

years, as well as the practices of several other emergency on-call physicians identified by the initial audits. (21 AR 4488-4491; 22 AR 4558; 27 AR 5816-5817, 5921, 5924; see 21 AR 4381, 4492-4493; 27 AR 5925; 28 AR 6042-6043; 4 CT 766, 811; 8 CT 1719.)

The AHC did not select the physician reviewers used by the outside auditors, other than to request that at least two reviewers be used and that reviewers from Southern California not be used, in order to minimize the chance of a reviewer knowing the doctor being reviewed. [5] (22 AR 4559; 27 AR 5817, 5819; see 21 AR 4493; 23 AR 4912; 27 AR 5819.) Mercer's reviews were performed with no contact between the reviewers and the Hospital. (22 AR 4559, 4563, 4567; 26 AR 5517.)

The Mercer and Hirsch reports on Dr. El-Attar, which the AHC received in January 2003, were highly negative. (9 AR 1856,

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[5] The reviewers Mercer used to audit Dr. El-Attar's practice included three board-certified cardiologists, including (a) a clinical professor and former director of cardiology at University of California, San Francisco, (b) a professor of cardiology at Vanderbilt University Medical Center, and (c) the chief of cardiology at San Francisco General Hospital. (10 AR 2158-2159; 22 AR 4560-4562, 4681; see 8 CT 1720-1721; 10 AR 2179; 11 AR 2214-2216; RT D-54.) The fourth Mercer reviewer was an internal medicine physician who holds three board certifications and teaches as a clinical professor at the University of Arizona College of Medicine. (10 AR 2159, 2197; 22 AR 4561; 26 AR 5516; see 8 CT 1721.)

The reviewer Hirsch selected to audit Dr. El-Attar's charts was board-certified in internal medicine and medical management, the former director of cardiology at Ford Ord U.S. Army Hospital, and the former chief of cardiology and medicine and former president of the medical staff at the University of Minnesota Medical Center. (10 AR 2172; 23 AR 4908-4911.)

1908, 1910, 1914; 10 AR 1972, 2149-2160; 27 AR 5818-5819, 5827; see 21 AR 4493; 8 CT 1721-1722.)

Mercer reported that all 17 of Dr. El-Attar's reviewed cases were "below generally accepted practice standards," including 11 which exhibited "major deficienc[ies] in care." (8 AR 1789-1791, 1797, 1799; 10 AR 1967-1968, 1971, 2151-2152, 2154; 22 AR 4572-4576, 4594, 4598-4599, 4601; 27 AR 5819; see 9 AR 1822-1824; 22 AR 4565.) Mercer also identified 31 instances of medically unnecessary services performed or ordered by Dr. El-Attar (8 AR 1790, 1793; 10 AR 1968-1969, 2151, 2153; 22 AR 4574, 4604, 4616; 27 AR 5822; see 27 AR 5813, 5824-5825), and it identified charting deficiencies in 16 of the 17 cases (8 AR 1789-1790, 1795; 10 AR 1967-1968, 1970, 2151, 2154; 22 AR 4573, 4582; 27 AR 5819, 5824; see 22 AR 4579, 4581, 4721-4722; 27 AR 5825 [the federal government and other third-party payers will not authorize payment for medical services unless the medical record documents a need for such services], 5825, 5900-5901). It also confirmed continual behavior problems by Dr. El-Attar. (8 AR 1792, 1796, 1799; 10 AR 1970, 1972, 2155; 22 AR 4584; 27 AR 5826; see 10 AR 2161; 11 AR 2433; 26 AR 5606-5607, 5643; 27 AR 5783-5789, 5839 [in 1997-1998, Dr. El-Attar went through disciplinary proceedings and a peer review hearing at the Hospital involving a long list of documented behavioral issues], 5826, 5842; 28 AR 6021-6022.)

The Hirsch audit report made similar findings. (9 AR 1908-1914; 27 AR 5827; see 8 CT 1721-1722; RT D-59.) It was critical of Dr. El-Attar's cardiologic care and found his behavior to be unacceptable and unprofessional. (9 AR 1828, 1908, 1910, 1914; 27

AR 5828-5829; see 8 CT 1722; 9 AR 1919, 1951-1952.) The Hirsch report stated that Dr. El-Attar's patients were undergoing risky procedures needlessly, which exposed the Hospital to liability for conspiracy to cheat Medicare and Medi-Cal. (9 AR 1914; 27 AR 5829; see 8 CT 1722.)

Immediately after receiving the Mercer and Hirsch audit reports, the AHC unanimously decided that the only way to protect patients and the Hospital was to summarily suspend Dr. El-Attar and have him removed from the medical staff, which would prevent him from admitting patients to or practicing at the Hospital. (27 AR 5827, 5830-5832; 28 AR 6052; see 27 AR 5820, 5822-5830; 8 AR 1819.) The Hospital board agreed with the AHC's recommendation and, in January 2003, denied Dr. El-Attar's application for reappointment to the medical staff and summarily suspended his clinical privileges. (8 AR 1818-1819; 9 AR 1829, 1835, 1856; 27 AR 5830-5831; see 13 AR 2680.)

C. The MEC confirms that Dr. El-Attar should be granted a review hearing, but delegates to the board the responsibility for conducting the hearing even though the bylaws assign that responsibility to the MEC.

The Hospital's CEO asked the MEC to confirm the board's summary suspension of Dr. El-Attar based on the Mercer and Hirsch reports, but it refused to do so and the suspension thus ended. (9 AR 1820-1829, 1851, 1860, 1862, 1869; 27 AR 5831; 28 AR 5950; see 9 AR 1836 [the MEC questioned why it was not

consulted about selection of outside auditors]; 11 AR 2350 [under the bylaws, the board's summary suspension of Dr. El-Attar terminated when the MEC refused to ratify it]; 13 AR 2674-2676; see also 3 CT 617 [Hospital's letter to Dr. El-Attar stating that his medical staff membership and clinical privileges would continue during his administrative hearing]; 4 CT 766, 811; 8 CT 1723 & fn. 4.) The MEC then formed its own ad hoc committee to review 16 of the Dr. El-Attar cases reviewed by Mercer. (9 AR 1870, 1890; 6 CT 1173-1177; see 9 AR 1841, 1847, 1855.)

The CEO notified Dr. El-Attar of the board's decision to deny his application for reappointment to the medical staff. (9 AR 1871-1872; 13 AR 2677; see 11 AR 2357; 8 CT 1723.) Three weeks later, in March 2003, Dr. El-Attar requested a hearing at the Hospital — called a judicial review hearing — to contest that decision. (9 AR 1875-1876; 13 AR 2685; see 11 AR 2355 [medical staff bylaw]; 8 CT 1723.)

The MEC reviewed the findings of its own ad hoc committee, which agreed that there were documentation problems in Dr. El-Attar's cases, but did not recommend any adverse peer review action. (9 AR 1890-1893.) The MEC then confirmed that Dr. El-Attar should be granted a judicial review hearing regarding the board's denial of his application for reappointment to the medical staff. (9 AR 1890; see 8 CT 1723)

The Hospital's medical staff bylaws state it is the MEC that appoints the physician members of a judicial review committee and

the committee's hearing officer. [6] (11 AR 2355, 2358-2359, 2361; see Bus. & Prof. Code, § 809.2, subd. (a) [the JRC acts as the trier of fact for peer review].) The MEC decided, however, that, "since the MEC did not summarily suspend [Dr. El-Attar's] privileges, did not recommend any adverse action relating to [Dr. El-Attar] and has not filed any Section 805 report relating to [Dr. El-Attar];[7] and since the requested hearing would be to review actions by the Governing Board; *it should be the Governing Board and not the MEC which arranges and prosecutes the requested hearing.*" (9 AR

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[6] In pertinent part, the bylaws state: "A hearing occasioned by a . . . Governing Board's recommendation shall be conducted by a Judicial Review Committee appointed by the Medical Executive Committee and composed of at least five (5) members of the Active Staff who shall gain no direct financial benefit from the outcome; who have not acted as 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 . . . . Membership on a Judicial Review Committee shall consist of at least one member who shall have the same specialty as the petitioner. All other members shall have M.D. or D.O. degrees." (11 AR 2358-2359.)

The bylaws further state: "The Medical Executive Committee shall appoint a hearing officer to preside at the hearing. The hearing officer may be an attorney at law qualified to preside over a quasi-judicial hearing, but an attorney regularly utilized by the medical center for legal advice regarding its affairs and activities shall not be eligible to serve as hearing officer. The hearing officer shall gain no direct financial benefit from the outcome and must not act as a prosecuting officer or as an advocate." (11 AR 2361.)

[7] Business and Professions Code section 805, subdivision (b), "requires that hospitals report certain disciplinary actions, including denials of staff privileges, to the [State's] Medical Board . . . [and usually] to the National Practitioner Data Bank . . . ." (*Mileikowsky, supra,* 45 Cal.4th at p. 1268.)

1890-1891, emphasis added; 9 AR 1890 [the minutes of the MEC's meeting conclude that: "*the Medical Executive Committee leaves the actions relating to the Judicial Review Hearing procedures to the Governing Board*" (emphasis added)], 1894 [same]; see 8 CT 1723, 1729; RT B-46 to B-47, D-17.)

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

After the MEC left further action to the board, the board's AHC arranged for Dr. El-Attar's judicial review hearing. It sent a Notice of Hearing Charges letter to Dr. El-Attar, which identified the six members of the medical staff the AHC was appointing to serve on the Judicial Review Committee (JRC), and the attorney it appointed to act as the hearing officer. (9 AR 1895-1907; 11 AR 2358-2359, 2361; 13 AR 2696-2708, 2713; see 27 AR 5864; 8 CT 1723-1724; see also 11 AR 2281-2292 [AHC's first amended notice of charges]; 13 AR 2780.)

Dr. El-Attar promptly filed a petition for writ of mandamus, asking the superior court to enjoin the peer review proceedings on the ground the MEC, rather than the AHC, should have appointed the JRC hearing officer and physician panel members. (1 CT 177.) The court denied the petition, stating that, "on 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; or, that the charges were improperly issued." [8] (2 CT 225.) Accordingly, the court ruled that the "hearing regarding the hospital administrative review of the denial of reappointment may proceed." (*Ibid.*)

Two weeks later, in May 2003, Dr. El-Attar's counsel began his voir dire examination of the hearing officer, followed by his voir dire of the physicians appointed to the JRC. [9] (17 AR 3733-3734; 1 CT 177; 8 CT 1724; RT D-21; see 6 CT 1128-1149 [hearing officer voir dire], 1149-1178 [voir dire of two physicians selected for the JRC]; 19 AR 4127-4167 [voir dire of five of the physicians selected for the JRC].) The hearing officer excused one of the physicians (a cardiologist who had reviewed Dr. El-Attar's charts for the MEC's ad hoc committee) and two others resigned prior to commencement of the evidentiary hearings; two more physicians were appointed to the JRC. (17 AR 3734; 8 CT 1724; see 13 AR 2777 [letter announcing the appointment of two additional physicians to the JRC], 19 AR 4183-4209 [voir dire of the two additional physicians].)

The hearing officer and physicians who served on the JRC met every criteria specified in the bylaws (see fn. 6, *ante*): none had

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[8] Dr. El-Attar's petition also sought a writ of administrative mandamus under Code of Civil Procedure section 1094.5, which the court denied without prejudice on the ground such a petition is not ripe until after the conclusion of the administrative proceedings. (2 CT 225.)

[9] The bylaws provide that the "member shall be entitled to a reasonable opportunity to question and challenge the impartiality of Judicial Review Committee members and the hearing officer." (11 AR 2360.)

a direct financial interest in the outcome of the hearing; none had previously taken part in considering the issues related to the hearing; none had a negative relationship with Dr. El-Attar; none had prejudged the case; and none had previously participated as an accuser, investigator, fact finder, or initial decision maker. (4 CT 846-848; 5 CT 993-994; 6 CT 1128-1149; see e.g., 6 CT 1148 [Dr. El-Attar's counsel confirmed that, aside from preserving his objection to the AHC rather than the MEC making the appointment, "we do not challenge" the hearing officer].)

Following voir dire, the JRC held 30 evidentiary hearings over the next two years, at which it examined thousands of exhibits and medical records and heard testimony from several percipient and seven expert witnesses. [10] (16 AR 3505-3543; 17 AR 3550-3731; see 35 AR 7768; 1 CT 85; 5 CT 992; 8 CT 1724-1725.)

The record establishes that the hearing officer knew his job and performed it conscientiously. [11] (See, e.g., 13 AR 2772-2775; 6 CT 1133, 1135-1136.) During the evidentiary hearings, the hearing officer often ruled in favor of Dr. El-Attar. [12] For example, Dr. El-

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[10] After approximately 20 evidentiary hearings, one of the physician members of the JRC resigned for personal reasons, leaving four physicians on the JRC who participated in all 30 evidentiary hearings. (See 32 AR 6991-6996; 8 CT 1724; RT B-7.)

[11] The hearing officer was a semi-retired former litigation partner with Fulbright & Jaworski who had limited his practice to mediation, arbitration, and hearing officer positions. (6 CT 1128-1129, 1142-1143.)

[12] See, e.g., 20 AR 4328, 4330, 4332; 22 AR 4638, 4788; 23 AR 4851; 24 AR 5205, 5223; 25 AR 5449, 5507; 26 AR 5671; 27 AR 5840, 5872-5873, 5878, 5910; 28 AR 5985, 6078-6079; 29 AR 6344; 30 AR

(continued...)

Attar without good cause missed various deadlines for producing documents and identifying witnesses, and the hearing officer recognized that delay was to Dr. El-Attar's advantage because he maintained his staff privileges until the administrative peer review proceedings concluded. (See 20 AR 4254 [hearing officer: "[I]t is in Dr. El-Attar's interest to have the matter go on as long as possible because then he doesn't face the risk of an early adjudication which might go against him. So he has an incentive to delay the hearing, and the motivation to do that is present"]; see 13 AR 2720; 15 AR 3203-3204, 3231-3233; 22 AR 4669.) The hearing officer nonetheless declined to impose any evidentiary sanction. [13] The hearing officer explained that he was "bend[ing] over backwards" in favor of Dr. El-Attar because "otherwise, there would be no response to the Mercer . . . [¶] and Segal [i.e., Hirsch] reports." (20 AR 4332 [one of the JRC physicians agreed, "That sounds reasonable"].)

(...continued)
6560; 31 AR 6893; 33 AR 7166, 7239, 7279, 7333-7334, 7374; 34 AR 7413, 7503-7504; 35 AR 7638; see 27 AR 5744-5745 [hearing officer cautions a witness not to argue with Dr. El-Attar's counsel and then sua sponte strikes portions of the witness' testimony as unresponsive to questions asked by Dr. El-Attar's counsel], 5761-5763, 5868, 5871, 5875-5876; 34 AR 7412-7413 [hearing officer rules that the JRC cannot question Dr. El-Attar about evaluations of him during peer review proceedings at other hospitals].

[13] 20 AR 4270 [hearing officer permits Dr. El-Attar to introduce into evidence late produced documents even though no good cause was shown for the late production], 4277 [hearing officer refuses to be "too technical" regarding Dr. El-Attar's late production of exhibits and witness lists, even though Dr. El-Attar does not have an adequate excuse or explanation for his alleged oversight], 4279-4280.

The record establishes that all the physician members of the JRC likewise took their jobs seriously, questioning witnesses [14] and seeking clarification of testimony and the medical records at issue. [15] Like the hearing officer, the JRC went out of its way to ensure that Dr. El-Attar received a fair hearing, for example, by

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[14] See 21 AR 4527; 22 AR 4620, 4624, 4664, 4820; 23 AR 4889-4890, 4892; 25 AR 5404; 26 AR 5595-5597, 5703; 28 AR 6043-6048, 6053, 6160, 6173, 6188-6189; 29 AR 6415, 6440, 6452; 30 AR 6521, 6524, 6540, 6542, 6602, 6646, 6648, 6678; 31 AR 6727, 6731-6732, 6758, 6846, 6854, 6897; 32 AR 6925, 6931, 6937-6938, 6941, 6953, 7036, 7038, 7046, 7070-7072, 7074, 7079-7080, 7088, 7098, 7125-7128, 7136-7137, 7145-7147; 33 AR 7167, 7185-7187, 7195, 7198, 7260-7261, 7266, 7275-7276, 7280-7281, 7293, 7296, 7298, 7319, 7329; 34 AR 7357-7359, 7366-7369, 7382-7383, 7392-7394, 7398, 7401, 7403-7404, 7411, 7480, 7506, 7510, 7512-7513, 7522, 7525-7526, 7530, 7534-7539, 7546-7547, 7555-7566; 35 AR 7618, 7632, 7698, 7741.

[15] See 22 AR 4667, 4797; 23 AR 4926-4927, 4931, 4944, 4961, 4970, 4974-4976, 5011-5014, 5042, 5044, 5048-5050, 5056-5059, 5062-5064, 5079, 5085; 24 AR 5144, 5156, 5188, 5222, 5224, 5235, 5251, 5253, 5270, 5281, 5298, 5303, 5306, 5308; 25 AR 5317, 5320-5321, 5328-5329, 5337, 5341, 5343, 5375, 5380, 5416-5417, 5426, 5432, 5437-5438, 5445, 5464, 5495, 5498-5500; 26 AR 5513, 5544, 5550, 5561-5562, 5570, 5572-5573; 27 AR 5848-5853, 5890-5891, 5915, 5923; 28 AR 6017, 6092, 6097, 6114, 6122-6124, 6150; 29 AR 6215, 6224, 6231-6233, 6298, 6315-6316, 6351, 6354, 6386-6388, 6404; 30 AR 6616, 6629, 6632-6633, 6639, 6663-6664; 31 AR 6695, 6699, 6700-6702, 6733-6734, 6747-6748, 6756, 6777, 6784, 6791-6792, 6817, 6822, 6832, 6864, 6866, 6871, 6875-6876; 32 AR 6927, 6933-6934, 6944, 6962-6963, 6967, 6971, 6998, 7020, 7044-7045, 7061-7062, 7065, 7069, 7081, 7083-7084, 7087, 7095, 7104, 7115-7117, 7143; 33 AR 7158, 7164, 7171-7172, 7176-7178, 7192, 7214, 7254, 7257, 7259, 7263, 7265, 7278, 7315, 7323, 7336, 7338, 7341; 34 AR 7454, 7461, 7469, 7483, 7486, 7488, 7498, 7517, 7524, 7577, 7585; 35 AR 7607-7608, 7619, 7626, 7643, 7652, 7658, 7668, 7676, 7680, 7692, 7709, 7721, 7731, 7740.

allowing Dr. El-Attar to introduce and rely on documents that he had failed to produce during discovery. [16] (32 AR 6930-6931.)

At the conclusion of the evidentiary hearings, the parties submitted comprehensive written closing briefs to the JRC. (16 AR 3505-3549; 17 AR 3550-3731 [Dr. El-Attar filed a two-part closing brief; part one had 41 pages, and part two spanned an additional 108 pages; see 8 CT 1724; 11 AR 2363.) The JRC then began its deliberations in September 2005. (17 AR 3735; 8 CT 1726.)

The JRC issued its decision one month later, finding patterns by Dr. El-Attar of dangerous, unacceptable, substandard medical practice, of inadequate, substandard medical record documentation, and of inappropriate interpersonal relations with staff members, even as it rejected some other charges that had been made by the

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[16] Indeed, one of the JRC physicians made statements during the hearings that plainly favored Dr. El-Attar. (34 AR 7394 [JRC physician asks Dr. El-Attar whether he received a formal written notification of behavioral events because to him "verbally is worthless"], 7396 [JRC physician questions why behavioral issues are being brought up now, years past when they occurred], 7397 [JRC physician requests evidence that Dr. El-Attar received written notification of behavioral issues], 7398 [JRC physician continues to question Dr. El-Attar regarding behavioral issues and notification from the administration or staff], 7488-7489 [JRC physician observes that an EKG technician's testimony was condescending towards Dr. El-Attar, and the technician's testimony regarding Dr. El-Attar's decision to perform a particular medical procedure was not relevant since the technician was not a physician]; see also 34 AR 7490 [Dr. El-Attar's attorney adopts JRC physician's comments], 7518 [Dr. El-Attar adopts JRC physician's summary of his testimony].)

board's AHC. [17] (17 AR 3732-3743; see 8 CT 1726.) The JRC unanimously ruled that the board's recommendation to deny Dr. El-

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[17] The decision states the JRC was "persuaded, by the voluminous evidence introduced at the Hearing" (17 AR 3738) that "Dr. El-Attar has demonstrated 'a pattern of dangerous, unacceptable, substandard practice . . . .' " (17 AR 3737.) The JRC found that "Dr. El-Attar frequently relied on test reports prepared by others . . . without personally physically reviewing the actual tests himself. This is a pattern of practice which is substandard and poses serious potential harm to patients." (17 AR 3738.) The JRC further found that "Dr. El-Attar failed to investigate when he became aware that his patients had significant disparities between their physical condition and reports of their tests . . . ." (*Ibid.*) In addition, "Dr. El-Attar's records frequently failed to demonstrate patients specific indications for tests that he ordered or performed. [¶] [And] . . . Dr. El-Attar's documentation of the status of his patients was woefully inadequate and substandard. Proper documentation is critical to the continuity of patient care. Dr. El-Attar's failure in this regard again poses potential risks to the patients." (*Ibid.*)

The JRC's decision further states that "Dr. El-Attar's conduct toward hospital staff was shown frequently to be disruptive and inappropriate. . . . These were shown to be recurrent problems extending over a number of years. Such conduct has the potential to disrupt proper patient care. And, such conduct was below the accepted standard of behavior of physicians." (17 AR 3738.)

And the JRC's decision states that the charge "alleg[ing] that Dr. El-Attar engaged in a pattern of 'inadequate substandard medical record documentation' . . . has been sustained by the evidence. [¶] . . . Dr. El-Attar's penmanship is totally illegible. His workups are almost always the same (boilerplate), when it would be expected that his workups would vary substantially given his specialty and patient base. His records do not reflect patient-specific indications for the course of treatment or his thought process with regard to the resolution of the patient's clinical problem." (17 AR 3740.)

(continued...)

Attar reappointment to the medical staff was reasonable and warranted, although the JRC also noted that it would have pursued an intermediate resolution if it had been the initial decision maker. (17 AR 3736, 3737, 3742-3743.)

Dr. El-Attar appealed to the Hospital's appeal board. (17 AR 3756-3757; 35 AR 7764-7766, 7772, 7775, 7826; see 11 AR 2363-2365 [bylaws governing administrative appeal].) In August 2006, after reviewing the record and the parties' briefs, the appeal board affirmed the JRC's decision, concluding that Dr. El-Attar had received a fair hearing that substantially complied with the bylaws and applicable law. (19 AR 4110-4113; see 8 CT 1726-1727; RT D-17 to D-18.)

In particular, the appeal board concluded that "[t]he appointment of the JRC and Hearing Officer by the [board] was not specifically authorized by the Bylaws but did not violate any rule of fair procedure and was approved by the MEC. The appointment of the JRC and the Hearing Officer by the [board] was also in substantial compliance with the Bylaws and resulted in no demonstrable prejudice to Dr. El-Attar, because he had the right to

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The JRC found that the charge of inappropriate behavior was proven with respect to hospital staff but not proven with respect to hospital patients and their families. (17 AR 3741-3742.) The JRC ruled that the AHC did not prove its overutilization charge because "a higher than normal rate of utilization would be possible in view of the advanced age and physical condition of Dr. El-Attar's patient base." (17 AR 3739.) And the JRC ruled that the AHC's charge regarding failure to secure informed consent was not proven by the preponderance of the evidence. (17 AR 3741.)

voir dire these appointees for bias and lack of impartiality in the same manner as if they had been appointed by the MEC." [18] (19 AR 4111 [Conclusions and Recommendations, ¶ 2]; see RT D-17 to D-18.) On the merits, the appeal board concluded that substantial evidence supported the JRC's findings, that the JRC's decision was not arbitrary or capricious but reasonable and warranted, and that the board should affirm the JRC. (19 AR 4111-4113; see 8 CT 1726-1727.)

Less than two weeks later, the Hospital's governing board affirmed the JRC's ruling and terminated Dr. El-Attar's medical staff membership. (19 AR 4109; see 8 CT 1727.)

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

Dr. El-Attar filed in superior court a petition for writ of administrative mandamus, arguing in part that his peer review was

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[18] The administrative appeal decision explained, "Dr. El-Attar exercised his right to voir dire the JRC members and the Hearing Officer. Following such voir dire, the Hearing Officer determined that he and the impaneled members of the JRC were not biased against Dr. El-Attar and would be impartial adjudicators of the evidence that would be presented to the JRC. The Appeal Board concurs with the rulings of the Hearing Officer on the impartiality and lack of bias of the Hearing Officer and the impaneled JRC members. In addition, the Appeal Board concluded that the procedural rulings of the Hearing Officer . . . did not evidence any impermissible bias against Dr. El-Attar." (19 AR 4112.)

inherently unfair because the AHC, rather than the MEC, appointed the hearing officer and physicians who served on the JRC. (1 CT 1, 12, 17-19, 29; see 8 CT 1727.) The trial court denied Dr. El-Attar's petition, ruling inter alia that the peer review proceedings satisfied Dr. El-Attar's procedural rights and the AHC was authorized to prosecute and arrange for the judicial review hearing. (7 CT 1393 [order]; 8 CT 1713 [judgment], 1727-1730 [key portion of the trial court's 52-page statement of decision]; see also RT B-11 to B-14, D-18, D-25, D-115, D-123.)

Dr. El-Attar appealed (8 CT 1773). The Court of Appeal reversed, holding that Dr. El-Attar's over-two-year-long peer review must be redone because the governing board's AHC, rather than the MEC, appointed the JRC panel members and hearing officer. (*El-Attar, supra,* typed opn., 12-18.) The appellate court did not find that the peer review conclusions were substantively flawed, but held that the medical staff's bylaws prohibited the Hospital's board from initiating the needed peer review even though the medical staff's MEC didn't do so. (*Ibid.*)

LEGAL ARGUMENT

I. THE STANDARD OF REVIEW IS DE NOVO.

"A hospital's decisions resulting from peer review proceedings are subject to judicial review by administrative mandate under Code of Civil Procedure section 1094.5." (*Bode v. Los Angeles Metropolitan Medical Center* (2009) 174 Cal.App.4th 1224, 1235 (*Bode*); see Bus. & Prof. Code, § 809.8.)

When the issue on appeal is legal rather than factual, the appellate court exercises its independent judgment. (*Manriquez v. Gourley* (2003) 105 Cal.App.4th 1227, 1233.) In particular, 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 (*Southern Cal.*) ["The ultimate determination whether an administrative proceeding was fundamentally fair is a question of law to be decided on appeal"].) " '[I]f the decision of the lower court is right, the judgment or order will be affirmed regardless of the correctness of the grounds on which the court reached its conclusion.' " (*LaGrone v. City of Oakland* (2011) 202 Cal.App.4th 932, 940 (*LaGrone*), citing 9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 346, p. 397.)

II. DR. EL-ATTAR IS NOT ENTITLED TO A NEW PEER REVIEW HEARING BECAUSE 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. Medical staff peer review is governed by statutes, regulations, and medical staff bylaws, which seek primarily to protect public health while also ensuring reasonable fairness.

"Hospitals have a dual structure. First, an administrative governing body (often comprised of persons other than health care professionals) takes ultimate responsibility for the quality and performance of the hospital. Second, an 'organized medical staff' entity (composed of health care professionals) has responsibility for providing medical services, and is 'responsible to the governing body for the adequacy and quality of the medical care rendered to patients in the hospital.' (Cal. Code Regs., tit. 22, § 70703, subd. (a); see also *id.* § 70701(a)(1)(F); Bus. & Prof. Code, § 805.5.)" (*Alexander v. Superior Court* (1993) 5 Cal.4th 1218, 1224, disapproved on another point by *Hassan v. Mercy American River Hospital* (2003) 31 Cal.4th 709; accord, *Mileikowsky, supra,* 45 Cal.4th at p. 1272; see *Kibler v. Northern Inyo County Local Hospital Dist.* (2006) 39 Cal.4th 192, 201 ["the Legislature has

granted to individual hospitals, acting on the recommendations of their peer review committees, the primary responsibility for monitoring the professional conduct of physicians licensed in California"].)

"Decisions concerning medical staff membership and privileges are made through a process of hospital peer review." (*Mileikowsky, supra,* 45 Cal.4th at p. 1267.) "The primary purpose of the peer review process is to protect the health and welfare of the people of California by excluding through the peer review mechanism 'those healing arts practitioners who provide substandard care or who engage in professional misconduct.' " (*Ibid.,* quoting Bus. & Prof. Code § 809, subd. (a)(6); accord, *Ellison v. Sequoia Health Services* (2010) 183 Cal.App.4th 1486, 1494 (*Ellison*).)

"Another purpose, also if not equally important, is to protect competent practitioners from being barred from practice for arbitrary or discriminatory reasons." (*Miliekowsky, supra,* 45 Cal.4th at p. 1267; see *ibid.* ["Thus, [Business and Professions Code] section 809 recites: 'Peer review, fairly conducted, is essential to preserving the highest standards of medical practice' (id., subd. (a)(3)), but '[p]eer review that is not conducted fairly results in harm both to patients and healing arts practitioners by limiting access to care' (id., subd. (a)(4))"].) However, the " 'overriding goal of the state-mandated peer review process is protection of the public and while important, physicians' due process rights are subordinate to the needs of public safety.' " (*Ellison, supra,* 183 Cal.App.4th at p. 1498.)

The Legislature has enacted a number of statutes governing peer review procedures. (See Bus. & Prof. Code, §§ 809 et seq.; *Mileikowsky, supra,* 45 Cal.4th at pp. 1267-1269; *Unnamed Physician v. Board of Trustees* (2001) 93 Cal.App.4th 607, 616-617.) One of these statutes requires that, when a physician requests a judicial review committee hearing at the hospital to contest an adverse action or recommendation regarding his or her medical staff privileges, that administrative "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 who shall gain no direct financial benefit from the outcome, who have not acted as an accuser, investigator, factfinder, or initial decisionmaker in the same matter, and which shall include, where feasible, an individual practicing the same specialty as the licentiate." (Bus. & Prof. Code, § 809.2, subd. (a); see Bus. & Prof. Code, § 805 [defining peer review and peer review body]; *Mileikowsky, supra,* 45 Cal.4th at p. 1269.)

The Legislature has also acknowledged that the "governing bodies of acute care hospitals have a legitimate function in the peer review process." (Bus. & Prof. Code, § 809.05, subd. (a); see *Ellison, supra,* 183 Cal.App.4th at p. 1499.) While the governing body must "give great weight to the actions of peer review bodies" and not act in an "arbitrary or capricious manner" (Bus. & Prof. Code, § 809.05, subd. (a)), the governing body has the ultimate responsibility for ruling on applications for membership in the hospital's medical staff and other peer review actions. (See *Ellison, supra,* 183 Cal.App.4th

at pp. 1496-1497; 11 AR 2319, 2348-2349 [medical staff bylaws]; 18 AR 3829, 3846, 3863 [same]; 27 AR 5769; 28 AR 5937.)

Moreover, "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." (Bus. & Prof. Code, § 809.05, subd. (b); see 11 AR 2349 [medical staff bylaws].) And "[i]n the event the peer review body fails to take action in response to a direction from the governing body, the governing body shall have the authority to take action against a licentiate." (Bus. & Prof. Code, § 809.05, subd. (c) ["Such action shall only be taken after written notice to the peer review body and shall fully comply with the procedures and rules applicable to peer review proceedings established by [statutes governing peer review procedures]"]; see 11 AR 2349 [medical staff bylaws: "If the Medical Executive Committee 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 [the] Articles . . . of these Bylaws" governing peer review proceedings (emphasis added)].)

The Hospital's medical staff bylaws establish additional procedures governing peer review proceedings, but the procedures may not conflict with any peer review statute. (See Bus. & Prof. Code, §§ 809.6, subd. (a); 2282.5, subd. (a)(1) & (6); Cal. Code Regs., tit. 22, §§ 70701, subd. (a)(1) & (7), 70703, subds. (a) & (d); see *Mileikowsky, supra,* 45 Cal.4th at p. 1274; *Bode, supra,* 174 Cal.App.4th at 1232.) A hospital's "medical staff must adopt written bylaws 'which provide formal procedures for the evaluation

of staff applications and credentials, appointments, reappointments, assignment of clinical privileges, appeals mechanisms and such other subjects or conditions which the medical staff and governing body deem appropriate.' " (*Mileikowsky,* at p. 1267; see *Ellison, supra,* 183 Cal.App.4th at p. 1494 ["A hospital's bylaws govern its peer review proceedings, subject to the requirements of the peer review statutes"]; see also Bus. & Prof. Code, §§ 809.6, subd. (a); 2282.5, subd. (a); Cal. Code Regs, tit. 22, §§ 70701, subd. (a), 70703.)

B. The Hospital governing board's initiation of Dr. El-Attar's peer review proceedings, after the medical staff did not do so, violated no peer review statute.

The medical staff's MEC voted to "leave[ ] . . . to the Governing Board" the task of convening a judicial review committee to evaluate the board's decision to deny Dr. El-Attar's reappointment to the Hospital's medical staff. (9 AR 1890.) The board's AHC thus appointed the JRC members and hearing officer. The Court of Appeal did not hold that the board's actions violated any statute governing how peer review hearings are conducted, but concluded that the board violated the medical staff's bylaws, which required the MEC — and *only* the MEC — to appoint the hearing officer and physicians on the JRC. (*El-Attar, supra,* typed opn. 11-15 & fn. 8.) Following sections explain that any deviation from the bylaws was immaterial. We first explain that the board's actions complied with peer review statutes.

The statutory scheme specifies that a peer review "hearing shall be held, as determined by the peer review body . . . ." (Bus. & Prof. Code, § 809.2, subd. (a). There are two reasons why the AHC's selection of the hearing officer and JRC panel members were "as determined by the peer review body."

First, the medical staff's MEC is clearly a peer review body (Bus. & Prof. Code, § 805, subd. (a)(1)(B)(i) [" 'Peer review body' includes . . . [¶] . . . [a] medical . . . staff of any health care facility"]), and it directed that the board arrange the JRC hearing process. The peer review proceeding was thus conducted in the manner "determined by" a "peer review body."

Second, the board's AHC itself was a "peer review body" and thus was authorized to "determine[]" the hearing procedures. The Legislature has expressly defined " 'peer review body' " to include "*any designee* of the peer review body." (Bus. & Prof. Code, § 809, subd. (b), emphasis added.) The Hospital Board's AHC was a designee of a peer review body — the medical staff's MEC — because the MEC specified that the Board should arrange Dr. El-Attar's judicial review hearing. (See 8 CT 1729-1730 [statement of decision]; RT D-19.)

In sum, the Hospital's governing board violated no peer review statute when it, rather than the MEC, selected the hearing officer and physician members of the JRC.

C. An immaterial bylaw violation is not per se reversible error.

Medical staff bylaws can provide requirements that supplement the peer review statutes. (See Bus. & Prof. Code, § 809.6, subd. (a) ["[t]he parties are bound by any additional notice and hearing provisions contained in any applicable professional society or medical staff bylaws which are not inconsistent with . . . [the peer review statutes]"].) The Hospital's medical staff bylaws state it is the medical staff's MEC that is to appoint both the physician members and the hearing officer of the JRC. (11 AR 2358-2359, 2361.) Here, the governing board's AHC made the appointments instead. But, just as every trial court error does not require reversal of a judgment on appeal, not every deviation from the medical staff's bylaws is fatal to a peer review proceeding.

Courts often uphold the outcome of peer review proceedings despite deviations from the procedures specified in the bylaws, provided the procedure that was actually followed gave the physician being reviewed adequate notice of the charges and a fair opportunity to contest those charges before a reasonably impartial tribunal. (*Anton v. San Antonio Comm. Hosp.* (1977) 19 Cal.3d 802, 826 & fn. 25 (*Anton*) [deviations from procedural bylaws are immaterial unless prejudicial]; *Hongsathavij v. Queen of Angels etc. Medical Center* (1998) 62 Cal.App.4th 1123, 1144 (*Hongsathavij*); *Bollengier v. Doctors Medical Center* (1990) 222 Cal.App.3d 1115, 1128, 1129 (*Bollengier*) ["The concept of 'fair procedure' does not require rigid adherence to any particular procedure, to bylaws or

timetables"]; see *Dougherty v. Haag* (2008) 165 Cal.App.4th 315, 339 (*Dougherty*) [courts look "to the substance of whether the procedure was fair (as distinct from quibbling about the technicalities of provisions in the bylaws)"].)

As one court of Appeal explained, "it cannot be said that a violation of a hospital's bylaws establishes a denial of due process in every case. [Citation.] Rather 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 (*Rhee*); accord, *Tiholiz v. Northridge Hospital Foundation* (1984) 151 Cal.App.3d 1197, 1203 (*Tiholiz*).)

Examples of bylaw deviations that were held to be immaterial include:

- A governing board pursuing an administrative appeal of a JRC decision where the bylaws contemplated that such appeals would be sought only by the physician being reviewed or by the MEC (*Hongsathavij, supra,* 62 Cal.App.4th at pp. 1143-1144 [the "medical staff bylaws apparently did not envision a situation, as occurred here, . . . where the tension between the hospital and its medical staff was such that the MEC would not assume a role in such proceedings"]);

- A hospital failing to send to a physician being reviewed a copy of an earlier JRC decision regarding the same physician (*Rhee, supra,* 201 Cal.App.3d at p. 497 ["there is no question that the hospital violated its own bylaws"]); and

- A hospital's executive committee suspending a physician *prior* to meeting with him or holding an informal hearing (*Tiholiz, supra,* 151 Cal.App.3d at p. 1203 [the physician "had been given the opportunity to present whatever explanation he had concerning the [incident that triggered the discipline], prior to

any disciplinary action" and "minimal standards of fair hearing procedure were subsequently met"]).

Conversely, courts will sometimes overturn peer review results on the ground the proceedings were unfair, even though no bylaw was violated. (E.g., *Rosner v. Eden Township Hospital Dist.* (1962) 58 Cal.2d 592, 598; *Lasko v. Valley Presbyterian Hospital* (1986) 180 Cal.App.3d 519, 529-530 (*Lasko*); *Hackethal v. California Medical Assn.* (1982) 138 Cal.App.3d 435, 443-444 (*Hackethal*); *Applebaum v. Board of Directors* (1980) 104 Cal.App.3d 648, 659-660 (*Applebaum*).)

Thus, the critical issue is whether the affected physician's fair procedure rights were violated, not whether there was some technical violation of a bylaw. This is consistent with California's constitutional and statutory harmless error provisions for court judgments. (See Cal. Const., art. VI. § 13; Code Civ. Proc., § 475.) Indeed, this court has found to be harmless some errors in court proceedings that are directly analogous to the bylaw violation here.

In *People v. Freeman* (2010) 47 Cal.4th 993, 996-998, 1006 (*Freeman*), this court held that a judge's failure to follow judicial disqualification statutes was harmless because there was no due process violation. The judge there recused himself from a bail proceeding based on a report the defendant had been stalking a judicial colleague, but later accepted the trial assignment after the stalking rumors were determined to be unfounded.

Similarly, in *Buckley v. Chadwick* (1955) 45 Cal.2d 183, this court affirmed a judgment even though the trial court erred in the jury selection process by not allowing the appellant to use all of his peremptory challenges. This court held the error was harmless

because "the appellant 'has made no affirmative showing, and does not offer to show, that any of the . . . jurors who were actually sworn and served in the trial of the cause were biased, prejudiced, or in any way unfit to serve as trial jurors; nor does it appear that by reason of the manner in which the jury was selected the . . . [appellant] did not have a fair and impartial trial.' " (*Id.* at p. 203.) The court concluded, "Under such circumstances, and although the method by which the jury was selected was erroneous and cannot be approved by this court, the error nevertheless does not appear on the record before us . . . to have resulted in a miscarriage of justice, and hence furnishes no ground for reversal of the judgment." (*Ibid.*)

It follows that, if the peer review proceedings were fair, Dr. El-Attar suffered no prejudice from any bylaw deviation.

D. No bylaw violation deprived Dr. El-Attar of a fair procedure.

1. Fair procedure is satisfied by *any* procedure that affords a fair opportunity for an applicant to present his position.

For more than a century this court has recognized a common law right to "fair procedure" review of membership decisions by private organizations and associations that serve as gatekeepers to certain professions or otherwise affect their members' important economic interests. (E.g., *Otto v. Tailors' P. & B. Union* (1888) 75 Cal. 308, 314-315; see *Pinsker v. Pacific Coast Society of*

Orthodontists (1974) 12 Cal.3d 541, 550-551, fns. 7 & 8 (*Pinsker*); *Ezekial v. Winkley* (1977) 20 Cal.3d 267, 277 (*Ezekial*).) Thus, fair procedure requirements apply to medical staff peer review proceedings at a hospital. (See *Anton, supra,* 19 Cal.3d at p. 815; *Ascherman v. San Francisco Medical Society* (1974) 39 Cal.App.3d 623, 641-650 (*Ascherman*); *Oskooi v. Fountain Valley Regional Hospital* (1996) 42 Cal.App.4th 233, 246 (*Oskooi*) (conc. opn. of Sills, J., citing *Ascherman v. Saint Francis Memorial Hosp.* (1975) 45 Cal.App.3d 507, 511).)

This "common law requirement of a fair procedure does not compel formal proceedings with all the embellishments of a court trial [citation], nor adherence to a single mode of process." (*Pinsker, supra,* 12 Cal.3d at p. 555.) Rather, fair procedure "may be satisfied by any one of a variety of procedures which afford a fair opportunity for an applicant [or member] to present his position." (*Ibid.*; see *Ezekial, supra,* 20 Cal.3d at p. 278 [fair procedure requires only "rudimentary procedural and substantive fairness"]; *Anton, supra,*19 Cal.3d at p. 829; *Cipriotti v. Board of Directors* (1983) 147 Cal.App.3d 144, 155-156.)

Fair procedure does not mandate any "fixed format." (*Tiholiz, supra,* 151 Cal.App.3d at p. 1202.) So long as some hearing is provided, a hospital is not "hampered by formalities" since "[t]he concept of 'fair procedure' does not require rigid adherence to any particular procedure, to bylaws or timetables." (*Bollengier, supra,* 222 Cal.App.3d at pp. 1128-1129.) Indeed, the fair procedure opportunity to respond may be satisfied by nothing more than the chance to make a written defense submission. (See *Kurz v.*

Federation of Petanque U.S.A. (2006) 146 Cal.App.4th 136, 150; 2 Am.Jur.2d (2004) Administrative Law, § 306, pp. 269-270.)

In essence, the fair procedure requirement is satisfied if the organization provides (1) notification regarding the reasons for the organization's membership decision and (2) a fair opportunity for the member (or prospective member) to defend against that decision. (*Pinsker, supra,* 12 Cal.3d at p. 555; *Ezekial, supra,* 20 Cal.3d at p. 278; *Anton, supra,* 19 Cal.3d at p. 815, fn. 12; see *Taboada v. Sociedad Espanola etc.* (1923) 191 Cal. 187, 191; *Oskooi, supra,* 42 Cal.App.4th at p. 246 (conc. opn. of Sills, J.); see also 7 Witkin, Summary of Cal. Law (10th ed. 2005) Constitutional Law, § 657, p. 1062 ["A proceeding before an administrative officer or board is adequate if the basic requirements of notice and opportunity for hearing are met"]; 9 Witkin, Cal. Procedure (5th ed. 2008) Administrative Proceedings, §3, p. 1099.)

2. Dr. El-Attar did not show any bias by the JRC members or hearing officer.

Only a fair opportunity to defend is at issue here, specifically whether the administrative decision was made by an impartial adjudicator. (See *Morongo Band of Mission Indians v. State Water Resources Control Bd.* (2009) 45 Cal.4th 731, 737 (*Morongo Band*) ["the constitutional guarantee of due process of law requires a fair tribunal"]; *Rhee, supra,* 201 Cal.App.3d at p. 490 ["Due process of course includes the right to be heard before an impartial tribunal"];

Lasko, supra, 180 Cal.App.3d at p. 529; *Hackethal, supra,* 138 Cal.App.3d at p. 442.)

"[T]he burden of establishing a[n] [adjudicator's] disqualifying interest rests on the party making the assertion." (*Schweiker v. McClure* (1982) 456 U.S. 188, 196 [102 S.Ct. 1665, 72 L.Ed.2d 1].) Dr. El-Attar did not satisfy that burden. He claimed only that it was inherently unfair for the board's AHC to select the hearing officer and JRC panel members; he never argued or established that either the hearing officer or the JRC panel was actually biased in favor of the AHC. (See AOB 12-15.) That is not enough.

"A fair tribunal is one in which the judge or other decision maker is free of bias for or against a party." (*Morongo Band, supra,* 45 Cal.4th at p. 737.) The "standard of impartiality required at an administrative hearing is *less exacting* than that required in a judicial proceeding." (*Gai v. City of Selma* (1998) 68 Cal.App.4th 213, 219 (*Gai*), emphasis added; see 9 Witkin, Cal. Procedure, *supra,* Administrative Proceedings, §3, p. 1101; 2 Cal.Jur.3d (2007) Administrative Law, § 498.) And the judicial proceeding standard is not an exacting one to begin with.

This court recently explained that "while a showing of actual bias is not required for judicial disqualification under the due process clause, *neither is the mere appearance of bias sufficient.* Instead, based on an objective assessment of the circumstances in the particular case, 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." ' " [19] (*Freeman, supra,* 47 Cal.4th at p, 996, emphasis added, quoting *Caperton, supra,* 129 S.Ct. at p. 2259; accord, *Morongo Band, supra,* 45 Cal.4th at p. 737; *Withrow v. Larkin* (1975) 421 U.S. 35, 47 [95 S.Ct. 1456, 43 L.Ed.2d 712] (*Withrow*).)

As in the context of a due process challenge, a party'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.*" (*Morongo Band, supra,* 45 Cal.4th at p. 737, emphasis added.) Thus, "[i]n the absence of financial or other personal interest, and when rules mandating an agency's internal separation of functions and prohibiting ex parte communications are observed, the presumption of impartiality can be overcome only by specific

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[19] This unacceptable risk of a biased adjudicator is an exacting standard that is difficult to meet. "[O]nly the most 'extreme facts' would justify judicial disqualification based on the due process clause." (*Freeman, supra,* 47 Cal.4th at p. 996, citing and quoting *Caperton v. A.T. Massey Coal Co., Inc.* (2009) 556 U.S. 868 [129 S.Ct. 2252, 2265, 2266, 173 L.Ed.2d 1208] (*Caperton*); see *Freeman,* at pp. 1005 ["[T]he due process clause should not be routinely invoked as a ground for judicial disqualification. Rather, it is the exceptional case presenting extreme facts where a due process violation will be found. [Citation.] Less extreme cases—including those that involve the mere appearance, but not the probability, of bias—should be resolved under more expansive disqualification statutes and codes of judicial conduct"], 1006 [a due process violation "is extraordinary; the clause operates only as a 'fail-safe' and only in the context of extreme facts"].)

evidence demonstrating actual bias or a particular combination of circumstances creating an unacceptable risk of bias." (*Id.* at p. 741; accord, *Andrews*, at p. 792 [a "party must allege concrete facts that demonstrate the challenged judicial officer is contaminated with bias or prejudice [because] '[b]ias and prejudice are never implied and must be established by clear averments' "]; *Gai, supra,* 68 Cal.App.4th at pp. 219-220.) Thus, a physician's mere speculation that a JRC might have been biased is insufficient to prove that his fair procedure rights were violated. [20] (*Rhee, supra,* 201 Cal.App.3d at pp. 491-494; *Gill v. Mercy Hospital* (1988) 199 Cal.App.3d 889, 911.)

3. The JRC selection process was not inherently unfair.

The Court of Appeal found inherently unfair the JRC-selection procedure in the present case "that enable[d] the Governing Board to tip the scales in its favor." (*El-Attar, supra,*

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[20] In the context of medical staff peer review, fair procedure principles are violated if the affected physician receives no notice of the charges against him or no hearing whatsoever (*Ascherman, supra,* 39 Cal.App.3d at p. 651; *Hackethal v. Loma Linda Community Hosp. Corp.* (1979) 91 Cal.App.3d 59, 66-67 [no hearing on the merits of the charges]), if the same person acts as the accuser, investigator, and adjudicator (*Applebaum, supra,* 104 Cal.App.3d at pp. 659-660), or where the physician's ability to conduct voir dire is unduly constrained (*Hackethal, supra,* 138 Cal.App.3d at pp. 443-444) or non-existent (*Lasko, supra,* 180 Cal.App.3d at p. 529). None of these circumstances are present here.

typed opn., 18.) But fair procedure principles are not infringed where the administrative body prosecuting the action also selects the adjudicator. In fact, that is the procedure followed in most peer review proceedings.

In the typical peer review proceeding, the adverse decision being challenged by a physician is one made by the medical staff's MEC, not by the governing board. And it is the MEC that appoints the JRC physician members and hearing officer, and then advocates before the JRC in favor of its decision. (See 11 AR 2347-2349 [medical staff bylaws]; 21 AR 4470-4471; RT D-86 to D-87.) That's not an unfair procedure; indeed, it's the same procedure contemplated by both the CMA and CHA model medical staff bylaws. [21] (See *El-Attar, supra,* typed opn. 14 [discussing CMA Model Medical Staff bylaws]; Motion for Judicial Notice (MJN),

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[21] "Furthermore, no generally applicable principle of constitutional law permits the affected person in such a case to select the adjudicator." (*Haas v. County of San Bernardino* (2002) 27 Cal.4th 1017, 1031; accord, *McIntyre v. Santa Barbara County Employees' Retirement System* (2001) 91 Cal.App.4th 730, 735; *Binkley v. City of Long Beach* (1993) 16 Cal.App.4th 1795, 1809-1810 (*Binkley*); 7 Witkin, Summary of Cal. Law, *supra,* Constitutional Law, § 669, p. 1087.) For this reason, a physician has no fair procedure right to participate in the selection of the hearing officer and panel members of the judicial review committee conducting medical staff peer review. (*Kaiser Foundation Hospitals v. Superior Court* (2005) 128 Cal.App.4th 85, 109-110 ["it is evident that the Legislature intended to permit the unilateral selection of panel members and a hearing officer by the peer review body"]; *Smith v. Vallejo General Hospital* (1985) 170 Cal.App.3d 450, 459 [dismissing physician's "eristic claim" that it was "patently unfair for respondents to select 'both judge and jury' "].)

Declaration of Anna M. Suda, exhibit A, ¶¶ 14.6-4, 14.6-5 [CHA Model Medical Staff Bylaws 2011].) [22]

These peer review selection procedures are consistent with general fair procedure principles. As this court explained, "[b]y itself, the combination of investigative, prosecutorial, and adjudicative functions within a single administrative agency does not create an unacceptable risk of bias and thus does not violate the due process rights of individuals who are subjected to agency prosecutions." (*Morongo Band, supra,* 45 Cal.4th at p. 737; accord, *Adams v. Commission on Judicial Performance* (1995) 10 Cal.4th 866, 880-883 [due process is not violated merely because the same commission is responsible for both investigating and adjudicating a claim of judicial misconduct]; *Kloepfer v. Commission on Judicial Performance* (1989) 49 Cal.3d 826, 833-835; *Griggs v. Board of Trustees* (1964) 61 Cal.2d 93, 98; see also *Southern Cal., supra,* 108 Cal.App.4th at pp. 548-549 [rejecting claim that a contractor did not receive a fair administrative "hearing before a reasonably impartial, noninvolved tribunal because [the] City was both prosecutor and adjudicator, and at the same time, was a defendant in [the contractor's] lawsuit for damages"]; *Binkley, supra,* 16 Cal.App.4th at pp. 1809-1810 [due process is not violated where the hearing officer is selected, paid, and advised by the city]; 7 Witkin, Summary of Cal. Law (10th ed. 2005 & 2011 Supp.) Constitutional Law, § 667, pp. 1082-1084; 2 Am.Jur.2d, *supra,* Administrative Law, § 315, pp. 276-277.)

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[22] HPMC has concurrently filed a motion asking this court to take judicial notice of the CHA Model Medical Staff Bylaws 2011.

To the contrary, it is "very typical for the members of administrative agencies to receive the results of investigations, to approve the filing of charges or formal complaints instituting enforcement proceedings, and then to participate in the ensuing hearings. This mode of procedure . . . does not violate due process of law." (*Withrow, supra,* 421 U.S. at p. 56 [the combination of investigatory and adjudicatory functions of a medical licensing board does not present a constitutionally unacceptable risk of bias].) Indeed, even where the agency attorney acting as the prosecutor concurrently advises the agency adjudicator in unrelated matters, this court viewed any tendency for the adjudicator to favor the prosecution to be "too slight and speculative to achieve constitutional significance." (*Morongo Band, supra,* 45 Cal.4th at p. 737.)

More significant bylaw deviations than those at issue here have been held to be harmless. For example, in *Davis v. Int. Alliance etc. Employees* (1943) 60 Cal.App.2d 713, a trade union's constitution required disciplinary charges to be filed with the *local* union secretary, read at a regular meeting of the *local* union, and referred by the presiding officer of the *local* union to a trial committee or an executive board. (*Id.* at p. 716; see *Dougherty, supra,* 165 Cal.App.4th at p. 340.) Instead, expulsion charges were filed with an *international* union representative and the *international* representative appointed the trial committee. (*Davis,* at p. 716.) The Court of Appeal rejected the member's appeal, holding that fair procedure principles are not offended even when an organization deviates from its bylaws by shifting an adjudication

to "a less favorable forum [from the perspective of the persons being expelled], thereby depriving them of their home court advantage . . . ." (*Dougherty,* at p. 340.)

When assessing fair procedure issues, courts also look for additional guidance to what the Legislature has determined to be a fair procedure. (*Nightlife Partners, Ltd. v. City of Beverly Hills* (2003) 108 Cal.App.4th 81, 91 ["to the extent citizens generally are entitled to due process in the form of a fair trial before a fair tribunal, the provisions of the [Administrative Procedure Act] are helpful as indicating what the Legislature believes are the elements of a fair and carefully thought out system of procedure for use in administrative hearings"]; *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.* (2002) 99 Cal.App.4th 880, 884-885 & fn. 5.)

It is therefore significant that many California statutes require or allow the director of an agency to appoint the hearing officer or administrative law judge who will preside over adjudicatory proceedings being prosecuted by that agency. (E.g., Bus. & Prof. Code, § 24210, subd. (a); Gov. Code, § 27720; Lab. Code, § 1742, subd. (b); Unemp. Ins. Code, § 404; see *CMPB Friends, Inc. v. Alcoholic Beverage Control Appeals Bd.* (2002) 100 Cal.App.4th 1250, 1258 ["The Legislature has determined that the Department may properly delegate the power to hear and decide licensing issues to an administrative law judge appointed by the Department's director"].) Additionally, the Legislature has enacted fair procedure rules for both government agencies and unincorporated professional associations that do *not* prohibit an

agency or association from selecting the adjudicators for disciplinary and membership proceedings where the agency or association is prosecuting the charges being adjudicated. (See Gov. Code, § 11425.30; Corp. Code, § 18320, subd (b); see also 9 Witkin, Cal. Procedure, *supra*, Administrative Proceedings, §70, p. 1193-1194.)

Moreover, for almost three decades, California's law *required* the governing board of public hospitals to select the hearing officer who would preside over peer review proceedings. (See former Health & Saf. Code, § 32153 [enacted by Stats. 1965, Ch. 731, § 1; repealed by Stats. 1992, Ch. 1358 (Senate Bill 1852), § 8].) Although that selection procedure is no longer *mandated*, public hospitals are now governed by the peer review statutes in the Business and Professions Code, which as explained above, allow the medical staff to delegate selection responsibilities to the hospital board. (See Health & Saf. Code, § 32150; see *ante,* pp. 29-30.)

The federal Health Care Quality Improvement Act of 1986 (HCQIA) also is instructive on the issue of fair procedure. HCQIA extends federal immunity to participants in medical staff peer review proceedings that meet the federal definition of a fair procedure. (42 U.S.C.A., § 11111.) Significantly, those federal fair procedure provisions expressly allow the hospital to appoint both the hearing officer and panel members of the JRC. (42 U.S.C.A., §§ 11112(b)(3)(A)(ii) & (iii); 11151(4).)

Finally, it is also significant that, before Dr. El-Attar's JRC hearing had even finished, the Hospital's medical staff bylaws were revised to expressly allow the JRC selection procedure followed in

this case (18 AR 3876 [July 2004 HPMC Medical Staff Bylaw, ¶ 8.3-6], 3877 [July 2004 HPMC Medical Staff Bylaw, ¶ 8.3-9]) and that those revised bylaws are consistent with the current California Hospital Association (CHA) Model Medical Staff Bylaws. (See MJN, Declaration of Anna M. Suda, exhibit A, ¶¶ 14.1-5, 14.6-1, 14.6-5(a).) Thus, 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. To overturn those peer review proceedings now without a showing that the appointment procedure actually prejudiced Dr. El-Attar makes no sense.

Dr. El-Attar's fair procedure rights were not infringed merely because the Hospital governing board, rather than the medical staff's MEC, selected the hearing officer and panel members for the JRC. This is especially true where, as here, both the hearing officer and JRC panel members were subject to extensive voir dire examination. (See *Yaqub v. Salinas Valley Memorial Healthcare System* (2004) 122 Cal.App.4th 474, 488 [holding that fair procedure was not impinged by overlapping membership on sequential JRC panels evaluating adverse peer review recommendations regarding the same physician, since the JRC panel members "were subjected to voir dire [and] all were confident in their ability to decide the current matter fairly and independently of the previous decision"]; see *ante*, p. 15.) Indeed, a decision that fair procedure principles do *not* permit a hospital's governing board to appoint the hearing officer and JRC panel members would disrupt well-settled

principles of administrative law and call into question the legitimacy of numerous statutes and regulations governing various types of administrative proceedings.

In sum, neither evidence of actual bias, nor circumstances suggesting a probability of actual bias, exist in this case. To the contrary, the hearing officer and physicians on the JRC were fair and impartial. (See *ante*, pp. 15-19.)

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

Even if there were a material deviation from the governing peer review statutes, regulations, bylaws, or fair procedure principles, that deviation should be excused under the common law rule of necessity. The common law rule of necessity allows an officer or administrative body, who would otherwise be disqualified, to proceed whenever a "failure to act would necessarily result in a failure of justice." (*Mosk v. Superior Court* (1979) 25 Cal.3d 474, 482, fn. 5; see also *Olson v. Cory* (1980) 27 Cal.3d 532, 537; *Caminetti v. Pac. Mutual L. Ins. Co.* (1943) 22 Cal.2d 344, 365-366; *Southern Cal., supra,* 108 Cal.App.4th at p. 550; 7 Witkin, Summary of Cal. Law (10th ed. 2005 & 2011 Supp.) Constitutional Law, § 670, p. 1088; 9 Witkin, Cal. Procedure (5th ed. 2008 & 2011 Supp.) Administrative Proceedings, § 110, pp. 1236-1237; cf. Gov. Code, § 11512, subd. (c) ["No agency member shall withdraw voluntarily or be subject to disqualification if his or her

disqualification would prevent the existence of a quorum qualified to act in the particular case, except that a substitute qualified to act may be appointed by the appointing authority"].)

Two Court of Appeal opinions have applied the rule of necessity to validate action by a hospital governing board with respect to medical staff peer review proceedings. [23] (*Hongsathavij, supra,* 62 Cal.App.4th at pp. 1142-1143; *Weinberg v. Cedars-Sinai Medical Center* (2004) 119 Cal.App.4th 1098, 1112-1113 (*Weinberg*).)

Hongsathavij explained that, under *Elam v. College Park Hospital* (1982) 132 Cal.App.3d 332, 346, a "hospital itself may be responsible for negligently failing to ensure the competency of its medical staff and the adequacy of medical care rendered to patients at its facility." (*Hongsathavij, supra,* 62 Cal.App.4th at p. 1143; see *Ellison, supra,* 183 Cal.App.4th at pp. 1496-1497; *O'Byrne v. Santa Monica-UCLA Medical Center* (2001) 94 Cal.App.4th 797, 811.) For this reason, a "hospital has a duty to ensure the competence of the medical staff by appropriately overseeing the peer review process." (*Hongsathavij,* at p. 1143, citing *Elam,* at pp. 338, 341-342, 347.) Because the hospital's "assets are on the line" the "hospital's governing body must remain empowered to render a final medical practice decision which could affect those assets." (*Hongsathavij*, at p. 1143.) Accordingly, a *"hospital's governing body must be*

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[23] The Legislature has enacted a peer review statute that is consistent with the common law rule of necessity. Business and Professions Code section 809.05, subdivision (c) 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."

permitted to align its authority with its responsibility and to render the final decision in the hospital administrative context." (*Ibid.*, emphasis added; accord, *Weinberg, supra,* 119 Cal.App.4th at pp. 1112-1113.)

Also, until the Court of Appeal decision in this case, a hospital's governing board's authority to take necessary action in connection with the peer review process was not limited by the terms of the medical staff's bylaws. In *Hongsathavij*, the court noted that "[f]or whatever reason, the medical staff bylaws [there] provide no specific right [for the Hospital] to appeal [the results of] actions initiated by the governing body. Nonetheless, we find the review sought by the Medical Center in the present case did not constitute a material deviation from the bylaws." (*Hongsathavij, supra,* 62 Cal.App.4th at p. 1143.) The court explained:

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

(*Id.* at pp. 1143-1144, emphasis added; see also *ante*, pp. 34-36.)

The physician seeking to overturn an adverse peer review decision in *Hongsathavij* argued that, if the Hospital's "governing

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

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

Here, the AHC appointed the JRC hearing officer and physicians only after the MEC failed to do so. This action was necessary to align the governing board's authority with its ultimate responsibility for ensuring patient safety. (See 4 CT 843; see *ante,* pp. 25-28.) Accordingly, any deviation from peer review statutes and bylaws would be excused by the rule of necessity. (See *Hongsathavij, supra,* 62 Cal.App.4th at pp. 1142-1143; *Weinberg, supra,* 119 Cal.App.4th at pp. 1112-1113.)

The Court of Appeal here held there was insufficient evidence of "an active refusal on the part of the MEC to fulfill its duties under the Bylaws" to overcome a "presum[ption] that the MEC

would faithfully carry out its obligations under the Bylaws." (*El-Attar, surpra,* typed opn., 18, fn. 10.) But the Court of Appeal improperly disregarded evidence that the MEC *did* refuse to fulfill its obligation under the bylaws to appoint the hearing officer and JRC panel members. (See 9 AR 1890-1891; see *ante*, pp. 13-14.)

Under the proper standard of review, appellate courts 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" ' "]; accord, *LaGrone, supra,* 202 Cal.App.4th at p. 940.) The Court of Appeal erred by failing to do so.

CONCLUSION

For the above reasons, 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.

February 24, 2012

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

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Dated: February 24, 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 February 24, 2012, I served true copies of the following document(s) described as **OPENING BRIEF ON THE MERITS** on the interested parties in this action as follows:

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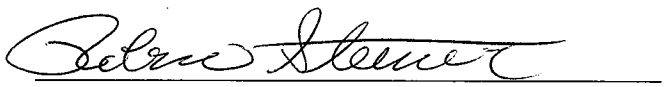

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