IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
ASHEVILLE DIVISION

CIVIL NO. 1:04CV92

W. KELLEY BRASWELL, M.D.,	)	
	)	
Plaintiff,	)	
	)	
Vs.	)	**MEMORANDUM AND ORDER**
	)	
HAYWOOD REGIONAL MEDICAL CENTER; HARRY LIPHAM, M.D.; ERIC REITZ, M.D.; DEBERA HUDERLY, M.D.; LUIS MUNOZ, M.D.; DAVID PETERSON, M.D.; CHRISTOPHER WENZEL, M.D.; and RICHARD STEELE, M.D.,	)	
	)	
Defendants.	)	
	)	

THIS MATTER is before the Court on the Plaintiff's timely filed objections to the Memorandum and Recommendation of United States Magistrate Judge Dennis L. Howell to which the Defendants have filed response. Pursuant to standing orders of designation and 28 U.S.C. § 636, the undersigned referred the Defendants' motion for summary judgment to the Magistrate Judge for a recommendation as to disposition. Having conducted a *de novo* review of those portions of the

recommendation to which specific objections were filed, the recommendation is adopted and the Defendants' motion is granted.[1] **28 U.S.C. § 636(b); Fed. R. Civ. P. 72.**

I. STANDARD OF REVIEW

> Under the Federal Rules of Civil Procedure, summary judgment shall be awarded "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, . . . show there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a

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[1] As will be noted *infra*, where only general, non-specific objections are raised, this Court will not undertake a *de novo* review. ***Diamond v. Colonial Life & Accident Ins. Co.*, 416 F.3d 310, 315 (4th Cir. 2005), *cert. denied*, 126 S. Ct. 1033 (2006) (quoting Fed. R. Civ. P. 72. Advisory Committee Note).** "Parties filing objections must specifically identify those findings objected to. Frivolous, conclusive or general objections need not be considered by the district court." ***Battle v. U.S. Parole Comm'n*, 834 F.2d 419, 421 (5th Cir. 1987) (quotations omitted).** "A general objection to the entirety of the magistrate's report has the same effects as would a failure to object. The district court's attention is not focused on any specific issues for review, thereby making the initial reference to the magistrate useless." ***Howard v. Sec'y of HHS*, 932 F.2d 505, 509 (6th Cir. 1991).** Boilerplate objections without any citation to case law or the record do not warrant *de novo* review. ***Wells v. Shriners Hosp.*, 109 F.3d 198, 200 (4th Cir. 1997).** "In this Circuit, *de novo* review is unnecessary 'when a party makes general and conclusory objections that do not direct the court to a specific error in the magistrate's proposed findings and recommendations.'" ***Hyatt v. Town of Lake Lure*, 314 F.Supp.2d 562, 580 (W.D.N.C. 2003), *aff'd*, 114 Fed. Appx. 72 (4th Cir. 2004) (quoting *Orpiano v. Johnson*, 687 F.2d 44, 48 (4th Cir. 1982)) (other citations omitted).**

> matter of law." As the Supreme Court has observed, "this standard provides that the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact."

Bouchat v. Baltimore Ravens Football Club, Inc.*, 346 F.3d 514, 519 (4th Cir. 2003) (quoting Fed. R. Civ. P. 56(e) and *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986)).** A genuine issue exists if a reasonable jury considering the evidence could return a verdict for the nonmoving party. ***Shaw v. Stroud*, 13 F.3d 791, 798 (4th Cir. 1994) (citing *Anderson, supra*).** "Regardless of whether he may ultimately be responsible for proof and persuasion, the party seeking summary judgment bears an initial burden of demonstrating the absence of a genuine issue of material fact." ***Bouchat*, 346 F.3d at 522 (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986)).** If this showing is made, the burden then shifts to the non-moving party who must convince the Court that a triable issue does exist. ***Id.

> A party opposing a properly supported motion for summary judgment "may not rest upon the mere allegations or denial of [his] pleadings," but rather must "set forth specific facts showing that there is a genuine issue for trial." Furthermore, neither "[u]nsupported speculation," nor evidence that is "merely colorable" or "not significantly probative," will suffice to defeat a motion for summary judgment; rather, if the adverse party fails to bring forth facts showing that "reasonable minds

> could differ" on a material point, then, regardless of "[a]ny proof or evidentiary requirements imposed by the substantive law," "summary judgment, if appropriate, shall be entered."

***Id*. (quoting Fed. R. Civ. P. 56(e) and *Felty v. Graves-Humphreys Co.*, 818 F.3d 1126, 1128 (4th Cir. 1987)) (other internal citations omitted).** Moreover, in considering the facts for the purposes of this motion, the Court will view the pleadings and material presented in the light most favorable to the nonmoving party. ***Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).**

II. FINDINGS OF FACT[2]

Haywood Regional Medical Center (Hospital) is a hospital and a state actor for purposes of a cause of action brought pursuant to 42 U.S.C. § 1983. The Hospital has a Medical Executive Committee (MEC) which is comprised of the chairs of each medical department within the Hospital and is chaired by the Hospital's Chief of Staff. **Affidavit of Harry Lipham, M.D., filed August 22, 2005, ¶ 2.** Among the duties of the MEC is the

[2]Plaintiff's counsel has attached to the Objections evidence which was not previously of record in the case. Such evidence is not considered.

making of recommendations to the Hospital's Board of Directors (Board) concerning the suspension of privileges for physicians at the Hospital. ***Id.***

Dr. Kelley Braswell (Braswell or Plaintiff) is a Board Certified General Surgeon licensed to practice in the State of North Carolina. **Complaint, ¶¶ 1, 7.** Since at least 1999, Braswell practiced medicine in Haywood County with Midway Medical Center in Clyde, North Carolina. **Affidavit of Nancy Freeman, M.D., filed August 22, 2005, ¶¶ 1, 3.** He had surgical privileges at the Hospital. At that time, Haywood County had four general surgeons, Braswell and Drs. Reitz, Sharpton and Sufian. **Affidavit of Eric Reitz, M.D., filed August 22, 2005, ¶ 2.** Drs. Reitz, Sharpton and Sufian shared office space and expenses but each of them had independent medical practices. ***Id.***

In 1999, Braswell determined that an additional general surgeon at Midway Medical was feasible and he began to actively recruit for such a member. **Deposition of Kelley Braswell, Vol. I, *attached to* Defendant's Motion for Summary Judgment, filed August 22, 2005, at 49.** By mid-2000, the Hospital had also determined that 1.8 additional surgeons could be accommodated in Haywood County. **Affidavit of David Rice, filed August 22, 2005, ¶ 2.** In fact, as will be noted *infra*, Braswell

served on the task force created by the Hospital to investigate whether the County could withstand the additional surgeons. Meanwhile, the three other general surgeons had also decided to recruit an additional general surgeon. **Braswell Deposition, at 50.** In fact, both Drs. Braswell and Sharpton interviewed Dr. Larry Herberholz for a position as a general surgeon. ***Id.*** Dr. Sharpton's group was interviewing Dr. Herberholz to share office space and expenses but to maintain a separate practice. **Affidavit of Bennie Sharpton, M.D., filed August 22, 2005, ¶ 4.** Braswell testified that if he had not subsequently interviewed Dr. Birdsong, he would have hired Dr. Herberholz. **Braswell Deposition, at 51.** Braswell was interested in having another surgeon in his practice because it would have allowed him to be on call less often and vacations would have been easier. ***Id.*****, at 63.** Braswell was aware that his competitors were interviewing Dr. Herberholz and they were aware that Braswell was recruiting an additional surgeon.

In early January 2001, Braswell sent an undated letter to Dr. Herberholz in which he wrote:

> I have some concerns about bringing two surgeons to this area at the same time. Counting outmigration we only have a county population of about 40,000. That is a pretty small group for 6 general surgeons to maintain an active practice.

Deposition Exhibit 10, *attached to* Braswell Deposition. At some point prior to January 25, 2001, Braswell also wrote to the Hospital Board to express his concern that hiring a second general surgeon was not warranted; he provided a copy of that letter to Dr. Herberholz. **Deposition Exhibit 11, *attached to* Braswell Deposition.** "I think that we will be doing a significant disservice to both of these individuals if both are brought here. In addition this may represent a nearly half million-dollar blunder by the hospital in terms of guarantees which cannot be met."[3] ***Id.*** **(footnote added).** The evidence in the record does not show that Braswell provided the Hospital with a copy of his letter to Dr. Herberholz.

At the January 25, 2001, meeting of the Hospital Board of Commissioners, Braswell's letter to the Board was discussed. **Deposition Exhibit 12, *attached to* Braswell Deposition.** The Hospital president, David Rice,[4] expressed surprise at Braswell's position, noting that Braswell had been a member of the task force which determined that 1.8 additional general surgeons could be employed in the county. ***Id.*** Dr. Sharpton

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[3]The term "guarantees" referred to the financial incentives offered by contract by the Hospital to the recruitees.

[4]David Rice has been the president of the Hospital since 1993. **Rice Affidavit, ¶ 1.**

volunteered to reduce his own practice in order to accommodate new surgeons. ***Id.***

> It was noted that the two surgeons may arrive within four or five months of each other and could create a slow practice for the surgeons for a period of time. It was also noted that Dr. Herberholz, being recruited by Dr. Sharpton's group, has verbally agreed to the terms of the contract [offered by the Hospital] and has visited the area. The Board approved this contract tonight. Dr. Birdsong's contract was not approved due to additional requests that did not meet Board approval. He is being recruited by Dr. Braswell. He intends to visit a second time within two weeks. Both recruitment efforts are well advanced. The Board requested that Mr. Palmer[5] and Mr. Rice meet with Dr. Braswell and convey the Board's interest to recruit both surgeons under the standard contract, previously approved by the Board.

***Id*. (footnote added).**

At the February 22, 2001, Board meeting, Braswell's letter to the Board was again discussed and it was noted that although the task force of which Braswell had been a member had approved two positions, "Dr. Braswell did not seem to remember." **Deposition Exhibit 13, *attached to* Braswell Deposition.**

> Prior to re-presenting a proposed contract for Dr. Dearl Birdsong at the February Finance Committee Meeting, Mrs. Lipham [a Board member] reported that while doing follow-up

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[5]Linton Palmer was a member of the Hospital's Board. **Rice Affidavit, ¶ 14.**

with Dr. Herberholz, she discovered that he had received a letter from Dr. Kelley Braswell, which detailed Dr. Braswell's opinion that there was not enough work in this area for two additional general surgeons. Dr. Herberholz, after receiving this communication, decided to go to Alabama to practice. Mr. White, Chair of the Finance Committee, commented that upon hearing the report from Mrs. Lipham regarding Dr. Herberholz's decision to go to Alabama, the Finance Committee decided to table further discussion of the Birdsong Contract.

It was noted that Dr. Braswell wrote to Dr. Herberholz the day after meeting with Mr. Palmer and Mr. Rice where Dr. Braswell told Mr. Rice and Mr. Palmer that he understood and respected the Board's decision to proceed with the recruitment of two additional general surgeons.

Dr. Sharpton said that he would like to have a method set up to be used in the future to eliminate "divisiveness" amongst recruiting physicians.

At 7:55 p.m. Dr. Kelley Braswell was invited to speak with Board members regarding his conduct in relation to this recruitment situation. Dr. Braswell asked that the minutes of this meeting reflect the fact that the meeting was held with less than 50 hours notice to him and that he did not have the opportunity to obtain legal counsel.

Mr. Palmer reminded Dr. Braswell of the meeting held with him and Mr. Rice the day before he wrote to Dr. Herberholz. Dr. Braswell commented that information he had did not indicate the need for two additional general surgeons. Mr. Rice re-stated that physicians in Dr. Sharpton's practice had previously indicated that they would work to make the recruitment effort succeed by adjusting their hours to accommodate the new recruits. Dr. Braswell said that he understood that whichever practice obtained the first recruit the other practice would not complete their recruitment efforts. It was at that time the Board

> reminded Dr. Braswell that Dr. Birdsong did not have a signed contract. Dr. Braswell expressed surprise at this information.
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> Dr. John Stringfield commented to Dr. Braswell that this type of conduct would sabotage [the Hospital's] recruiting process if one practice could call a recruitment candidate of another practice and sway the candidate's placement decision.
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> Dr. Kelly (sic) Braswell was excused at 8:49 p.m.

Id. The Board determined to take no further action concerning Dr. Birdsong's contract until discussion could be had with the Hospital's attorney. ***Id.*** Three days after the Board meeting, Braswell wrote to the Board apologizing for his behavior and acknowledging that his "unsolicited correspondence" with Dr. Sharpton's recruit was "ill advised." **Deposition Exhibit 16, *attached to* Braswell Deposition.**

It is unclear whether Dr. Birdsong was employed as a surgeon in Haywood County. During his deposition, Braswell testified that Dr. Birdsong left employment from one of his surgical competitors in July 2003 and another surgeon was hired. **Braswell Deposition, at 113.** Rice, the Hospital president, averred that on "April 26, 2001, [the Hospital] Board voted to offer Dr. Birdsong a recruiting contract." **Rice Affidavit, ¶ 8.**

Braswell testified that after this incident, Dr. Lipham and his wife, with whom Braswell had previously socialized, stopped doing so. **Braswell**

Deposition, at 104. In addition, Braswell had the "feeling at the time" that Dr. Lipham avoided consultations for Braswell's patients. ***Id.*, at 105-06.**

Prior to this point in time, the four general surgeons in the County had a system whereby they assisted one another with coverage and call. ***Id.*, at 65.** When one physician was on call for another, he did not receive any compensation for attending to those patients; it was just a matter of assisting one another. ***Id.*** After the recruiting incident, the other three surgeons no longer would agree to cover for Braswell or take calls for him. ***Id.*, at 61.**

At some point in 2001, Braswell requested that he be credentialed by the Hospital to perform laparoscopic gastric bypass surgery for the treatment of morbid obesity.[6] **Exhibit 5, *attached to* Plaintiff's Memorandum in Opposition to Defendants' Motion for Summary Judgment, filed September 16, 2005.** At a meeting on September 4, 2001, the Medical Executive Credentials Committee unanimously approved his request and determined that the "[r]esults of the first six procedures will be monitored closely by the Surgical Case Review Committee." ***Id.*** Later

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[6]Laparoscopic gastric bypass surgeries are a specific type of procedure. Braswell was already performing gastric bypass procedures.

that month, the Joint Conference Committee requested additional criteria and in April 2002, the Medical Executive Credentials Committee again favorably recommended Braswell for credentialing with six cases to be reviewed. ***Id.*** Although in June 2002, the Joint Conference determined to allow credentialing with certain conditions, one month later, the Conference reversed course and denied the same. **Exhibit 6, *attached to* Plaintiff's Memorandum.** It was noted that the hospital in Asheville, North Carolina, did not perform the procedure and would not accept transfers into its facility of any patient having complications from such a procedure. ***Id.*** In November 2002, after a hearing at which Braswell was present, it was determined that the procedure was "the most difficult laparoscopic procedure being performed at this point in time" and the Hospital declined to add the procedure. **Exhibit 7, *attached to* Plaintiff's Memorandum.** As a result, Braswell was not credentialed for the procedure. ***Id.*** It does not appear that any surgeon was allowed to perform laparoscopic gastric bypass surgery at the Hospital.

During 2002, Dr. Nancy Freeman was the Chief of Staff for the Hospital and Braswell's partner, having been a family physician at Midway Medical since prior to 1999. **Freeman Affidavit, ¶¶ 1, 3.** In December

2002, the risk manager for the Hospital reported to Dr. Freeman that Patient F, who had been operated on by Braswell, was having multiple complications. ***Id.*, ¶ 4.** Braswell performed a gastric bypass on Patient F on December 2, 2002, and performed two additional surgeries on December 6 and 13 to correct leakage from anastomosis.[7] ***Id***. Dr. Freeman reviewed the medical records for the patient on December 14, 2002, and noted that he had been suffering from renal failure[8], shock, and sepsis.[9] ***Id.*, ¶ 5.** Medical consultants on the case had recommended the patient be transferred to a facility with a higher level of care due to his worsening condition and the risk of death. ***Id.*** According to Dr. Freeman, Braswell refused to follow their advice and had failed to use surgical assistants on the two occasions when he had to repeat the surgery on the patient. ***Id.*, ¶¶ 7, 8.** On that same date, Dr. Freeman spoke to Braswell

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[7]"[A]n opening created by surgical . . . means between two normally separate spaces or organs." ***Dorland's Illustrated Medical Dictionary* (28th ed. 1994).**

[8]Kidney failure. ***Dorland's, supra*.**

[9]"[T]he presence in the blood or other tissues of pathogenic microorganisms or their toxins[.]" ***Dorland's, supra.***

and insisted that the patient be transferred.[10] ***Id.*, ¶ 6.** Braswell described this encounter with Dr. Freeman as one in which she demanded that either he transfer the patient or have his hospital privileges suspended. **Braswell Deposition, at 143.** Braswell admitted that he "may have graced her with some expletives" during this encounter. ***Id.***

Dr. Freeman averred that because of this patient's experience, she determined to call "an immediate and indefinite moratorium" on the performance of all gastric bypass surgeries at the Hospital by any surgeon, with the concurrence of the Hospital's administration. She also established an *ad hoc* committee to review all gastric bypass surgeries for the previous two years. **Freeman Affidavit, ¶ 7.** This moratorium was, in effect, a summary suspension of privileges of any surgeon to perform gastric bypass surgery at the Hospital. Although Dr. Freeman wanted to find an "outside surgeon," *i.e.,*one without privileges at the Hospital, to serve on the committee, it does not appear this was done. **Exhibit 6, *attached to* Plaintiff's Memorandum.** On December 20, 2002, she presented to the MEC the issues surrounding Patient F's care and what she considered to

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[10]The patient was transferred to another hospital, but died of pulmonary embolism, the "closure of the pulmonary artery or one of its branches by" a blood clot. ***Dorland's, supra*.**

be Braswell's conduct in connection therewith. **Freeman Affidavit, ¶ 8.** The MEC voted to continue the suspension of Braswell's privileges to perform gastric bypass surgery but lifted the moratorium on those surgeries by other physicians. ***Id.*, ¶ 9.**

Effective January 1, 2003, Dr. Lipham became the Chief of Staff of the Hospital. **Lipham Affidavit, ¶ 1.** On January 8, 2003, Dr. Lipham requested that Braswell present his position regarding the suspension of his gastric bypass privileges at a meeting with the MEC on January 14, 2003. ***Id.*, ¶ 4.** Before meeting with Braswell, the MEC received the report of the *ad hoc* committee. ***Id.*, ¶ 5.** The MEC then met with Braswell and reviewed the *ad hoc* committee's report as well as the care involved with Patient F. ***Id.*, ¶ 6.**

> The MEC questioned Dr. Braswell on several topics regarding his gastric bypass surgeries including lack of documentation of prior diet attempts, lack of psychiatric evaluation, leakage in four out of eight cases where leakage occurred because the staples did not go all the way across the stomach, lack of detail of documentation of preoperative work, and performing laproscopic gastric bandoplasty without privileges. The MEC also questioned Dr. Braswell on certain topics involving Patient F, including the lack of pulmonary consult when Patient F had sleep apnea, and Dr. Braswell's management of an upper gastrointestinal leak.

Id. The *ad hoc* committee reviewed 19 of Braswell's patients from 2000 through 2002. **Exhibit 9, *attached to* Plaintiff's Memorandum, at 7.** Of the 19 patients, 18 did not receive nutritional assessments or prior diet attempts. ***Id.*** Seven patients did not receive a psychiatric evaluation. ***Id.*** In one case, a procedure was performed without consent. ***Id.*** In nine cases, there was a failure to obtain appropriate medical pre-operative evaluations. ***Id.*** In four cases, Braswell failed to use a surgical assistant during surgery; and in one case, he did not have privileges for the procedure performed. ***Id.*** In ten cases, there were post-operative deficiencies noted; and in 14 cases, there were complications. ***Id.*** The report found that there were "innumerable documentation failures." ***Id.*** The report noted that although one of these patients had been a smoker, neither a cardiology nor pulmonary consultation was ordered. ***Id.*****, at 10.** The same patient had phlebitis but blood thinners were not ordered prior to surgery to prevent clots. ***Id.*** A 23-year old female patient was operated on without a pregnancy test. ***Id.*****, at 11.** That patient's allergy to Percocet was not noted by the physician; when the nurse noted the allergy based on the patient's reaction, Braswell nonetheless placed an order for her to receive Percocet, a mistake that was found by the nursing staff. ***Id.*** A second

female patient also went through the procedure without a pregnancy test. ***Id.*****, at 12.** On one occasion, the anesthesiologist refused to participate in the surgery because the patient's blood pressure was too high. ***Id.***

As for Patient F, the committee found although the patient had a history of tachycardia, no cardiological pre-operative consultation was had; the patient had a history of schizophrenia which was a contraindication for the surgery; Braswell failed to visit the patient after the first anastomotic disruption, despite being called repeatedly by the nursing staff; Braswell failed to use surgical assistants in the second and third surgeries; and there was a failure to consult with specialists. ***Id.*****, at 9.**

Toward the end of the meeting with him, Braswell stated "these are not easy patients and . . . there is a learning curve involved in doing these procedures." ***Id.*****, at 5.** The MEC determined to continue the suspension as to gastric bypass surgery and formed a second *ad hoc* committee to review Braswell's surgical cases for the next two months. ***Id.*****, at 6; Lipham Affidavit, ¶ 7.**

On April 12, 2003, Braswell performed bowel surgery on Patient H whose condition thereafter rapidly deteriorated, resulting in the patient's transfer to another hospital. ***Id.*****, ¶ 8.** This patient's care was reviewed by

the *ad hoc* committee which found that the patient should have been taken back into surgery as a result of sepsis but the hospital staff was unable to reach Braswell. **Reitz Affidavit, ¶ 3.** Braswell ordered a CT scan instead of taking the patient back into surgery and failed to obtain timely pulmonary and internal medicine consultations. ***Id.***

At a closed meeting on May 6, 2003, the MEC reviewed the second *ad hoc* committee's report and determined to call a special meeting of the MEC to which Braswell would be invited in order to review his cases. **Exhibit 9, *supra*, at 14.**

The Surgical Case Review Committee[11] voted on May 15, 2003, to recommend to the MEC[12] that all of Braswell's privileges be suspended.

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[11]The Hospital has a standing Surgical Case Review Committee. **Affidavit of Richard Steele, M.D., filed August 22, 2005, ¶ 2.** One of its functions "is to conduct post-operative reviews of surgical procedures in which patients have experienced unexpected outcomes." ***Id.*** The members of this committee at that time were: Dr. Richard Steele, a urologist; Dr. Michael Pass, a family practice physician; Dr. Eric Reitz, a general surgeon; Dr. Debera Huderly, a radiologist; Dr. David Peterson, a cardiologist; Dr. Luis Munoz, a pathologist; and Dr. Christopher Wenzel, an ear, nose and throat physician. **Rice Affidavit, ¶ 13.**

[12]The members of this committee at that time were: Dr. Harry Lipham, a pulmonologist; Dr. Richard Lang, a radiologist; Dr. Christopher Wenzel, an ear, nose and throat physician; Dr. Michael Rey, an emergency medicine physician; Dr. Brian Caffery, a family practice physician; Dr. Daniel Fox, an internist; Dr. Robin Matthews, a gynecologist; Dr. Cliff

Reitz Affidavit, ¶ 3. At a meeting of the MEC on May 20, 2003, the case of Patient H was discussed at length. **Exhibit 9, at 19.**

> Dr. Lipham reviewed with the committee the steps that can be taken. He stated that the MEC can decide not to take any action based on this information, or can decide to summarily suspend privileges or can begin the corrective action process as per the bylaws. Dr. Lipham stated he alone did not want to make the decision regarding summarily suspending Dr. Braswell's privileges for the following reasons:
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> 1) He is not a surgeon.
> 2) He was involved in this case and a prior similar case, which is currently in hearing process.
> 3) Dr. Braswell had expressed concern over Dr. Lipham's involvement at a prior MEC meeing.

Id.*, at 20.** The committee noted that if a summary suspension was made, Braswell would be entitled to a meeting within 15 days. ***Id.*, at 21.** The committee unanimously voted to summarily suspend his privileges pending the appeal process. ***Id.

The MEC met with Braswell on May 27, 2003, and allowed him to present his opinion of the case involving Patient H. ***Id.*, at 22-27.** Braswell told the committee that, in his opinion, they had not followed due process by issuing a summary suspension which he characterized as "unheard of in this hospital." ***Id.*, at 28.** He felt that other cases reviewed by the

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Riester, a radiologist; and Dr. Richard Steele, a urologist. **Rice Affidavit, ¶ 12.**

committee were of greater concern than this one. ***Id.*** It was unclear whether this referred to his cases or those of other physicians. While Braswell admitted that, in retrospect, he should have taken the patient back into surgery earlier, he did not feel that the patient had been put in danger. ***Id.*** He also admitted that he should have called for consultations but denied the nurses were unable to reach him by telephone and claimed that beepers "don't always work." ***Id.*** After discussing the matter, the committee concluded that "Dr. Braswell appears not to understand the severity of the concerns in this case." ***Id.*****, at 29.** This was exacerbated by the fact that these problems had previously been addressed with him at a prior meeting, and yet, occurred during a time when he knew that his charts were being reviewed. ***Id.*****, at 30.** The committee unanimously voted to continue the suspension of his privileges. ***Id.***

Braswell then pursued the fair hearing process during which time he was represented by counsel. **Braswell Deposition, at 163.** Braswell, through his attorney, waived his right to a 30-day notice of the hearing date. ***Id.*****, at 171;** ***see also,*** **Braswell Deposition Exhibit 53.** The hearing was conducted in October and November 2003 and Braswell, who was represented by counsel, testified and presented an outside physician as a

witness. **Lipham Affidavit, ¶ 20.** The fair hearing committee issued its decision on November 20, 2003:

> The committee accepts that there are legitimate and serious concerns regarding Dr. Braswell's preoperative assessment and postoperative management of the cases presented during the hearing. Inadequate documentation of many cases was also noted. These issues are especially true in the index cases[.]
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> However, it appears to this committee that Dr. Braswell was not afforded ample opportunity to respond to the allegations made prior to the summary suspension. Furthermore, the hospital's proper flow of information from the surgical case review committee to the MEC to the hospital President, etc[.] appeared to be lacking.
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> The committee acknowledges that the MEC acted in good faith and with the intention of protecting patients, however, we are concerned by the apparent lack of appropriate documentation by the hospital as required by the bylaws.
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> After a thorough and exhaustive review of all the evidence presented during the hearing, the committee finds that the evidence did not support summary suspension, and that other avenues of corrective action (as listed in Hospital Bylaws article XII, section C.5) could have been investigated by the Medical Executive Committee prior to summary suspension.

Exhibit 14, *attached to* Plaintiff's Memorandum.

After the report of the fair hearing committee, the issue was referred back to the MEC which voted, on December 2, 2003, to affirm its earlier decision to recommend the suspension of Braswell's privileges. **Lipham**

Affidavit, ¶ 19. Braswell then requested appellate review of that recommendation; such review was conducted by the Appellate Review Committee before whom Braswell appeared with counsel. **Affidavit of Grady Stokes, filed August 22, 2005, ¶¶ 1, 4.** The Appellate Review Committee recommended to the Hospital Board that the suspension be affirmed. ***Id.*** On February 26, 2004, that Board voted to affirm the recommendation to suspend Braswell's privileges. **Rice Affidavit, ¶ 18.**

III. DISCUSSION

In his objections to the Magistrate Judge's Recommendation, the Plaintiff takes exception to much of the language contained in the factual portion thereof, claiming that discrepancies between the findings and the record exist and that the Magistrate Judge made credibility determinations. Rather than address such factual issues, the undersigned conducted a *de novo* review of the record and has construed all facts in the light most favorable to the Plaintiff. As a result, discussion of these issues is unnecessary.

A. Plaintiff's cause of action pursuant to 42 U.S.C. § 1983 based on the First Amendment

The Plaintiff's First Amendment claim is based on the letter which he wrote to Dr. Herberholz stating his belief that the population of Haywood County would not adequately support six general surgeons. Plaintiff claims the Magistrate Judge applied an improper standard in determining whether this claim may withstand summary judgment and claims that the decision of the undersigned, filed January 14, 2005, in this action constitutes the law of the case both as to the proper standard and as to whether the elements of that standard have been met.

It is first noted that in the Court's January 2005 decision, the undersigned addressed the Defendants' motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). A party defending such a motion faces a far different standard than that applied to motions for summary judgment. In finding that the complaint had stated a claim upon which relief might be granted, the undersigned did not make rulings as to whether the Plaintiff would ultimately prove facts establishing such a claim. The undersigned merely ruled that the Plaintiff had, at that point, stated a claim based on the, as yet unproven, allegations of the complaint. To argue that such a decision, rendered before discovery had occurred in the case,

constitutes the law of the case for purposes of ruling on a motion for summary judgment is disingenuous.

Plaintiff argues that the appropriate standard to be applied to a First Amendment retaliatory conduct claim pursuant to § 1983 is as follows:

> A plaintiff seeking to recover for First Amendment retaliation must allege that (1) [he] engaged in protected First Amendment activity, (2) the defendants took some action that adversely affected [his] First Amendment rights, and (3) there was a causal relationship between [his] protected activity and the defendants' conduct.

***Constantine v. Rectors, George Mason Univ.*, 411 F.3d 474, 499 (4th Cir. 2005).** This standard, he notes, was the one used by the undersigned in ruling on the motion to dismiss.[13] Thus, it must be used in connection with the summary judgment review. This argument is rejected for the reasons stated above.

The Magistrate Judge used the standard recently reiterated by the Supreme Court in *City of San Diego, Cal. v. Roe*, 543 U.S. 77 (2004):

> To reconcile the employee's right to engage in speech and the government employer's right to protect its legitimate interests in performing its mission, the *Pickering* Court adopted a balancing

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[13]In addressing the adequacy of the complaint, it would have been impossible for the undersigned to have performed the balancing test discussed *infra*, since the only pleading being considered at that point was the complaint and the allegations thereof.

> test. It requires a court evaluating restraints on a public employee's speech to balance "the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."
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> . . .
>
> *Pickering* did not hold that any and all statements by a public employee are entitled to balancing. To require *Pickering* balancing in every case where speech by a public employee is at issue, no matter the content of the speech, could compromise the proper functioning of government offices. This concern prompted the Court in *Connick* to explain a threshold inquiry (implicit in *Pickering* itself) that in order to merit *Pickering* balancing, a public employee's speech must touch on a matter of "public concern."

***Id.*, at 82 (quoting *Pickering v. Bd. of Education*, 391 U.S. 563, 568 (1968) and *Connick v. Myers*, 461 U.S. 138, 143 (1983)).**

In this case, the Plaintiff alleges that the Hospital was a public or governmental employer. **Amended Complaint, filed June 21, 2004, ¶ 2.** And, he alleges that his speech was on a matter of public concern. **Plaintiff's Objections to Memorandum and Recommendation, filed January 13, 2006, at 7.** Thus, the balancing test applied by the Magistrate Judge was correct.

Nonetheless, the Plaintiff persists in his claim that the rulings in *Constantine* and *Huang v. Bd. of Governors of the Univ. of North Carolina*, 902 F.2d 1134 (4th Cir. 1990), supply the second element of his cause of

action: that the Defendants took some action that adversely affected his First Amendment rights without the use of a balancing test. It is first noted that *Constantine*, like the earlier ruling in this case, involved a motion to dismiss for failure to state a claim upon which relief may be granted. And, unlike this case which involves a public employer and employee, the plaintiff in *Constantine* was a law student who complained to the dean and her professor about the refusal of examination administrators to allow her additional time to complete a final examination due to the sudden onset of a migraine headache. She publicized her complaints in an article for the law school's newspaper. After her article appeared, the dean allowed her another opportunity to take the exam but Constantine believed that the university had determined in advance to give her a failing grade when she finally took the exam. She did, in fact, receive a failing grade. In June 2005, the Fourth Circuit addressed the plaintiff's appeal from the dismissal of her complaint on a Rule 12(b)(6) motion and applied the second element as stated above: that the defendant took some action that adversely affected her First Amendment right.

As noted above, however, the relationship between the Hospital and Braswell most closely resembles that of a governmental employer and

employee. The Hospital is a state actor for purposes of § 1983. And, in his complaint, Braswell alleges that "[i]n December 2002, Dr. Braswell was a Board Certified General Surgeon at Haywood Regional Hospital." **Amended Complaint, ¶ 7.** The crux of Braswell's complaint is that the Hospital declined to go through with a contract with Dr. Birdsong and denied privileges to Braswell at the Hospital in retaliation for his speech. ***Baquir v. Principi*, ___ F.3d ___, 2006 WL 146111, *2 n.4 ("'Privileges,' which are granted based on credentials and other considerations, allow a physician to practice at a hospital in a particular field of medicine.").**

Moreover, *Huang*, the other case cited by the Plaintiff in support of his objection to the Magistrate Judge's recommendation, actually supports the standard applied by the Magistrate Judge.

> Plaintiffs asserting First Amendment [] claims under § 1983 must show *first* that the expressions which are alleged to have provoked the retaliatory action relate to matters of public concern. Whether an expression involves a matter of public concern is a question of law. . . . *Second*, claimant must show that the alleged retaliatory action deprived him of some valuable benefit. *Third*, claimant must show a causal relation between the expression of public concern and the retaliatory action.

***Huang*, 902 F.2d at 1140 (internal citations omitted).** In a footnote, the Circuit further noted that where "the expressions relate to a matter of public concern, First Amendment protection attaches only if the employee's interest in the speech outweighs the employer's interest in 'effective and efficient fulfillment of its responsibilities to the public.'" ***Id.*, at n.7 (quoting *Connick*, 461 U.S. at 150).** In other words, the *Huang* court acknowledged the *Pickering* balancing test. Other cases, including those involving medical professionals in litigation with hospitals, apply the same test. ***See, e.g., Carreon v. Illinois Dep't of Human Servs.*, 395 F.3d 786, 791 (7th Cir. 2005) ("[E]ven if the employee spoke on a matter of public concern, the government may restrict the speech if it can carry its burden of proving that the interest of the public employee as a citizen in commenting on the matter is outweighed by the interest of the state, as employer, in promoting effective and efficient public service. The court performs this balancing only if the employee's speech touches on a matter of public concern." (quotations omitted)); *Rodgers v. Banks*, 344 F.3d 587, 601 (6th Cir. 2003) ("Because Plaintiff has successfully established that her speech touched upon an issue of public interest or concern, we now must balance Plaintiff's**

interest, as a citizen, in making her speech against Defendant's interest, 'as an employer, in promoting the efficiency of the public services' performed at the Lewis Center.'" (quoting *Pickering*, 391 U.S. at 568)); *Love-Lane v. Martin*, 355 F.3d 766, 775 (4th Cir.), *cert. denied*, 543 U.S. 813 (2004); *Suarez Corp. Indus. v. McGraw*, 202 F.3d 676, 686 (4th Cir. 2000) (Reciting the same elements as *Constantine* and then acknowledging and quoting the *Pickering* balancing test).

In short, the Plaintiff cannot have it both ways: he is either speaking on a matter of public concern, thus triggering the balancing test, or he is not so speaking, thus depriving him of a cause of action altogether.

Having concluded that the balancing test must be applied, the Court will restate the elements of the Plaintiff's cause of action based on retaliation in violation of his First Amendment rights:

> First, the speech must relate to a matter of public concern. Second, the "employee's interest in the First Amendment expression must outweigh the employer's interest in efficient operation of the workplace." (This part of the inquiry is known as the *Pickering* balancing test.) Third, there must be a causal relationship between the protected speech and the retaliatory employment action; specifically, "the protected speech [must be] a 'substantial factor' in the decision to take the allegedly retaliatory action." The first two elements involve questions of law. The third element, causation, can be decided on "summary judgment only in those instances when there are no causal facts in dispute."

***Love-Lane*, 355 F.3d at 776 (quoting *Goldstein v. Chestnut Ridge Volunteer Fire Co.*, 218 F.3d 337, 352 (4th Cir. 2000)) (other citations omitted).** The parties have assumed, as did the Magistrate Judge, that the first element is satisfied, *i.e.*, the letter Braswell sent to Herberholz related to a matter of public concern. Braswell next objects to the Magistrate Judge's finding that the Hospital's interest, on balance, outweighed that of Braswell.

> Factors that [a court should] take into account in balancing these interests include whether the employee's speech (1) impairs the ability of supervisors to mete out discipline; (2) impairs harmony among co-workers; (3) damages close working relationships; (4) impedes the performance of the public employee's duties; (5) interferes with the operation of the agency; (6) conflicts with the responsibilities of the employee within the agency; and (7) is communicated to the public or to co-workers in private. . . . Of course, the speech "will not be considered in a vacuum; the manner, time, and place of the employee's expression are relevant, as is the context in which the dispute arose.

***Id.*, at 778 (quoting *Rankin v. McPherson*, 483 U.S. 378, 388 (1987)).**

Braswell participated in a task force designed to assess whether additional surgeons could be tolerated within the County. He determined that his personal practice should hire a surgeon and cited as reasons therefor the additional coverage he would receive for call and vacations. Obviously, he thought one additional surgeon was warranted. Braswell

does not dispute that Dr. Sharpton agreed to reduce his own working hours in order to accommodate two new surgeons for the area. In fact, Braswell was well aware that two surgeons were being recruited at the same time; however, it was not until January 2001 that he felt strongly that the community could not support two surgeons. This occurred at a point in time when both surgeons had been interviewed and offered contracts by the Hospital. It is telling that he stated, during the meeting with the Hospital board, that "he understood that whichever practice obtained the first recruit the other practice would not complete their recruitment efforts." **Braswell Deposition Exhibit 13.** Dr. Sharpton specifically noted that Braswell's letter had created "divisiveness" within the medical community. ***Id***. And, another doctor noted that "this type of conduct would sabotage [the Hospital's] recruiting process if one practice could call a recruitment candidate of another practice and sway the candidate's placement decision." ***Id***. Braswell never denied that he had earlier agreed with the assessment that the County could support 1.8 additional surgeons; he stated that he had not remembered that an additional .8 surgeon would be added. And, it is also telling that he sent a formal letter of apology

admitting that his conduct was divisive and "ill advised." **Braswell Deposition Exhibit 16.**

The Court finds, as a matter of law, that the letter sent by Braswell to a physician who had been offered a firm contract was, at the very least, an unauthorized interference with the efforts of the Hospital to recruit and attract new, competent medical professionals to the area. ***Love-Lane, supra*.** This, of course, impacted not just the Hospital and medical community, but Haywood County at large. ***Id.*** And, it is an understatement that such conduct would impair and interfere with the ability of the surgeons in the area to work together, trust each other and cooperate with one another.[14] ***Id.*** The letter interfered with a legitimate goal of the Hospital, created disharmony among the medical community, impaired a relationship of trust and loyalty among the existing surgeons, tainted the professionalism of the community and exposed that tainted professionalism to outsiders, *i.e.*, Dr. Herberholz and anyone to whom he might mention or show the letter. ***Rodgers, supra*.** The minutes of the

[14]The Plaintiff claims the Magistrate Judge failed to cite evidence to support his conclusions in this regard. Suffice it to say that the very conduct about which Braswell complained, the refusal of the other surgeons to share call and coverage, proves this point.

Board's meeting clearly show that each of these things occurred as a result of the letter. Moreover, Braswell's own complaints also prove the impact that his letter had on the medical community. He complained that after this incident he was no longer assisted by the other surgeons. And, he "had the feeling" that Dr. Lipham no longer wished to socialize with him.[15] **Braswell Deposition, at 104.** Because the Court finds that the balance is in favor of the government employer, it holds as a matter of law that the Plaintiff cannot withstand summary judgment. As a result, it is unnecessary to reach the third element: whether there was a causal relationship between Braswell's free speech and the allegedly retaliatory conduct. ***Witte v. Wisconsin Dep't of Corrections*, ___ F.3d ____, 2006 WL 156737 (7th Cir. 2006); *Maldonao v. City of Altus*, 433 F.3d 1294, 1309-10 (10th Cir. 2006); *Holley v. Giles County, Tenn.*, 2006 WL 265468 (6th Cir. 2006); *Hall v. Septa*, 2006 WL 236463 (3d Cir. 2006).** As a result, this cause of action is dismissed.

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[15]The Court is also compelled to note that while the third element is not reached, speculation or reports of "feelings" are insufficient to withstand a motion for summary judgment. ***James v. Booz-Allen & Hamilton, Inc.*, 368 F.3d 371, 377 (4th Cir.), *cert. denied*, 543 U.S. 959 (2004); *Sylvia Dev. Corp. v. Calvert County, Md.*, 48 F.3d 810, 818 (4th Cir. 1995).**

B. Plaintiff's cause of action pursuant to 42 U.S.C. § 1983 based on violations of due process

The Plaintiff's first due process claim is that bias tainted the decisions to summarily and permanently suspend his privileges.[16] This bias, he claims, was not limited to the named Defendants in this case but to other physicians who participated in the decision-making process. Or, as the Plaintiff phrased it:

> From the evidence of the competitive advantage to be gained by these doctors from the suspension of Plaintiff's privileges as well as the retaliatory motives of the competing surgeons and Dr. Lipham, a reasonable jury could conclude that the process by which Plaintiff was stripped of his privileges was tainted by bias and he was denied due process as a result.

Plaintiff's Objections to Memorandum and Recommendation, filed January 13, 2006, at 17.

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[16]The Plaintiff briefly notes that the Magistrate Judge found the Hospital's Board had the final, ultimate authority to suspend his privileges and apparently objects to that recommendation. However, no discussion is had of that issue. In the next section of the Plaintiff's objections, however, he states, "the Magistrate Judge has made a finding that only the Hospital Board was the decision maker in the actions taken against the Plaintiff. This is a finding to which the Plaintiff makes specific objection." **Plaintiff's Objections to Memorandum and Recommendation, filed January 13, 2006, at 18.** Merely making such a statement without any supporting legal or factual argument is insufficient to make a "specific objection" and the Court does not consider it to be so.

However, the law is clear that bias obtained in the context of the due process procedure does not qualify as bias sufficient to violate that right.

> An impartial decision maker is an essential element of due process. An individual is not disqualified, however, because he has formed opinions about a case based on his or her participation in it. To be disqualifying, personal bias must stem from a source other than knowledge a decision maker acquires from participating in a case.

***Bowens v. N.C. Dep't of Human Resources*, 710 F.2d 1015, 1020 (4th Cir. 1983) (citations omitted).**

> Furthermore, actual bias or a high probability of bias must be present before due process concerns are raised, and a person claiming bias on the part of an administrative tribunal must overcome a presumption of honesty and integrity in those serving as adjudicators. Plaintiff bears the heavy burden of proving bias or a high risk thereof.

***Simpson v. Macon County, N.C.*, 132 F.Supp.2d 407, 411 (W.D.N.C. 2001) (quotations and internal citations omitted).**

Plaintiff argues that David Rice, the Hospital president, Dr. Lipham, and his wife were present during the meeting of the MEC at which it was determined to recommend to the Board that Braswell's privileges to perform gastric bypass surgery be summarily suspended. These individuals, he believes, were biased against him because of the letter which he sent to Dr. Herberholz. Dr. Freeman, he notes, informed

Braswell of the suspension. Drs. Sufian and Sharpton, he claims, were Braswell's competition in the community for surgical practice and served on the "surgical *ad hoc* committee" as well as the Board. Dr. Steele, who, like Braswell, performed vasectomies, served on the MEC, the "gastric *ad hoc* committee," the Surgical Case Review Committee, and the Board. Dr. Nathan, he claims, was a competitor because he performed endoscopic procedures and he served on both of the *ad hoc* committees. Thus, the Plaintiff claims that the pecuniary advantage each of these physicians stood to gain by eliminating Braswell's privileges at the Hospital shows a personal bias sufficient to withstand summary judgment.

Dr. Lipham, who served at various times during the period at issue as the Chief of Staff and a member of the MEC, is a pulmonary specialist. In what manner his pecuniary interests would be heightened by eliminating Braswell's privileges at the Hospital has not been explained. The same reasoning applies to his wife. Moreover, as a member of the MEC, Dr. Lipham refused to make a decision unilaterally as to the suspension of Braswell's privileges. ***See*, Plaintiff's Exhibit 9, at 20.** As for Braswell's allegation that Lipham's lack of desire to socialize with him constitutes evidence of bias, that issue has been dismissed as based on personal

feeling, opinion or speculation. The same reasoning applies to Mrs. Lipham. In short, the only evidence that these individuals were biased against Braswell because of the Herberholz letter is Braswell's own speculation and personal opinion, neither of which is sufficient to withstand summary judgment.

David Rice has been the president of the Hospital since 1993. Braswell has not explained in what manner Rice stood to gain financially by the elimination of his privileges.[17] Dr. Freeman, who served as the Chief of Staff at the time Plaintiff's privileges to perform gastric bypass procedures were summarily suspended, is a family physician and was at all relevant times the Plaintiff's partner. Her decision to suspend his privileges actually would have been detrimental to her own pecuniary interests since they were in the same practice. This hardly constitutes evidence of bias.

While Dr. Steele, a urologist, was a member of the MEC, there were, in addition to he and Dr. Lipham, seven other physicians on that committee, all of whom unanimously voted to summarily suspend Braswell's privileges to perform gastric bypass procedures. Braswell, who

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[17]As to personal bias based on the Herberholz letter, the same reasoning applies to Rice as to the Liphams.

claims that Dr. Steele had a pecuniary interest in eliminating him as competition because they both performed vasectomies, notes that Dr. Steele also served on the Surgical Case Review Committee. That committee, however, is a standing committee at the Hospital and is responsible for reviewing any case in which a patient has an unexpected or complicated post-operative outcome. Braswell does not dispute that he had at least two such cases, Patients F and H.

As for Dr. Sharpton, one of the competing general surgeons in the area, he offered to reduce his own working hours and, thus, his income, in order to recruit new general surgeons to the area. This is evidence which refutes Braswell's claim that Dr. Sharpton harbored a personal bias based on the fact that Braswell might take away business. Moreover, while Sharpton was a member of the Board and Appellate Review Committee which participated in the fair hearing appeal process, he abstained from voting on the issue of suspending Braswell's privileges. **Sharpton Affidavit, ¶ 5.** There were seven other individuals serving on those entities. **Rice Affidavit, ¶ 14.**

Dr. Nathan, a gastroenterologist, served on the gastric bypass *ad hoc* committee. Braswell claims Nathan had a pecuniary interest due to

the fact that he performed endoscopies, as apparently did Braswell. However, there were four other physicians serving on that committee.

Dr. Sufian, one of the other general surgeons, served on the *ad hoc* committee which reviewed Braswell's cases between February and March 2003. While Braswell attributes a pecuniary motive to him, five other physicians served on that committee.

In short, Braswell speculates that each of the physicians to whom he attributes personal bias had a financial motive for eliminating his privileges. The fact is that each of these physicians participated in the committees reviewing or assessing his performance. "To be disqualifying, personal bias must stem from a source other than knowledge a decision maker acquires from participating in a case." ***Bowens, supra*.** This evidence is simply insufficient to meet the "heavy burden" a plaintiff must meet to show actual bias or a high risk thereof. Nor is it sufficient to attack the integrity of this many different medical professionals.

Next, the Plaintiff objects to the Magistrate Judge's finding that the various committees involved with his case were not adjudicative bodies,

merely investigatory ones, and thus, no due process was owed.[18]

Plaintiff's objection is:

> The simplest statement of the Plaintiff's claim is that on two separate occasions, the MEC met and voted to strip Plaintiff of his privileges; first his privileges to do gastric bypass surgery and then all privileges at the Hospital. It is undisputed that on each occasion, Plaintiff received no notice of the meeting of the MEC and prior to the action being taken was given no opportunity to defend his record of medical practice.

Plaintiff's Objections, at 20.

The Plaintiff has not cited a single case in support of his objections and has not cited to the record. This does not warrant *de novo* review. Nonetheless and considering first the claim that he was denied pre-deprivation due process, the Bylaws, Rules and Regulations for the Medical Staff of the Hospital provide for the summary suspension of privileges.

> Whenever a Practitioner['s] . . . conduct requires that immediate action be taken to protect the life of any patient(s) or to reduce the substantial likelihood of immediate injury or damage to the health or safety of any patient . . . the President . . . with concurrence of . . . the Chief of Staff . . . shall have the authority to summarily suspend the Medical Staff membership status and/or all or any portion of the clinical privileges of such Practitioner. Such summary suspension

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[18]The Court does not address this objection because the law renders the characterization of the bodies moot.

> shall become effective immediately and the President shall give written notice of the suspension to the Practitioner.

Exhibit 8, *attached to* Plaintiff's Memorandum, at 55. Thereafter, the fair hearing procedure outlined within the Bylaws, and of which Braswell availed himself, supplied post-suspension procedures to contest the suspension. ***Id.*, at 56.**

> Dr. [Braswell] is correct that due process generally requires notice and an opportunity to be heard prior to the deprivation of a protected property interest. It is well settled, however, that "[p]rocedural due process is a flexible concept whose contours are shaped by the nature of the individual's and the state interests in a particular deprivation." In some cases, "where a state must act quickly, or where it would be impractical to provide predeprivation process," postdeprivation process is enough to satisfy the requirements of due process. [Courts] have previously considered . . . the pre-suspension process due a physician where patient safety was considered to be at risk. In *Caine v. Hardy*, an anesthesiologist at a public hospital was suspended after an investigation of the death of one of his patients revealed serious deficiencies in his performance. Believing that Dr. Caine posed a danger to his patients, the hospital suspended him without first affording him a formal hearing. [The Court] held that, under such exigent circumstances, where the safety of the public is at risk, an adequate post-suspension remedy satisfies the requirements of due process.

***Patel v. Midland Mem. Hosp. & Med. Cen.*, 298 F.3d 333, 339-40 (5th Cir. 2002) (quoting *Caine v. Hardy*, 943 F.2d 1406, 1412 (5th Cir. 1991) and *Gilbert v. Homar*, 520 U.S. 924, 230 (1997)) (other internal citations**

omitted); *Ferraro v. Bd. of Trs. of Labette County Med. Cen.*, 106 F.Supp.2d 1195, 1202 (D. Kan. 2000), *aff'd*, 28 Fed. Appx. 899 (10th Cir. 2001) ("[T]he Supreme Court has found that when it is necessary to act quickly, postdeprivation [process] satisfies the requirements of the Due Process Clause."); *accord, Palotai v. Univ. of Maryland at College Park*, 38 Fed. Appx. 946, 952 (4th Cir. 2002).

The evidence establishes that Dr. Braswell "was sanctioned under the bylaw authorizing quick action by the hospital to protect the lives of patients."[19] ***Caine*, *supra*, at 1411 (footnote added).** As previously noted *infra*, Dr. Freeman, the Plaintiff's partner and the Chief of Staff at the time, was summoned by the Hospital's risk manager in December 2002 concerning Patient F. Dr. Freeman's investigation showed that despite post-operative complications and a continually deteriorating condition, the Plaintiff refused to listen to the advice of consulting physicians. He took the patient back into surgery on two occasions without surgical

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[19]Plaintiff argues that the language of the by-law required that one of his patients actually be present in the Hospital at the time the suspension was pronounced. This is a frivolous argument; it is clear that the by-law was intended to protect any patient who might be admitted to the Hospital for surgery by Braswell.

assistants.[20] When Dr. Freeman insisted that he transfer the patient to a facility with more advanced treatment options, the Plaintiff admitted that he used profanity toward her. This behavior certainly would have given the Hospital cause to believe that Braswell did not take his conduct seriously, as the minutes of various meetings disclose. Dr. Freeman, as the Chief of Staff, recommended a moratorium on all gastric bypass surgeries as to all surgeons, not just as to the Plaintiff. She summoned an *ad hoc* committee to review the past two years of such surgeries, not just those performed by the Plaintiff but by other physicians as well. On December 20, 2002, Dr. Freeman took her information concerning Patient F to the MEC which recommended the continued suspension of the Plaintiff's privileges to perform gastric bypass surgery. He was allowed to continue to perform other surgeries and, indeed, did so.

On January 2, 2003, Dr. Lipham, the new Chief of Staff, invited the Plaintiff to appear before the MEC on January 14, 2003. Prior to that meeting, the *ad hoc* committee presented its review of 19 gastric bypass

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[20]Plaintiff's counsel argues that the necessity for the presence of additional physicians has not been documented. Surgical assistants, however, are not physicians but members of the nursing staff, surgical technicians, or surgical physician's assistants who are present to assist the surgeon during the procedure.

surgeries performed by the Plaintiff in the previous two years. ***See*, Plaintiff's Exhibit 9.** Among the more appalling deficiencies noted were two female patients on which the Plaintiff did surgery without first performing pregnancy tests. He performed one surgery for which he had no privileges and another one for which he had no consent. The committee noted that 14 out of 19 cases had complications; four involved surgeries without surgical assistants.

In response to questions at that meeting, Braswell did not deny his failure to insist that these patients first attempt diet and nutritional assessments but explained that he relied on the fact that the insurance companies would not authorize the surgeries without such attempts. He admitted that he did not obtain psychiatric evaluations for these patients because psychiatrists never advised against the surgery. The reason four patients were returned to surgery was blamed on the stapler used in the procedure, which Braswell explained did not properly staple the wound. One physician questioned Braswell as to why he was scheduled to perform a hysterectomy on a patient since he was a general surgeon. Braswell did not respond.

As to Patient F, Braswell admitted the patient had tachycardia; however, no cardiological consultation was held. Braswell also admitted that the patient had sleep apnea and a consultation should have been obtained. The apnea resulted in a complication in the patient. Braswell blamed one of the patient's problems on the fact that the patient failed to increase his protein level prior to surgery. As for failing to consult, Braswell claimed that a nurse went to the ICU medical director instead of to him. He did not address whether the consultation was necessary except to opine that a pulmonary consultation was unnecessary despite the fact that the patient had apnea.

This evidence clearly establishes that the Hospital acted appropriately in December 2002 when it summarily suspended the Plaintiff's privileges. The Plaintiff was advised in January 2003 that the *ad hoc* committee would review his other surgical procedures in the following two month period. The Plaintiff's suspension from performing gastric bypass procedures continued during that time. Out of 21 procedures reviewed between January 23, 2003, and April 10, 2003, 20 percent of the patients suffered complications; in over half of these procedures, there were sketchy documentation and other deficiencies.

On April 12, 2003, Braswell performed surgery on Patient H. Again, numerous deficiencies were noted in the pre- and post-operative handling of the case and the patient suffered from severe complications which have been noted *infra*. Many of the problems encountered with Patient F were repeated with this patient, including an inability of the nursing staff to locate Braswell when the patient's condition began to deteriorate. As noted *infra*, the MEC concluded that Braswell simply did not understand the seriousness of the Hospital's concerns. Indeed, the report of the Surgical Case Review Committee is alone sufficient to warrant the action taken:

> It is truly with great sadness that as a committee we have found Dr. Braswell to be a very common name brought up and in contrast to the above noted minor, sporadic problems[,] his tend to be of a much more serious nature.
>
> Our concerns include but are not limited to the following:
>
> 1-Frequent, poor pre-operative evaluation, including appropriate lab work and use of consultants.
> 2-Frequent, questionable appropriateness of surgical procedures that might have been handled differently.
> 3-Incredibly poor chart documentation and entries that border on willful missrepresentation (sic).
> 4-Not being forthcoming with families when problems do arise.
> 5-And, lastly as you are well aware of in recent months an extremely disturbing trend of young, otherwise healthy patients going very badly post operatively with nurses being unable to locate Dr. Braswell. Even of more concern is his apparent lack of interest or his inability to appreciate the seriousness of the situation when contacted. In addition, the documentation of

> Radiologists, internists[,] nursing and ancillary staff, all strongly advising him to be more aggressive with some of the post operative problems only to have these dismissed and the patient at or near death and requiring transfer.
>
> . . .
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> [F]or most of us on the committee, we have not known Dr. Braswell for as long as some hospital staff members. We do not know what his level of care was 10-15 years ago but clearly there seems to be a deterioration in judgment and skill over the last several years. Whether this is related to some type of mental deterioration, his recent health problems, over extension with his practice in Sylva, or simply burnout, we feel his care is inappropriate and far too high in number of cases to ignore. Therefore, it is with great regret that we are recommending, until further evaluation can be done, that surgical privileges be suspended.
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> . . .
>
> We have already seen too many otherwise healthy individuals that have come through the committee that have had near life threatening complications when treated by Dr. Braswell and inappropriate recognition and care.

Exhibit 24, *attached to* Plaintiff's Memorandum.

The Court finds that "[i]n light of the consistent findings before the MEC, the MEC reasonably concluded that it had no choice but to act quickly to protect patient safety. Because pre-suspension process was not practical under these circumstances, Dr. [Braswell's] due process rights were not violated." ***Patel*, 298 F.3d at 340.** Despite the evidence noted above, Braswell claims there is no evidence that he was actually incompetent or that any patient in the Hospital was actually in danger.

"When determining the amount of process constitutionally due Dr. [Braswell] prior to the . . . suspension of his privileges, the key question is not whether Dr. [Braswell] was *actually* a danger, but whether the MEC had reasonable grounds for suspending him as a danger." ***Id.*** Based on the evidence, the MEC did have such grounds. ***Id.*** The fact that a later report may have undercut the seriousness of those grounds, primarily on the basis that Braswell did not adequately document the actual treatment provided, is of no moment to the situation faced by the MEC. ***Id.*; *Beyer v. Lakeview Community Hosp*., 187 F.3d 634 (table), 1999 WL 552606 (6th Cir. 1999).** The Court finds that the Hospital did not violate Braswell's pre-deprivation due process rights.

As to the claim of post-deprivation of due process, the Plaintiff made the following objection:

> The Magistrate Judge makes note of the absence of any argument by the Plaintiff that the Fair Hearing Process was insufficient from a due process perspective. That is because this is not an allegation of the Plaintiff. Instead, the Plaintiff focuses on the insufficiency of the post-deprivation process at earlier stages of the process and after the decision of the Fair Hearing Committee.
>
> . . .
>
> As it is Plaintiff's position that the deprivation of his due process rights occurred at the two meetings of the MEC on December 20, 2002 and May 6, 2003, Plaintiff's recitation of facts by which he demonstrates the insufficiencies of the

> procedures which followed these actions, Plaintiff has met his burden of demonstrating that a genuine issue of material fact exists as to whether any post-deprivation processes were Constitutionally sufficient.

Plaintiff's Objections, at 21-22. From this the Court gleans the following: (1) the Plaintiff does not allege that the post-deprivation due process provided by the fair hearing process and the appeal therefrom was constitutionally deficient; (2) he claims the post-deprivation due process prior to the fair hearing process was insufficient, although he does not state in what manner it was deficient and he does not identify what process was defective;[21] (3) he claims the post-deprivation due process after the fair hearing process was insufficient, although he does not state in what manner it was deficient and he does not identify what process was defective; (4) it is his position that the only deprivation of due process occurred at the MEC meetings of December 2002 and May 2003; and (5) because the Defendants failed to prove they are entitled to summary judgment on this issue, he was not obligated to come forward with any evidence in opposition.

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[21]It does bear noting that the fair hearing process is, in fact, the post-deprivation due process provided for in the Hospital's Bylaws. ***See*, Exhibit 8, *attached to* Plaintiff's Memorandum.**

Suffice it to say that a recommendation that the Defendants' evidence warranted summary judgment as to this issue should have alerted Plaintiff to the necessity of citing to any evidence in support of his claims of post-deprivation due process violations in his objections. A reading of the objections, however, clearly shows that no such claim is actually being raised. In any event, the Plaintiff has failed to specifically object to the recommendation that this claim be dismissed and the undersigned, having nonetheless conducted a *de novo* review of this issue, finds that no post-deprivation violation occurred.

C. The Plaintiff's objection to the qualified immunity finding

The Court finds the Plaintiff's objection as to this ground is frivolous and without merit.

D. The Plaintiff's state law claims for breach of contract and defamation

The Plaintiff's objections only addressed the issue of whether the Defendants are immune from suit based on common law causes of action pursuant to the Health Care Quality Improvement Act of 1986 (HCQIA), 42 U.S.C. §§ 11101, *et seq.* The undersigned briefly addresses the substantive quality of those claims so that *res judicata* may attach and this matter may achieve final resolution.

The Plaintiff's objections do not specifically address the cause of action based on breach of contract. The complaint alleged that because the procedural due process provisions of the Hospital's by-laws were not followed, the Hospital breached its contract with the Plaintiff.[22] Since the Plaintiff's claims based on due process violations have been dismissed, there is no manner in which he could prove a breach of contract. Moreover, he has not raised any objections as to this claim.

The cause of action for defamation is based on the letter sent by the Surgical Case Review Committee to Dr. Lipham on May 16, 2003, portions

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[22]The Bylaws themselves were alleged to be a contract between the parties. No portion of the Bylaws was placed in the record showing the formation of a contract.

of which have been quoted *infra*. ***See*, Plaintiff's Exhibit 24, *supra*.** However, in the objections, Plaintiff states that Dr. Lipham testified that he never received this report and "there is no evidence in the minutes of any meeting of the MEC that it reviewed the report." **Plaintiff's Objections, at 23.** That being the case, no cause of action for defamation may exist. ***Mbadiwe v. Union Mem. Reg'l Med. Cen., Inc.*, 2005 WL 3186949, *4 (W.D.N.C. 2005) (citing *Smith-Price v. Charter Behavioral Health Sys.*, 164 N.C. App. 349, 355, 595 S.E.2d 778, 784 (2004)).** Nor would the report be actionable in any event since it begins with the cautionary instruction that, "[t]his letter is in regards to Dr. Kelley Braswell and *reflects the feelings and opinions of the Surgical Case Review Committee*." **Exhibit 24, *supra* (emphasis added).** A statement of opinion is not "'provable as false.'" ***Mbadiwe, supra* (quoting *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 19 (1990)).**

Having reviewed the Plaintiff's objections to the Magistrate Judge's determination of immunity from suit pursuant to HCQIA, the Court finds they fall far short of the mark. While the Magistrate Judge noted that the report from the Surgical Case Review Committee provided a reasonable basis for the Defendants' conduct, the Plaintiff claims that report, on which

he relies for his claim of defamation, was never actually published, and thus, cannot be the basis for reasonable action. This myopic view overlooks the vast documentary evidence adduced by the Defendants through the *ad hoc* committees, informal interviews and hearings conducted in the Plaintiff's case. And, contrary to the Plaintiff's allegation, the *ad hoc* committees were not *"eventually"* formed but almost immediately so. The Plaintiff's primary complaint appears to be that the Board did not ultimately follow the recommendation of the Fair Hearing Committee. However, it was in no manner obligated to do so.

The Court, therefore, finds that the common law claims should also be dismissed. Finally, this case has been thoroughly and contentiously litigated, no doubt as a result of the high stakes, both professionally and emotionally, which are involved. However, it has been exhaustively litigated and reviewed. The Court can perceive of no need for any further proceedings in this arena and thus will not allow any post-judgment filings, except completely routine ones, absent permission from the undersigned. Such permission should not be sought absent a compelling, good faith justification.

IV. ORDER

IT IS, THEREFORE, ORDERED that the Defendants' motion for summary judgment is hereby **GRANTED;** a Judgment is filed herewith.

Signed: February 16, 2006

Lacy H. Thornburg
United States District Judge