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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

B. D. MAHESHWARI,

Plaintiff and Appellant,

v.

GOVERNING BOARD OF SHARP
MEMORIAL HOSPITAL,

Defendant and Respondent.

D039509

(Super. Ct. No. GIC771148)

APPEAL from a judgment of the Superior Court of San Diego County, John S. Meyer, Judge. Affirmed.

By this appeal, the plaintiff B. D. Maheshwari, M.D., a cardiologist, seeks to overturn the court's decision upholding Sharp Memorial Hospital's (Sharp's) decision to deny his application for staff privileges. When Dr. Maheshwari applied for staff privileges, the medical executive committee (MEC) for Sharp denied his application on the basis that (1) it had concerns about the quality of Dr. Maheshwari's care at another

hospital, Riverside Community Hospital (RCH), where he had previously worked; and (2) he allegedly did not provide sufficient information to Sharp with his application for Sharp to perform a complete evaluation of his application. Dr. Maheshwari appealed that decision to Sharp's judicial review committee (JRC), and when it denied his appeal, he appealed to the defendant Governing Board of Sharp Memorial Hospital (the Board). The Board denied Dr. Maheshwari's appeal.

Dr. Maheshwari thereafter filed a petition for writ of administrative mandamus (petition) under Code of Civil Procedure section 1094.5,¹ asserting that Sharp's application process violated his due process rights, was unfair, and that Sharp's actions were arbitrary and capricious. He also contended that there was no substantial evidence to support Sharp's decision, and that Sharp erred by excluding certain evidence Dr. Maheshwari sought to submit at the hearing before the JRC (JRC Hearing).

The court ruled in favor of Sharp on Dr. Maheshwari's petition. First, the court found that substantial evidence supported Sharp's decision. The court also found that Sharp provided Dr. Maheshwari with a fair procedure in conjunction with his application. The court found that there was no substantial evidence to support Dr. Maheshwari's assertion that Sharp acted arbitrarily and capriciously during the process. The court also found that Sharp's decision to exclude certain evidence was supported by the record.

¹ All further statutory references are to the Code of Civil Procedure unless otherwise specified.

Finally, the court found that there was no merit to Dr. Maheshwari's claim of a violation of his due process rights.

On this appeal, Dr. Maheshwari first asserts his fair procedure rights were violated because Sharp's actions were "arbitrary and capricious." Specifically, Dr. Maheshwari asserts that Sharp (1) decided to "get rid of" his application before it received any records concerning the RCH cases; (2) refused to allow him to meet with Sharp committees; (3) required Dr. Maheshwari to submit patient names and other confidential information in connection with his application; (4) conducted an investigation searching for medical malpractice actions filed against him and his wife; and (5) breached its promise to obtain patient information from other hospitals before making a decision on his application. Dr. Maheshwari also contends that the process was unfair because Sharp allowed its chief of medical staff, who was biased against Dr. Maheshwari's application, to be involved in the decision-making process.

Dr. Maheshwari asserts that his equal protection rights were violated because Sharp's bylaws do not afford applicants for staff privileges the same right to meet with committee members as members of the medical staff. Dr. Maheshwari asserts that the JRC hearing officer erred by excluding from consideration on his appeal certain medical records, follow-up information and declarations from former patients. Finally, Dr. Maheshwari contends that Sharp's expert witness who testified before the JRC applied the wrong standard of care in evaluating Dr. Maheshwari's care of patients.

We conclude that (1) Sharp did not violate Dr. Maheshwari's fair hearing rights; (2) there was no error in the exclusion of evidence he presented for the first time at the

JRC Hearing; and (3) Sharp's expert's testimony does not require a reversal in this matter.² Accordingly, we affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

I. *Factual Background*

A. *Dr. Maheshwari's Qualifications*

Dr. Maheshwari earned his medical degree at a medical school in India and then worked as a doctor in Great Britain for five years. He came to the United States in 1971. Dr. Maheshwari completed a fellowship in cardiology, including cardiac catheterization, at Wayne State University in Detroit, Michigan. He has been board certified in internal medicine since approximately 1973 and board certified in cardiology since 1975. Dr. Maheshwari is also an attorney.

Dr. Maheshwari has practiced medicine in Corona, California, since approximately 1975. He had full invasive cardiology privileges, including balloon angioplasty and coronary stenting, at RCH, Anaheim Memorial Hospital (AMH), and Western Medical Center, Anaheim (WMC). He also had provisional invasive cardiology privileges at Scripps Memorial Hospital in San Diego.

B. *Dr. Maheshwari's Application for Staff Privileges at Sharp*

In November 1998, Dr. Maheshwari submitted an application for staff privileges to Sharp. In that application Dr. Maheshwari sought privileges to perform general

² As we shall discuss, *post*, based upon the reasons for our holding that there was no violation of Dr. Maheshwari's fair hearing rights, we need not address his claim that his equal protection rights were violated.

cardiology, diagnostic catherization and interventional cardiology services. As part of the application, Dr. Maheshwari agreed that he, as an applicant, had the burden of producing to Sharp adequate information for it to evaluate his competence and qualifications. The bylaws of the attending medical staff for Sharp (Staff Bylaws), paragraph 5.2 provides in part:

"[T]he Applicant shall have the burden of producing information for an adequate evaluation of the applicant's qualifications and suitability for the clinical privileges and staff category requested, of resolving any reasonable doubts about these matters, and of satisfying requests for information. The applicant's failure to sustain this burden shall be grounds for denial of the application."

Dr. Maheshwari also agreed to provide patient records for use in the evaluation process if Sharp deemed them relevant. Dr. Maheshwari was granted temporary privileges pending a decision on his application.

Shortly after the review process began, Sharp discovered that Dr. Maheshwari was under review by RCH because of quality-of-care concerns in seven cases Dr. Maheshwari worked on there. In a memorandum Barbara Grondona, Sharp's medical staff office manager, told Sharp's chief of staff, Dr. David Ostrander, of the review by RCH. The memorandum also spoke of the status of Dr. Maheshwari's temporary privileges pending investigation of the RCH review:

"The issue is that, if we terminate these privileges, it's reportable to both the Medical Board and Data Bank and this doctor would be entitled to his hearing rights, under the Bylaws. I've confirmed this with legal counsel. They had a good alternative: [¶] They suggest that you speak with Dr. Maheshwari and be candid with him. Tell him that, in conjunction with the credentialing process, we have learned that he is currently under quality review at another hospital. Let him know that, in light of this, it is incumbent upon the Medical

Staff to investigate and that, pending conclusion of the investigation, *it is our recommendation that he withdraw his temporary privileges.* Let him know that we will proceed with processing his application and that any information that he can provide, regarding the quality review, will be helpful to our medical staff in assessing his application. Let him know that if he does not agree to this, we will have to terminate his temporary privileges, we will have to report him." (Italics added.)

Dr. Ostrander followed this up with a telephone conversation with the chief of staff at RCH, Dr. C. Bevan Stuart. Dr. Stuart outlined some of the concerns RCH had with Dr. Maheshwari's treatment of patients. Based upon this conversation, Dr. Ostrander decided that Sharp should investigate the RCH review.

Dr. Ostrander thereafter informed Dr. Maheshwari that Sharp was investigating the RCH review and advised him that they needed further information that they could not obtain from RCH:

"We were not able to learn any details regarding the specific reasons for this review, and our routine query of your status with that hospital has not been answered, despite several requests. [¶] . . . [¶] In light of the absence of specific details involving this matter and our inability to get the required written response from [RCH], *your application is considered incomplete.* If there is *any* further information you can provide, as to your current situation at that hospital, please do so." (Italics added.)

Dr. Maheshwari was also advised that as he had not requested renewal of his temporary privileges after 90 days, they had expired and would not be renewed.

C. Decision by Hoagland Committee

Dr. Ostrander advised Dr. Maheshwari that a panel of cardiologists would be appointed to review the quality of care issue. This committee was known as the "Hoagland Committee" because Dr. Paul Hoagland chaired it.

Dr. Maheshwari replied to Dr. Ostrander's letter as follows:

"I understand that there has been an understanding between you and Maurice Buchbinder that *I will supply you with details of these cases*, and that you will appoint a panel of cardiologists from [Sharp] to review that cases with respect to the quality. I am sending you copies of the medical records obtained from [RCH] on these patients, the observations of the members of the Cardiology Section of [RCH] on the individual cases, and my responses. . . .

".....

"If you or your committee have any questions with respect to the [RCH] cases, I will be very happy to visit and answer the questions." (Italics added.)

However, only portions of the medical records were submitted at that time. Dr. Ostrander acknowledged receipt of the documents Dr. Maheshwari provided and informed him that Sharp would "proceed with the review of these cases and the processing of your application. Additionally, *if you are able to provide any additional information* regarding the status of the peer review proceedings at [RCH], it will be most helpful. Should additional information be needed, we will contact you." (Italics added.)

Dr. Maheshwari then sent a letter with information concerning the review at RCH. Dr. Maheshwari also stated in that letter that he was "very willing to come and talk to you and/or any other cardiologist(s) who have an interest in exploring further these matters."

Dr. Ostrander informed Dr. Maheshwari that the Hoagland Committee would need the radiological studies or "cine films," which were films taken of the actual procedures performed by Dr. Maheshwari, for each patient in the suspect cases. Dr. Ostrander informed Dr. Maheshwari that his application would "be considered incomplete until we receive this information and any other information which might be deemed necessary."

Although the chief of staff at RCH initially refused to release the cine films, after threat of a lawsuit by Dr. Maheshwari, RCH sent the cine films to Sharp.

After the cine films were received by Sharp, Dr. Ostrander informed Dr. Maheshwari that "[t]he information will now be reviewed and you will be informed of the outcome of this review process." The Hoagland Committee met and reviewed the cine films and concluded that Dr. Maheshwari's treatment was below the standard of care in six of the seven cases.

Following receipt of the Hoagland Committee's report, Dr. Ostrander notified Dr. Maheshwari that Sharp would seek an independent review of the medical records and the cine films through the California Medical Association (CMA). This was proposed, according to Dr. Ostrander, as it was "most fair" that the issue be reviewed by someone not known to any of the parties involved. Dr. Maheshwari responded that he did not "see any need for independent CMA review of the medical records and cine films since the cardiologists at [RCH], as well as[] at [Sharp,] have already reviewed them. Any further review would be redundant."

D. Denial of Application by MEC

Thereafter, Dr. Maheshwari's application went to the MEC for a decision. The MEC, through Dr. Ostrander, advised Dr. Maheshwari that it had reviewed his request for privileges, had concerns about the quality of care rendered in the RCH cases, and wanted him to provide patient information for his cardiology cases for the past six months at all facilities where he currently held privileges. Dr. Maheshwari responded that he would not provide the information due to privacy concerns as to his patients and that, based

upon the information he had already provided, he had established his qualifications for privileges.

Dr. Ostrander responded to Dr. Maheshwari by clarifying that Sharp was only seeking a sampling of these cases, that the privacy concerns could be addressed, and by citing state law that allows physicians to disclose medical information to committees at hospitals that are reviewing the competence or qualifications of doctors. Dr. Ostrander reminded Dr. Maheshwari that it was his burden to provide information to establish his competence and qualifications and stated that if he refused to provide the requested information his application would be deemed denied. Dr. Maheshwari wrote back, stating that if Sharp needed the patient information, it should request it from the hospitals itself. Dr. Maheshwari also stated that Sharp's delay in rendering a decision on his application had "damaged" him.

Because of Dr. Maheshwari's refusal to obtain the requested patient records requested by the MEC, the MEC itself contacted RCH and other hospitals to attempt to obtain a sampling of six months of Dr. Maheshwari's cases. After receiving authorization from Maheshwari, Sharp requested samplings from RCH and the Corona Regional Medical Center (CRMC). Dr. Stuart of RCH wrote a letter to Sharp's then-chief of staff, Dr. Kenneth J. Roth, expressing concerns about patient confidentiality and stating that he believed this was information that Dr. Maheshwari himself should provide to Sharp. Dr. Roth also spoke to Dr. Stuart by telephone around this time. Dr. Stuart told Dr. Roth about problems RCH had had with Dr. Maheshwari. Dr. Roth's notes of the conversation with Dr. Stuart reflect that Dr. Stuart stated as to Dr. Maheshwari that "he's the worst

physician on our staff" and that "I regret the day we ever granted him privileges here." Dr. Roth did not relay this information to Dr. Maheshwari. CRMC never responded to the MEC's request for records.

Based upon Dr. Maheshwari's refusal to provide any further information to the MEC, his expressed concern over the time that had passed since his application was submitted, and the lack of cooperation from RCH and CRMC, the MEC decided to proceed with a vote upon Dr. Maheshwari's application without the six-month sampling. In February 2000, Dr. Roth, then-chief of staff for Sharp, informed Dr. Maheshwari that the MEC had voted to recommend denial of the application. The denial was based upon the MEC's concerns about the quality of care in Dr. Maheshwari's coronary interventions and its doubts concerning his overall clinical judgment in cardiology. Dr. Maheshwari was also notified that the denial was based in part upon his failure to meet his burden of producing information that would have allowed the MEC to more fully evaluate his qualifications and suitability for general cardiology privileges.

E. JRC Hearing

In February 2000 Dr. Maheshwari advised Sharp that he was requesting a JRC Hearing, as provided in Sharp's Staff Bylaws, to contest the decision by the MEC. The JRC Hearing was conducted before the JRC, which consisted of physicians from the medical staff at Sharp. The hearing was also presided over by a hearing officer, Steven Landuyt, Esq.

The JRC Hearing took place over five days in April and May 2000. The JRC received and reviewed medical records, the cine films and other supporting documents

from the RCH cases. Dr. Maheshwari testified concerning his management of the RCH cases. He also established that he was never disciplined by RCH concerning those cases and that RCH not only renewed his privileges after he treated those patients, but also granted him additional privileges in interventional cardiology.

The JRC heard testimony from experts retained by both Dr. Maheshwari and Sharp. Dr. Paul Phillips, Sharp's expert, testified that Dr. Maheshwari's treatment in the RCH cases "fell below the standard of care." When asked to define the standard of care, Dr. Phillips stated that it was what a "quorum of physicians" would feel that a "majority of cardiologists" would have done. Dr. Phillips further explained that in Dr. Maheshwari's case "the standard of therapy being administered was below that which I would accept in my laboratories."

Dr. Maheshwari called Dr. Maurice Buchbinder as his expert. Dr. Buchbinder was Sharp's director of interventional cardiology from 1995 to 1999. Dr. Buchbinder had known Dr. Maheshwari professionally for 10 to 12 years and had worked on approximately 20 to 25 interventions with Dr. Maheshwari. Dr. Buchbinder opined that Dr. Maheshwari's "judgment was right on in the median and mean of every individual that I have come across. His synthesis of the cases have [*sic*] been, generally speaking, what I would have thought of. . . . I have not been struck by anything unusual more than standard practice."

Dr. Buchbinder stated that in most cases Dr. Maheshwari's decisions were the same as he would have made. Although in some instances he would have acted differently, Dr. Buchbinder testified that in his opinion Dr. Maheshwari's actions were

reasonable and within the standard of care. Dr. Buchbinder stated that the standard of care was what a reasonable interventional cardiologist would do in the circumstances of a particular case.

At the JRC Hearing Dr. Maheshwari also sought to admit the complete medical records of the six RCH patients, as well as declarations from some of those patients. The hearing officer requested letter briefs on the issue and concluded that the evidence should be excluded as Sharp had requested all information concerning the RCH patients from the beginning. The hearing officer concluded that Dr. Maheshwari understood the importance of those records and could have submitted the entire chart for each of the patients initially, but did not do so. Instead, Dr. Maheshwari requested that his application be reviewed based upon the information he had already provided.

F. The JRC's Decision

The JRC upheld the decision to deny Dr. Maheshwari's application for privileges. In reaching this decision the JRC relied upon the testimony of Dr. Phillips, cine films and the medical records provided by Dr. Maheshwari. Based upon this evidence, the JRC concluded that serious quality-of-care issues existed in the six RCH cases. The JRC also concluded that Dr. Buchbinder's testimony, rather than supporting Dr. Maheshwari, "damned" him "with faint praise." The JRC also was not persuaded by Dr. Maheshwari's own testimony concerning his care in the six RCH cases.

The JRC found that Dr. Maheshwari had the burden of producing information for an adequate evaluation of his qualifications for staff membership and privileges, including the burden of producing satisfactory information to resolve reasonable doubts

concerning his qualifications and suitability for the clinical privileges that he was seeking. The JRC concluded that Sharp received information that raised reasonable doubts concerning Dr. Maheshwari's qualifications for general cardiology and interventional cardiology privileges. The JRC found that Sharp took reasonable steps to resolve the questions raised about Dr. Maheshwari's qualifications. The JRC then concluded that the evidence demonstrated that in six of the seven cases under review by RCH Dr. Maheshwari's treatment fell beneath the standard of care for cardiologists.

The JRC also found that Dr. Maheshwari refused to provide information requested by Sharp that was needed to establish his qualifications and to resolve reasonable doubts that had arisen regarding his qualifications. Finally, the JRC found that Dr. Maheshwari failed at the JRC Hearing to meet his burden of persuading the JRC, by a preponderance of the evidence, of his qualifications of membership and privileges in general cardiology and interventional cardiology.

G. Appeal to Sharp's Board

In September 2000, Dr. Maheshwari appealed the JRC's decision to Sharp's Board. In that appeal Dr. Maheshwari first asserted that Sharp's evaluation of his application was a "sham" and that Sharp had decided to deny his application before it had the necessary information. In the appeal Dr. Maheshwari also contended that he had proved by a preponderance of the evidence that he was qualified to have privileges at Sharp.

Dr. Maheshwari asserted that the evidence demonstrated that his handling of the six RCH cases did not violate the standard of care. Dr. Maheshwari also asserted that the

hearing officer erred in excluding the new evidence he sought to admit at the JRC Hearing.

Dr. Maheshwari contended that Sharp's standards for evaluating applicants for staff privileges were "arbitrary and capricious" and that it acted in an arbitrary and capricious manner in denying his application. Finally, Dr. Maheshwari asserted that the JRC violated Staff Bylaws and his due process rights when it considered different allegations of improper care in the RCH patients from that considered by the Hoagland Committee.

In June 2001, the Board issued its decision affirming the decision of the JRC. In doing so, the Board concluded that the JRC's decision was not arbitrary or capricious and was supported by substantial evidence. The Board also rejected Dr. Maheshwari's claim that the hearing officer improperly excluded evidence and that certain procedural errors resulted in a miscarriage of justice. Specifically, the Board found:

"1. The [JRC's] decision is not arbitrary or capricious and is supported by substantial evidence. The record supports the [JRC's] conclusion that cases reviewed by an ad hoc committee (the Hoagland committee) demonstrated problems with Dr. Maheshwari's care of patients at another facility and it was reasonable to request Dr. Maheshwari to produce additional information (i.e., information sufficient to allow (Sharp) to conduct a review of a random sample of Dr. Maheshwari's cardiology cases over a six month period) to resolve reasonable doubts about his qualifications and suitability for medical staff membership.

"2. The record supports the [JRC] Hearing Officer's decision to exclude certain evidence proffered by Dr. Maheshwari on the ground that it was inadmissible under Medical Staff Bylaws section 83-7(2).

"3. While it appears that the Medical Staff failed to comply with the requirement in the [Sharp] Bylaws, Article X, section 1(d), it also

appears that such provision is not mirrored by any [Sharp] Medical Staff Bylaws provision. It is clear from the record that the Medical Staff sought throughout the proceedings to comply fully with the procedural requirements of the Medical Staff Bylaws. The standard for determining the effect of an error in procedure is set forth in the Medical Staff Bylaws section 8.4-2: 'In no event shall the decision of the [JRC] be set aside or reversed on the grounds of improper admission or rejection of evidence, or for any error in matters of notice or procedure, unless, after an examination of the entire cause, including the evidence, the governing body shall be of the opinion that the error complained of has resulted in a miscarriage of justice.'

"After an examination of the entire cause, the Appellate Panel believes that the error complained of (i.e., the failure of Dr. Maheshwari to appear before an ad hoc investigating committee of his section/clinical department) did not result in a miscarriage of justice. Dr. Maheshwari was afforded the opportunity to present any evidence he wished to the Hoagland committee, and he was afforded and took advantage of the opportunity to appear in person and testify before the [JRC] and to present evidence. In addition, the Appellate Panel notes that the [Sharp] Bylaws section in question is vague and/or confusing about the timing of the right to appear before an 'ad hoc investigating committee.' The [Sharp] Bylaws section appears to require that the opportunity to appear before the 'ad hoc investigating committee' be afforded AFTER the final decision is reached by the [MEC] to not confer an appointment, etc.

"4. In all other aspects other than the apparent discrepancy between the [Sharp] Medical Staff Bylaws and the [Sharp] Bylaws, the reporter's transcript of the [JRC] Hearing reflects that Dr. Maheshwari was afforded a fair procedure in substantial compliance with the Medical Staff Bylaws. . . ."

H. *Petition to Superior Court*

Following the Board's denial of his appeal, Dr. Maheshwari filed his petition with the San Diego County Superior Court. In that petition, Dr. Maheshwari asserted that the Board's decision constituted a prejudicial abuse of discretion because substantial evidence established that Dr. Maheshwari was qualified to receive privileges at Sharp.

Dr. Maheshwari also asserted that his fair procedure and due process rights were violated based upon Sharp's handling of his application. Specifically, Dr. Maheshwari asserted that Sharp (1) decided to get rid of his application before reviewing the RCH cases; (2) failed to give him the opportunity to meet with Sharp's committees; (3) refused to inform him concerning specific concerns about the RCH cases until after it denied his application; (4) demanded that he provide private patient information; (5) hired a law firm to conduct a search for lawsuits involving he and his wife; (6) broke its promise not to decide his application until additional patient information was forthcoming; and (7) failed to inform him of his right to seek reconsideration of the MEC's decision. Dr. Maheshwari also contended that the hearing officer at the JRC Hearing erred by excluding the evidence he attempted to submit at that hearing. Finally, Dr. Maheshwari asserted that the JRC erred by relying on the testimony of Sharp's expert because he did not use the proper standard of care in rendering his opinion.

After reviewing the record of Dr. Maheshwari's application process and hearing arguments of counsel, the court rejected Dr. Maheshwari's claim. The court detailed the evidence in the record and the chronology of the application proceeding and concluded that the decisions of both the JRC and Board were supported by substantial evidence. The court also found that Dr. Maheshwari was "afforded a fair procedure in substantial compliance with the Medical Staff Bylaws in that [he] was afforded the opportunity to question and challenge committee members at the [JRC] Hearing, he was represented by counsel at the hearing, a record of the proceedings was made, he was afforded the ability

to present evidence and cross-examine witnesses, and he was provided with a decision based on a majority vote by the [JRC]."

The court found that Sharp did not use "arbitrary or capricious tactics." Specifically, the court found that the evidence did not support Dr. Maheshwari's claim that Sharp decided to reject his application before it reviewed any medical records. The court found that there was no evidence that Sharp refused to meet with Dr. Maheshwari as there was no request by Dr. Maheshwari to meet with any committees. The court also found that there was no evidence an appearance before the committees would have made a difference or that Sharp's alleged refusal to meet with him resulted in a miscarriage of justice.

The court rejected Dr. Maheshwari's claim that he was treated differently than other applicants because Sharp requested confidential information concerning his patients. The court found that substantial evidence demonstrated that Sharp was only interested in medical records, not personal confidential information concerning his patients. The court also found that it was not unusual that Sharp performed a lawsuit search on Dr. Maheshwari. The court rejected Dr. Maheshwari's claim that Sharp allegedly broke "promises" that they would advise him when they had completed review of certain evidence.

The court also found that the hearing officer at the JRC Hearing properly excluded the evidence submitted by Dr. Maheshwari for the first time at that hearing. The court found that the evidence was requested by Sharp during the application process and there was no showing by Dr. Maheshwari that he could not have produced the records earlier.

The court rejected Dr. Maheshwari's due process and fair procedure claims. Based upon its previous findings, the court concluded there was no merit to Dr. Maheshwari's claims that any "tactics" by Sharp denied him his due process or fair procedure rights. The court found that Dr. Maheshwari was given notice of Sharp's decision, he "was provided with the opportunity to question and challenge committee members at the [JRC] Hearing, he was represented by counsel at the hearing, a record of the proceedings was made, he was afforded the ability to present evidence and cross-examine witnesses, and he was provided with the decision based on a majority vote by the [JRC]."

The court entered judgment in favor of Sharp. This timely appeal follows.

DISCUSSION

On this appeal Dr. Maheshwari, although setting forth facts he contends show there was substantial evidence that he was qualified for staff privileges at Sharp, does not directly challenge the finding by the court that substantial evidence supported Sharp's rejection of his application. Rather, Dr. Maheshwari asserts that the actions by Sharp violated his fair procedure and equal protections rights, the JRC erred in excluding evidence he presented for the first time at the JRC Hearing, and Sharp's expert failed to apply the proper standard of care in evaluating his performance. We reject these assertions.

I. Fair Procedure Claims

Dr. Maheshwari asserts that his right to a fair procedure in the application process was violated because (1) Sharp acted arbitrarily and capriciously in denying his application; (2) Sharp violated its own bylaws in the process; and (3) Dr. Ostrander

should not have been allowed to participate in the process. We address these contentions in order.

A. *Standard of Review*

Section 1094.5, governing petitions for writ of administrative mandamus, provides in part:

"(a) Where the writ is issued for the purpose of inquiring into the validity of any final administrative order or decision made as the result of the proceeding in which by law a hearing is required to be given, evidence is to be taken, and discretion in the determination of facts is vested in the inferior tribunal, corporation, board or officer, the case shall be heard by the court sitting without a jury. . . .

"(b) The inquiry in such a case shall extend to the questions 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 finding are not supported by the evidence.

"(c) Where it is claimed that the findings are not supported by the evidence, in cases in which the court is authorized by law to exercise its independent judgment on the evidence, abuse of discretion is established if the court determines that the findings are not determined by the weight of the evidence. In all other cases, abuse of discretion is established if the court determines that the findings are not supported by substantial evidence in light of the whole record.

"(d) *Notwithstanding subdivision (c), in cases arising from private hospital boards abuse of discretion is established if the court determines that the findings are not supported by substantial evidence in light of the whole record.*" (Italics added.)

Thus, ordinarily, the superior court reviews an adjudicatory decision by a private hospital board (such as here) under the substantial evidence standard. (*Huang v. Board of*

Director (1990) 220 Cal.App.3d 1286, 1293.) However, the question of whether a physician received a fair hearing in an application for hospital privileges is subject to independent review by trial courts. (*Rosenblit v. Superior Court* (1991) 231 Cal.App.3d 1434, 1442.) Our review of a claim of violation of the right to a fair hearing is similarly de novo. (*Ibid.*; *Duncan v. Department of Personnel Administration* (2000) 77 Cal.App.4th 1166, 1174.)

B. *Fair Hearing Rights*

Private hospitals must observe "fair procedures" in rejecting, revoking or terminating staff privileges of a physician. (*Ezekial v. Winkley* (1977) 20 Cal.3d 267, 269-270; *Westlake Community Hosp. v. Superior Court* (1976) 17 Cal.3d 465, 468.) However, hospitals do not have to accord all of the same due process rights guaranteed to litigants in civil or criminal trials. (*Anton v. San Antonio Community Hosp.* (1977) 19 Cal.3d 802, 829-830.) A hospital complies with its fair hearing obligation if it gives the affected physician adequate notice of the charges and a fair opportunity to present his position. (*Id.* at p. 830.)

Nevertheless, under its duty to provide a fair procedure, a hospital may not act in an arbitrary or capricious manner in rejecting a physician's application for staff privileges. (*Pinsker v. Pacific Coast Society of Orthodontists* (1974) 12 Cal.3d 541, 550, 553.) The right of a physician to a fair hearing must be balanced against the interests of the hospital in protecting members of the public who receive care at its facility. (*Rhee v. El Camino Hospital Dist.* (1988) 201 Cal.App.3d 477, 489 (*Rhee*.) Because of this, "courts must not interfere to set aside decisions regarding hospital staff privileges unless

it can be shown that a procedure is 'substantively irrational or otherwise unreasonably susceptible of arbitrary or discriminatory application.' [Citations.]" (*Ibid.*)

C. *Analysis*

1. *Alleged premature decision to "get rid of" Dr. Maheshwari's application*

Dr. Maheshwari first asserts that Sharp decided to "get rid of" his application before receipt of any medical records regarding the RCH review. We reject this contention.

In support of this contention Dr. Maheshwari first cites the memo from Grondona to Dr. Ostrander regarding the review of his cases at RCH and his temporary privileges. Dr. Maheshwari asserts this document shows that Grondona was advising Dr. Ostrander how to get rid of Dr. Maheshwari's application. According to Dr. Maheshwari, the decision to get rid of him was made at that time and all of Sharp's actions thereafter were "designed to justify a decision that it had already made."

However, the record does not support this contention. First, the memorandum was concerned about the status of Dr. Maheshwari's *temporary* privileges while the investigation was ongoing. The memo was only advising that to avoid having to report Dr. Maheshwari he should be given the option to withdraw his application for temporary privileges pending Sharp's investigation. The memo says nothing about getting rid of Dr. Maheshwari's application and, instead, actually reflects the fact that Sharp was going to investigate the issue of the RCH cases before making a decision on his application. The conversation between Dr. Ostrander and Dr. Stuart also reflects that it motivated Sharp to investigate the RCH cases further, not to summarily deny Dr. Maheshwari's application.

The record reflects that Sharp did investigate the allegations regarding RCH, requested documents from Dr. Maheshwari, attempted to obtain them on its own when they were not forthcoming from Dr. Maheshwari, and that Dr. Maheshwari objected to Sharp reviewing records of additional patients to assist in its review. After the Hoagland Committee concluded that there were quality-of-care problems with six RCH cases, Sharp offered to have the matter reviewed by an independent group, the CMA. Dr. Maheshwari refused this offer. Far from demonstrating that Sharp decided to get rid of Dr. Maheshwari's application early on in the application process, the record actually establishes that Sharp attempted to obtain all relevant information before it made a decision on his application and that Dr. Maheshwari hindered those efforts.

2. *Sharp's alleged refusal to meet with Dr. Maheshwari*

Dr. Maheshwari asserts that Sharp violated his right to a fair hearing by refusing to meet with him, relying on article X, section 1, subdivision (d) of the Bylaws of Sharp Memorial Hospital (Sharp Bylaws), which provide in part:

"The Bylaws of the Medical Staff of [Sharp] . . . shall provide appropriate procedures to insure that all *applicants* and members of the staff are afforded a fair and impartial hearing and due process in any case where *an appointment is not to be conferred*, is not to be renewed, or when *privileges have been (or are proposed to be) reduced, suspended or terminated*. *These procedures shall allow the affected practitioner the opportunity to make an appearance before an ad hoc investigating committee of the staff member's section/clinical department (in all cases except where summary corrective action is required)*. Such hearings shall be conducted under such procedures adopted by each Medical Staff in its bylaws and approved by the Board of Trustees, which approval shall not be unreasonably withheld. In addition, the affected *staff member* shall be given the rights to a hearing before a judicial review committee." (Italics added.)

Sharp in turn argues that this provision only allowed staff members, not applicants for privileges, to meet with committee members in an evaluation process. However, although somewhat confusingly worded, it appears that this section of the Sharp Bylaws was intended to apply to non-staff member applicants for staff privileges at Sharp. The section does repeatedly refer to the rights of the "staff member," not those of an applicant. However, the first sentence states that the rights to be accorded are to apply to both "applicants and members of the staff." The term "where an appointment is not to be conferred, [or] is not to be renewed," therefore can only be construed as including an application for staff privileges.³

However, even though this bylaw accords a right to demand a meeting with a committee evaluating an application for privileges, Dr. Maheshwari still has not shown a violation of his fair hearing rights. First, the evidence does not show that Dr. Maheshwari, who was represented by counsel and is himself an attorney, ever made a demand that this right be honored and that Sharp refused. Dr. Maheshwari relies on two letters that he sent to Dr. Ostrander after Dr. Ostrander informed Dr. Maheshwari that Sharp was investigating the RCH cases. Those letters merely stated that Dr. Maheshwari was willing to meet with any committee or cardiologist at Sharp, *if Sharp wanted him to*

³ Based upon this conclusion, we need not address Dr. Maheshwari's assertion that denying applicants the right to meet with committee members while affording such a right to staff members violated his equal protection rights.

appear and answer questions. There was no request or demand that he be allowed to meet with committee members made on his own initiative.

Further, even if Sharp should have offered to meet with Dr. Maheshwari in response to these two letters, the error did not result in any prejudice sufficient to set aside Sharp's decision to deny staff privileges. Sharp's Staff Bylaws, section 8.4-2, provides that in any appeal from the decision of the JRC, "[i]n no event shall the decision of the [JRC] be set aside or reversed on the grounds of improper admission or rejection of evidence, or for *any errors in the matter of notice or procedure*, unless, after an examination of the entire cause, including the evidence, the governing body shall be of the opinion that the error complained of has resulted in a *miscarriage of justice.*" (Italics added.)

Here, at the JRC Hearing, Dr. Maheshwari was allowed to testify, explain his treatment in the RCH cases, and address any other issues he felt important. There is no suggestion that there was anything further that he would have presented to the MEC or the Hoagland Committee that was not presented to the JRC. After Dr. Maheshwari's side of the story was fully presented, the JRC concluded that there were problems with the quality of care he rendered in the six RCH cases. Thus, Dr. Maheshwari cannot demonstrate that the result would have been different had he met with the MEC and/or the Hoagland Committee.

Indeed, it would have been of a greater benefit if Dr. Maheshwari had provided complete records of his treatment of those patients and more fully complied with Sharp's requests for information. Additionally, following the initial conclusions of the Hoagland

Committee, it was Dr. Maheshwari's position that further information was *not* necessary to the decision and that Sharp should make its decision based upon the information it already had. Based upon all of these facts, Dr. Maheshwari cannot demonstrate that any miscarriage of justice resulted from any error in procedure in not allowing him to meet with committee members.

3. The MEC's request for patient information

Dr. Maheshwari asserts that his fair hearing rights were violated when Dr. Ostrander requested that he provide a detailed list of all of his cardiology patients for the prior six months, including the patient's name, medical records number, diagnosis and the age of the patient. Dr. Maheshwari objected to this request as a "fishing expedition" that would "violate the privacy of my patients who have no relationship whatsoever to [Sharp]. . . ."

In response, Dr. Ostrander wrote to Dr. Maheshwari, stating that the information was appropriate and necessary to review his application and that if he failed to provide the requested information, Sharp would deny his application. Dr. Ostrander also clarified that Sharp was only seeking a "sample" of Dr. Maheshwari's patients. Dr. Ostrander told Dr. Maheshwari that such records were appropriately requested under California law to be used in his review and that Sharp would take precautions to insure the secrecy of the patient's information. Dr. Maheshwari continued to refuse to provide the requested information and told Sharp that if it wanted the information, it would have to obtain it on its own.

Civil Code section 56.10, subdivision (c)(4) provides in part:

"(c) A provider of health care, or a health care service plan may disclose medical information as follows:

"....."

"(4) The information may be disclosed to organized committees and agents of professional societies or of medical staffs of licensed hospitals . . . if the committees . . . are engaged in reviewing the competence or qualifications of health care professionals"

As part of the application process, Dr. Maheshwari consented to an inspection of records and documents material to the evaluations and authorized all individuals and organizations in custody of such records and documents to permit such inspection and copying.

As these provisions make clear, the disclosure of patient information is permitted in conjunction with a review of a doctor's qualifications and competence to receive staff privileges. The Staff Bylaws contain no proscription on the type of patient information that may be requested. Dr. Maheshwari cites no law or anything in the Staff Bylaws that makes Sharp's request for patient information improper. Indeed, Dr. Maheshwari had agreed, as part of his application process, to allow hospitals where he treated patients to release patient information in connection with the review process. In addition, in response to Dr. Ostrander's request, Dr. Maheshwari never sought to provide a redacted version of the patient information, omitting patient names or other information he felt should not be disclosed. Rather, he simply refused to provide the information. Thus, Dr. Maheshwari's refusal to provide the requested patient information was not justified and

Sharp was within its rights to consider this lack of cooperation in refusing to grant Dr. Maheshwari staff privileges at Sharp.

Dr. Maheshwari asserts that Sharp's request for this patient information was "unusual." In support of this contention Dr. Maheshwari cites to testimony from Dr. Ostrander that in reviewing patient records the patients are usually not identified by name and that he could not recall another case where Sharp "went through a process like this" However, Dr. Ostrander also explained that Dr. Maheshwari's application was different than the ordinary situation. He also stated that while in written communications and recorded proceedings the name of a patient would not be used, in the review process there was no way the patient's name could be entirely eliminated. Further, even if Sharp's request was "unusual," that does not mean it was "arbitrary and capricious." There was nothing unfair about Sharp's request for a six-month sampling of Dr. Maheshwari's patient care.

4. Lawsuit investigation of Dr. Maheshwari

Dr. Maheshwari asserts that his fair proceeding rights were violated by Sharp's hiring of a law firm to search the civil filings index to determine if he had any malpractice lawsuits filed against him. We reject this contention.

Sharp conducted a review of the civil index of filings to determine the extent of any medical malpractice lawsuits filed against Dr. Maheshwari after it received information from his malpractice carrier that he had three malpractice cases that were repetitious in nature. Patricia Lawson, from Sharp's medical staff office, testified that

this was the normal procedure where Sharp received information that there were a high number of or repetitious claims of malpractice against an applicant for privileges.

However, although Dr. Maheshwari established that the three cases of malpractice were dismissed and many of the lawsuits discovered by Sharp had nothing to do with medical malpractice, he does not indicate why such a search was unfair, arbitrary or capricious. Further, Dr. Maheshwari does not offer any evidence that this information had any impact on his application. Indeed, based upon the lack of any detrimental information found as to Dr. Maheshwari, this information could have only helped his application for privileges.⁴

It is reasonable for a hospital reviewing the qualifications and competency of an applicant for staff privileges to conduct a search of public records to determine if any medical malpractice actions had been filed against that individual. As discussed, *ante*, in reviewing a candidate for privileges, hospitals have a duty to protect members of the public who receive care at its facility. (*Rhee, supra*, 201 Cal.App.3d at p. 489.)

5. Sharp's asserted promise to obtain medical records

Dr. Maheshwari also asserts that Sharp broke a promise to him that it would obtain medical records concerning his patient care from other hospitals and would not decide his application until it received those records. We reject this contention

⁴ Dr. Maheshwari asserts the search for lawsuits also included his wife. However, the record reveals that Sharp was only searching for lawsuits involving Dr. Maheshwari. The search merely revealed a lawsuit in which both he and his wife were parties.

In support of this contention, Dr. Maheshwari cites Dr. Ostrander's letter to him after he refused to obtain patient records from other hospitals. Dr. Maheshwari cites to Dr. Ostrander's statement that "[w]e will advise you, should we have any problems with the hospitals' provision of this information and would expect that you would help to facilitate this, if needed." Dr. Maheshwari also points to the statement that "[w]hen this information has been received, we will advise you when we have had an opportunity to review and consider this additional information." As discussed, *ante*, the requested patient information was not forthcoming before the MEC decided that Dr. Maheshwari's application for privileges should be denied. The MEC cited Dr. Maheshwari's failure to provide requested information as a reason, in addition to the quality of care as to the RCH patients, as a reason for denying his application.

Sharp's decision on denying staff privileges without the requested patient information did not result in an unfair procedure. First, the burden was on Dr. Maheshwari to provide the requested information. However, Dr. Maheshwari refused. Indeed, Dr. Maheshwari admitted at the JRC hearing that if Sharp had requested his assistance in obtaining records from RCH, *he would have refused*:

"Q. Is it your testimony if after all this process Dr. Ostrander had come back to you and said, 'Okay, you know, Dr. Maheshwari, we tried to get the[] information directly from the hospital up in Riverside but were unable to,' is it your testimony to this committee that you the would then have said, 'Okay, I'll get it for you myself?'"

"A. No.

"Q. You wouldn't have, would you?"

"A. No."

Dr. Maheshwari cannot persuasively assert that after he refused to obtain the requested information, Sharp is to blame for deciding his application without obtaining it themselves. There is nothing unfair, arbitrary or capricious about this decision. Further, the record demonstrates that after the Hoagland Committee's report expressing concern about quality care in the six RCH cases under review, Dr. Maheshwari asserted that no further review or information was necessary and that Sharp should decide his application with the information it already had before it. Dr. Maheshwari cannot then fault Sharp for deciding his application without the patient information from CRMC and RCH.

6. *Involvement of Dr. Ostrander in application evaluation*

Dr. Maheshwari also asserts that Dr. Ostrander's involvement in the evaluation of his application for staff privileges violated his right to a fair procedure because Dr. Ostrander had decided from the beginning to deny his application and was biased against Dr. Maheshwari. We reject this contention.

Citing *Applebaum v. Board of Directors* (1980) 104 Cal.App.3d 648 (*Applebaum*), Dr. Maheshwari contends that he was denied a fair hearing because Dr. Ostrander was an "instigator" of the charges against him and also participated in the process of assessing his application. In *Applebaum*, an obstetrician's privileges were suspended at a hospital based upon charges initiated by a doctor who received complaints from nurses concerning his delivery techniques. (*Id.* at p. 651.) That same doctor later served on an ad hoc committee investigating the charges against the obstetrician. (*Id.* at pp. 651-652.)

That committee recommended that his privileges be suspended. (*Id.* at pp. 652-653.) An appeal committee of the hospital upheld this decision. (*Id.* at pp. 653-654.)

The superior court granted the obstetrician's writ of mandate, finding, among other things, that the presence of the doctor who initiated the charges on the ad hoc committee that recommended suspension of his privileges violated his due process rights.

(*Applebaum, supra*, 104 Cal.App.3d at pp. 655-656.) The Court of Appeal upheld this ruling finding that the process was unfair because (1) the instigator of the charges against the obstetrician also was on the ad hoc committee; and (2) the ad hoc committee and the committee that reviewed the decision to suspend his privileges had overlapping membership. (*Id.* at pp. 659-660.) However, the court also stated that the fact that some investigatory, prosecutorial and adjudicatory functions are combined would not constitute a denial of due process "unless the facts of a case show foreclosure of fairness as a practical or legal matter." (*Id.* at p. 658; *Rhee, supra*, 201 Cal.App.3d at p. 490.)

The facts of this case are very different from those in *Applebaum*. Dr. Ostrander did not "instigate" the charges against Dr. Maheshwari. They were initiated at RCH. Dr. Ostrander was at most a conduit for that information and an investigator of the circumstances of the RCH review. He did not sit on any of the committees reviewing Dr. Maheshwari's application. Dr. Maheshwari does not allege any overlapping of members of the Hoagland Committee, MEC and JRC. Dr. Ostrander merely coordinated the review process in his role as chief of staff and communicated with Dr. Maheshwari regarding the status of the review and the need for additional information. The facts here

do not show a "foreclosure of fairness as a practical or legal matter." (*Applebaum, supra*, 104 Cal.App.3d at p. 658.)

In sum, we conclude, upon independent review of the record, that Sharp's review of Dr. Maheshwari's application for staff privileges did not violate his right to a fair hearing and procedure.

II. *Decision To Exclude Evidence at JRC Hearing*

Dr. Maheshwari asserts that the hearing officer erred in excluding evidence he sought to introduce at the JRC Hearing. We reject this contention.

Section 1094.5, subdivision (e) provides in part:

"Where the court finds that there is relevant evidence that, in the exercise of reasonable diligence, could not have been produced *or that was improperly excluded at the hearing* before respondent, it may enter judgment . . . remanding the case to be reconsidered in the light of that evidence"

The hearing officer at the JRC Hearing excluded the new evidence submitted by Dr. Maheshwari based upon Staff Bylaw, paragraph 8.3-7(2), which provides in part:

"An applicant . . . shall bear the burden of persuading the [JRC], by a preponderance of the evidence, of his qualifications by producing information which allows for adequate evaluation and resolution of reasonable doubts concerning his current qualifications for membership and privileges. *An applicant shall not be permitted to introduce information requested by the medical staff but not produced during the application process unless the applicant establishes that the information could not have been produced previously in the exercise of reasonable diligence.*" (Italics added.)

Dr. Maheshwari does not contend that he had previously provided the disputed evidence during the application process. Rather, Dr. Maheshwari contends that the information was not requested or, at least as to the declarations, that he could not have

with reasonable diligence submitted the information earlier. The record does not support this assertion.

In his March 1999 letter, Dr. Ostrander informed Dr. Maheshwari that Sharp had learned of his review at RCH for quality-of-care concerns, of Sharp's inability to obtain information concerning the review, and requested that Dr. Maheshwari provide *any* information concerning the situation to Sharp. Thus, there was no limitation on the type of information requested by Sharp and any information supportive of Dr. Maheshwari's position should have been submitted at that time.

Dr. Maheshwari responded by acknowledging that he understood that he was responsible for supplying Sharp "with details of these cases." Thus, there is no evidence that Dr. Maheshwari was confused in any way concerning the scope of what Sharp wanted to review on his application for privileges.

Dr. Ostrander then communicated to Dr. Maheshwari that he had "received the documentation *you have provided* (i.e., copies of medical records and other information related to the review of these cases at [RCH])." (Italics added.) Dr. Ostrander further stated in that letter that Sharp "will proceed with the review of these cases and the processing of your application. Additionally, if you are able to provide *any additional information* regarding the status of the peer review proceedings at [RCH], it will be most helpful. *Should additional information be needed, we will contact you.*" (Italics added.)

Dr. Maheshwari asserts that the statement from Sharp that it would contact him if it needed further information meant that it was satisfied with the information it had and was not requesting the information he later sought to admit at the JRC Hearing.

However, the letter actually indicated Sharp's belief that Dr. Maheshwari had already provided all information relevant to the review at RCH, pursuant to its previous request. The records provided by Dr. Maheshwari to that date were in actuality incomplete and Dr. Maheshwari did not attempt to submit complete records until the JRC Hearing. The letter also requested, as did Dr. Ostrander's previous letter, that if there were any further information that Dr. Maheshwari felt was relevant, he should provide it. This put the burden upon Dr. Maheshwari, pursuant to Sharp's Bylaws, to produce to Sharp any information he felt relevant. If he wanted Sharp to consider the complete patient files from the RCH cases and the patient declarations, it was incumbent upon him to do so at that time.

Dr. Maheshwari asserts the declarations of RCH patients were improperly excluded as they did not exist during the application process and therefore could not in the exercise of reasonable diligence have been produced earlier. However, the mere fact that Dr. Maheshwari did not request declarations from patients until after he was denied privileges does not mean that they were admissible. Dr. Maheshwari does not provide any reason why he could not have produced them during the application process. Again, if Dr. Maheshwari believed that the declarations were supportive of his application it was incumbent upon him to submit them to Sharp during the application process. The hearing officer properly excluded the evidence Dr. Maheshwari offered for the first time at the JRC Hearing.

III. *Testimony by Sharp's Expert*

Dr. Maheshwari's last contention is that Sharp's medical expert, Dr. Phillips, applied an improper standard of care in opining at the JRC Hearing that Dr. Maheshwari's treatment in the six RCH cases fell below the standard of care. We reject this assertion.

Dr. Maheshwari faults Dr. Phillip's testimony because he did not state specifically that the proper standard of care is what "reasonable interventional cardiologists would do in the circumstances of a particular case." Dr. Maheshwari asserts that Dr. Phillips's reference to what a "quorum of physicians" would do, what a "majority of cardiologists" would do or what he would accept in his laboratories was insufficient to establish the proper standard of care and therefore his testimony should have been rejected.

However, a review of Dr. Phillips's testimony demonstrates that although his testimony was not precise in describing the standard of care for interventional cardiologists, his testimony did state that the proper standard was what other cardiologists would do in the same or similar circumstances. Moreover, Dr. Phillips was testifying not to any new opinion he had as to the propriety of Dr. Maheshwari's treatment, but rather to the conclusions reached by the Hoagland Committee that determined that his standard of care was deficient in six of the seven RCH cases. Whatever he testified was the appropriate standard of care, the relevant inquiry was whether the Hoagland Committee, in concluding Dr. Maheshwari's treatment in the six RCH cases was deficient, actually employed the appropriate standard of care. There is no assertion that they did not do so.

Finally, the JRC, in upholding the MEC's denial of Dr. Maheshwari's application, relied not only upon Dr. Phillips's testimony, but also upon the report of the Hoagland

Committee and the documentary evidence presented at the JRC Hearing. The JRC then rendered its own conclusion that Dr. Maheshwari's treatment fell below the standard of care. Thus, even if Dr. Phillips's testimony were disregarded, ample evidence supported the JRC's decision to uphold the decision to deny staff privileges to Dr. Maheshwari.

DISPOSITION

The judgment is affirmed.

NARES, J.

WE CONCUR:

HUFFMAN, Acting P. J.

McDONALD, J.