Filed 1/15/04 Yaqub v. Salinas Valley Memeorial Healthcare System CA6

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

NIZAR A. YAQUB,

Plaintiff and Appellant,

H024953
(Monterey County
Super.Ct.No. M55830)

v.

SALINAS VALLEY MEMORIAL HEALTHCARE SYSTEM, et al.,

Defendants and Respondents.
_____/

After his hospital staff privileges were restricted by the hospital's board of directors, appellant Nizar Yaqub, M.D., filed a petition in superior court for a writ of mandate. The petition was denied and judgment was entered for respondent, Salinas Valley Memorial HealthCare System (SVMHS), which operates the hospital. Appellant contends that he was denied a fair administrative hearing of the charges against him, because (1) he did not receive fair notice of the charges as amended during the hearing; (2) more than half of the charges were barred by laches; and (3) he was denied his right to discover and present evidence relevant to the standard of care. Appellant further contends that both the panel that heard the evidence and the appellate panel were biased, and that the appellate panel applied an incorrect standard of review to the evidence

presented to the hearing panel. We find no denial of fair procedure, bias, or abuse of discretion and therefore affirm the judgment.

Background

Appellant, a certified specialist in obstetrics and gynecology, joined the medical staff at Salinas Valley Memorial Hospital (SVMH or the Hospital) in 1991.[1] On August 23, 1999, appellant was notified that the Medical Executive Committee (MEC) had reviewed concerns regarding his performance and had voted unanimously to restrict his hospital privileges.[2] The notification letter listed 21 violations of surgical, diagnostic, and recordkeeping procedures; deficiencies in patient care and surgical performance; and inappropriate interactions with other members of the medical staff. For example, appellant was accused of performing inappropriate operations, making incorrect diagnoses, performing certain surgical procedures without the necessary privileges or without the required proctor, performing operations that resulted in excessive blood loss, and inadequately documenting procedures. Appellant also had behaved in a threatening, demeaning, or verbally abusive manner toward nurses and other physicians. The MEC suspended all of appellant's privileges for 45 days, required him to undergo further OB/GYN training for one year, and ordered him to take courses in peer relations. The MEC further directed appellant to submit a plan that identified the physicians who would care for his patients during his absence. It warned appellant that failing to comply with these directives or violating any hospital rule would be grounds for summary removal from the medical staff.

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[1] The Hospital is a public hospital organized and operated under Health and Safety Code sections 32000, et. seq.

[2] Among the responsibilities of the MEC is the duty to act on reports from staff concerning performance improvement and to recommend to the board of directors all matters relating to clinical privileges.

Appellant requested a hearing in accordance with the hospital bylaws and Business and Professions Code sections 809, et. seq. The MEC appointed a Hearing Panel consisting of two physicians and an attorney. Justice Nat A. Agliano (ret.) served as presiding officer. At the inception of the hearing appellant expressly stipulated to the composition of the panel.

The hearing, which commenced August 28, 2000, initially addressed the August 23, 1999 charges along with subsequent allegations arising from two cases in November 1999. On the third day of the hearing the MEC announced its intention to move to amend the charges according to proof. Some of the amendment details, the MEC's counsel explained, were contained in the brief the MEC had already submitted before the hearing began. The MEC served its motion to amend on December 1, 2000, and shortly thereafter it submitted a "Compilation of Charges," a document combining all of the allegations. Over appellant's objection the presiding officer granted the motion to amend.

On April 15, 2001, the Hearing Panel issued a unanimous decision finding most of the charges true or partially true, and agreeing in part with the MEC's proposed restrictions on appellant's privileges. Contrary to the MEC's recommendation, however, the panel determined that appellant should be permitted to continue certain procedures without further training, such as Caesarean section, incidental appendectomy, surgical repair of vaginal tears, and hysterectomy (with a credentialed assistant present). For the privileges that were to be restricted, appellant would be required to obtain training for one year before re-applying for those privileges. He would also be required to participate in a program designed to improve his willingness to relate to his colleagues more appropriately. Finally, the panel found it necessary to suspend appellant's remaining privileges for 90 days.

Pursuant to the Hospital bylaws, both the MEC and appellant sought review by the board of directors. The MEC asserted that the evidence submitted at the hearing and the

panel's factual findings did not support the panel's decision to allow appellant to retain privileges to perform any hysterectomy or related surgical procedure. The MEC urged the board to modify the Hearing Panel's remedy so that one year's retraining would be required of appellant for *all* abdominal surgical procedures except Caesarean sections. Appellant, on the other hand, asserted (1) "substantial noncompliance" with the hospital bylaws and applicable law and (2) insufficiency of the evidence to support the panel's decision. In accordance with the bylaws the board appointed an Appellate Review Panel (ARP) to hear the appeals.

After a June 2001 hearing the ARP agreed with the Hearing Panel that "the charges show multiple patterns of poor practice [by appellant] over the years. He has performed surgeries for which he was not privileged . . . . He has performed operations without necessary proctors, assistants, or other specialists. . . . He has unnecessarily delayed treating patients. . . . He has falsified medical records." The ARP concluded that the 90-day suspension was "reasonable and fair." It also determined, however, that the Hearing Panel's decision to impose restrictions more lenient than those requested by the MEC was "not supported by substantial evidence based upon the entire hearing record, and upon the Fair Hearing Panel's findings of fact." Accordingly, the ARP ordered appellant's privileges to be restricted as requested by the MEC. He was permitted to retain surgical privileges only for Caesarean sections. He was ordered to take courses on interpersonal relations within three months, be courteous to his peers, and refrain from performing procedures for which he was not credentialed. His patient charts would be reviewed monthly to ensure that they were complete and met standards for satisfactory medical care. He also was ordered to submit to the MEC a plan naming the physicians who would care for his patients during his 90-day suspension. Appellant was informed that if he violated any applicable bylaws, rules, or regulations, he would be summarily removed from the Hospital staff.

On September 20, 2001, appellant filed a petition in superior court for a writ of administrative mandamus under Code of Civil Procedure section 1094.5 on the ground that he had not received a fair hearing before the Hearing Panel. He also argued that the ARP had imposed arbitrary, capricious, and unfounded penalties upon him. Appellant did not specifically dispute the sufficiency of the evidence supporting the factual findings made by the Hearing Panel and the ARP. He acknowledged that for purposes of the writ proceeding, the facts were undisputed. After independently reviewing the record, the superior court denied the petition.

Discussion

1. Scope and Standard of Review

The issues before us in this appeal fall into two general categories: (1) the fairness of the proceedings before the Hearing Panel and the ARP; and (2) the validity of the penalty ultimately imposed by the ARP. Code of Civil Procedure section 1094.5 ("section 1094.5") governs our review, which follows the same course as that of the superior court. The court's inquiry in an administrative mandate matter includes the questions of whether there was a fair trial and whether there was any prejudicial abuse of discretion. (§ 1094.5, subd. (b).) "Abuse of discretion is established if the respondent has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence." (§ 1094.5, subd. (b).) In a case arising, as here, from a decision by a board of directors of a hospital district, "abuse of discretion is established if the court determines that the findings are not supported by substantial evidence in the light of the whole record." (§ 1094.5, subd. (d).) Whether the hospital's determination was made according to a fair procedure is a question of law, which we consider independently based on the administrative record. (*Pomona Valley Hospital Medical Center v. Superior Court* (1997) 55 Cal.App.4th 93, 101.)

2. Fair Procedure

Appellant first renews his contention that he did not receive a fair adjudication by the Hearing Panel. He asserts the following procedural errors: (a) The Hospital took a position that contradicted its earlier portrayal of him in another doctor's peer review proceeding; (b) he was not given fair notice of all the charges; (c) many of the charges were barred by laches; and (d) he was denied the right to discover and present relevant evidence consisting of records of patients treated by other doctors at the Hospital.[3]

"The common law requirement of a fair procedure does not compel formal proceedings with all the embellishments of a court trial . . . nor adherence to a single mode of process." (*Pinsker v. Pacific Coast Society of Orthodontists* (1974) 12 Cal.3d 541, 555.) In the hospital context, a physician is entitled to adequate notice of the charges and a reasonable opportunity to respond. (*Rhee v. El Camino Hospital Dist.* (1988) 201 Cal.App.3d 477, 489.) "A physician's right to practice in a hospital is not absolute. It 'must be balanced against other competing interests: the interests of members of the public in receiving [high-]quality medical care, and the duty of the hospital to its patients to provide competent staff physicians.' " (*Goodstein v. Cedars-Sinai Medical Center* (1998) 66 Cal.App.4th 1257, 1265 [fn. omitted], quoting *Rhee v. El Camino Hospital Dist.*, *supra*, 201 Cal.App.3d at p. 489.) "[T]his is not a criminal setting, where the confrontation is between the state and the person facing sanctions. Here the rights of the patients to rely upon competent medical treatment are directly affected, and must always be kept in mind. An analogy between a surgeon and an airline pilot is not inapt; a hospital [that] closes its eyes to questionable competence and resolves

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[3] Because we conduct independent review of the administrative record, the superior court's reasoning and conclusions are not binding on us. (*Lewin v. St. Joseph Hospital of Orange* (1978) 82 Cal.App.3d 368, 387.) Consequently, appellant's argument that the lower court engaged in flawed reasoning and gave "short shrift to [his] procedural contentions" is not relevant for our purposes.

all doubts in favor of the doctor does so at the peril of the public." (*Rhee v. El Camino Hospital Dist., supra*, 201 Cal.App.3d at p. 489.)

Accordingly, hospitals should have "the widest possible discretion in decisions affecting physician staff privileges." (*Oskooi v. Fountain Valley Regional Hospital* (1996) 42 Cal.App.4th 233, 249.) Courts should not interfere with these decisions unless it can be shown that a procedure is " 'substantively irrational or otherwise unreasonably susceptible of arbitrary or discriminatory application . . . .' " (*Rhee v. El Camino Hospital Dist., supra*, 201 Cal.App.3d at. p. 489, quoting *Miller v. Eisenhower Medical Center* (1980) 27 Cal.3d 614, 626-627.)

a. Disparity in Findings

Appellant first requests "careful scrutiny" in view of the assertedly "contradictory determinations" the board made in this case and the case of another surgeon, who was the subject of proceedings we reviewed in *Jensen v. Salinas Valley Memorial Healthcare System* (H022004, unpub). At its essence this is not a procedural issue, but at most an indirect challenge to the factual findings of the Hearing Panel. Appellant complains that the MEC in *Jensen* was glad that appellant was assisting Dr. Jensen, whereas in his case the MEC was critical of his performance. In appellant's view, the MEC and SVMHS tend to "bend the facts to make them suit the desired outcome." Appellant therefore urges this court to "be particularly careful in scrutinizing the process that leads to such factual findings, so that these entities cannot use the substantial evidence rule to turn the judicial system into a rubber stamp for whatever agenda they are pursuing on any given day."

The *Jensen* case, of which we took judicial notice, is not helpful to appellant. "Although a court may judicially notice a variety of matters (Evid.Code, § 450 et seq.), only *relevant* material may be noticed." (*Mangini v. R. J. Reynolds Tobacco Co.* (1994) 7 Cal.4th 1057, 1062.) Moreover, taking judicial notice of certain documents does not extend to the truth of matters asserted in those documents, even where the judicially noticed matter consists of facts stated in a decision of the appellate court. (See, e.g.,

Sosinsky v. Grant (1992) 6 Cal.App.4th 1548, 1566 [judicial notice of the truth of "facts" stated in an appellate opinion's statement of facts is not appropriate].) Although we granted appellant's motion to take judicial notice of the record in *Jensen*, this ruling does not permit the inference that appellant was immune from negative evaluation. Appellant concedes that substantial evidence supports the factual findings in his case. That he was described in *Jensen* as a "capable assistant," taking control of procedures ostensibly performed by Dr. Jensen, is not relevant to the allegations or findings that appellant himself performed poorly in certain medical situations. The only overlap in the facts between *Jensen* and this case is that both Dr. Jensen and appellant had falsely claimed that appellant had assisted Dr. Jensen in a hysterectomy, which the latter was not authorized to perform without a proctor. Appellant later dictated and signed the operative report as if he had been the primary surgeon. The deception noted by the Hearing Panel in this case was consistent with the prior findings in *Jensen*.[4] Thus, a comparison of these two cases offers no basis for inferring manipulation of the factfinding process to suit the MEC's objectives.

b. Notice

Appellant next directs our attention to the issue of notice. He contends that the original charges amounted to allegations that he had violated hospital rules or that some of his medical procedures "had resulted in bad outcomes"-- i.e., "maloccurrences." Upon amendment, however, the MEC was permitted to assert "a completely new set of charges," recasting maloccurrences as instances of malpractice. Then, he complains, the December 2000 Compilation of Charges "added yet more allegations of malpractice." Thus, appellant argues, he "was given notice of one set of charges but, after he set out to

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[4] In appellant's case the Hearing Panel found the evidence "clear" that Dr. Jensen had functioned as the primary surgeon on that occasion, while in *Jensen* the panel found that she "probably" was the lead surgeon. (H022004) Appellant does not suggest this is a material difference.

defend himself on those charges, found himself subject to adverse findings on a completely different set of charges." These "tactics," according to appellant, violated both the Hospital bylaws and his right to due process.

The Hospital responds that the issue of notice was not raised before the board and therefore is precluded from judicial review. The record discloses, however, that appellant did protest the MEC's amendment in August 2000 when it was originally mentioned and again in December 2000, after the motion had been filed.[5] While "[t]he general rule is that an issue not raised at an administrative tribunal may not be raised in subsequent judicial proceedings" (*Chevrolet Motor Division v. New Motor Vehicle Bd.* (1983) 146 Cal.App.3d 533, 539), "less specificity is required to preserve an issue for appeal in an administrative proceeding than in a judicial proceeding." (*Citizens Assn. for Sensible Development of Bishop Area v. County of Inyo* (1985) 172 Cal.App.3d 151, 163.)

In his writ petition appellant did not complain of lack of notice.[6] In fact, he acknowledged that at the hearing "he was permitted to 'defend' himself against the specific 'charges' brought by the MEC." Assuming in any event that the issue is within

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[5] At the August 30, 2000 hearing appellant opposed the MEC's suggestion of an amendment to conform to proof, "on the basis that we came here to respond to certain charges and that's why we're here and we don't agree to respond to any others." At the December 21, 2000 hearing, as the presiding officer considered the motion, appellant's counsel stated: "I don't want to be thought to have waived the objection to the motion that the [MEC] should not be permitted to amend the charges, because Dr. Yaqub wasn't notified of these additional specific items. And I had the sense that you were going to grant the motion to amend to conform to proof, from things that you have said along the way, but I don't want to be thought of waiving that."

[6] Appellant's writ petition included the assertion that he was "denied substantive and procedural due process by egregious misconduct on the part of counsel for the MEC." Such misconduct occurred, for example, when the MEC "[s]ought to amend and supplement the 'charges' against the Petition[employer] in mid-proceedings." His argument to the superior court on this subject was confined to the point that the hearing officer should not have permitted evidence regarding stale charges.

the scope of our independent review, we nevertheless find no violation of either due process or the Hospital bylaws.[7] The amendment did not set forth "a completely different set of charges" or "an entirely different case," as appellant suggests. With only three exceptions the Compilation of Charges pertained to the same incidents originally charged, adding only details that had been revealed during the hearing testimony or explained earlier in the expert reports prepared for the hearing. In these reports the experts described the alleged events and stated the basis of their opinion that appellant had performed below the standard of care. Of the three new charges, two arose after the original charges were made, and appellant was notified of them in February 2000, long before the MEC moved to amend. The third, a vaginal breech delivery, had originally been combined with another case; at the hearing the MEC clarified that there were actually two different vaginal breech deliveries, one resulting in a stillbirth and the other causing severe brain and spinal cord damage to the baby. Of the two new cases, both were described in detail by the experts in August 2000. Whether the original charges could be characterized as maloccurrence or malpractice, appellant was clearly on notice at the outset that he was being held responsible for the negative outcome of the procedures.

Having had sufficient time to prepare his defense, appellant responded to the amended charges with extensive argument and presentation of evidence, and he thus appears to have suffered no prejudice from the amendment. He challenged the adequacy of the MEC's proof, pointing out the acceptable variations for accomplishing certain medical objectives, the conflicts in the evidence, the absence of harm in certain

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[7] The bylaws provision on which appellant relies is in the appendix, section II(B)(1)(b), which requires written notice specifying "[t]he reasons for the proposed action or recommendation, including the acts or omissions with which the [medical staff] member is charged."

situations, and the lack of guidelines during the time he was said to have caused fetal harm.

Rosenblit v. Superior Court (1991) 231 Cal.App.3d 1434 is distinguishable. There the hospital refused to disclose the specific acts or omissions that had harmed the physician's patients, even though he pleaded several times for the information. In addition, the physician submitted six written objections to the adequacy of the notice, which consisted of only a list of chart numbers pertaining to cases in which he had allegedly shown poor judgment. Here appellant received adequate notice and a detailed description of the allegations; and unlike the physician in *Rosenblit*, he did not request either additional explanation or more time to respond to the augmented charges. We find no deprivation of appellant's opportunity to defend himself on this ground.

c. Laches

Appellant unsuccessfully complained to the hearing officer, the ARP, and the superior court of the staleness of the pre-1998 charges. He argued to the Hearing Panel and the ARP that certain procedures were selected in a "'cherry-picking' expedition" to fabricate a pattern of substandard care, although these procedures either had not been scrutinized before or had been ruled upon favorably by the appropriate hospital committees. The presiding officer determined that none of the allegedly stale events had been finally determined, and that none had occurred so far in the past that appellant's ability to defend himself would be impaired. That appellant had been re-credentialed after some of the alleged events did not, in the presiding officer's view, preclude a re-examination of those events to determine appellant's *current* qualifications for certification.

The ARP agreed with the presiding officer that the charges had been brought in a timely manner. The superior court noted that there was no limitations period prescribed by the Legislature or the Hospital's bylaws, and it found no evidence that the charged events "were so stale or old that [appellant] was prevented from presenting an adequate

defense or otherwise prejudiced in rebutting any evidence presented by the MEC. . . . [I]t was the province of the [Hearing Panel] and SVMH to determine whether the respective charges were either so stale or [so] isolated . . . as to be insignificant for purposes of considering appropriate corrective action and restrictions and, if not, what action was appropriate."

On appeal, appellant contends that the Hospital denied him a fair procedure by pursuing multiple charges that were stale and therefore barred by the doctrine of laches. Appellant correctly notes that laches is available to a defendant in an administrative disciplinary proceeding. (*City of Oakland v. Public Employees' Retirement Sys.* (2002) 95 Cal.App.4th 29, 51; *Robert F. Kennedy Medical Center v. Belshe* (1996) 13 Cal.4th 748, 760.) To be successful in his laches defense, appellant would have had to show unreasonable delay by the hospital and either acquiescence in the performance now charged as inadequate or prejudice to appellant resulting from the delay. (*Conti v. Board of Civil Service Commissioners* (1969) 1 Cal.3d 351, 359.) Whether laches applied was a question of fact, which we do not resolve anew, but consider only as to whether there was substantial evidence to support the findings made below. (Cf. *Piscioneri v. City of Ontario* (2002) 95 Cal.App.4th 1037, 1046.) Here the Hearing Panel, the ARP, and the superior court found no unreasonable delay: The presiding officer stated that the events were not so old that relevant and material evidence was no longer available; the ARP agreed, as did the superior court. On the contrary, in the ARP's view, all of the charges together established "multiple patterns of poor practice . . . over the years." In light of the Hospital's duty to examine all of the relevant circumstances with the purpose of protecting its patients, the finding that the delay was not unreasonable was justified.

Furthermore, "what generally makes delay unreasonable is that it results in prejudice." (*Brown v. State Personnel Bd.* (1985) 166 Cal.App.3d 1151, 1159.) Appellant is incorrect in his assertion that it was the MEC's burden to show absence of prejudice. On the contrary, prejudice "must be affirmatively demonstrated by the

defendant in order to sustain his burdens of proof and the production of evidence on the issue." (*Miller v. Eisenhower Medical Center* (1980) 27 Cal.3d 614, 624.) The superior court found "no evidence presented that the incidents forming the basis of the charges were so stale or old that he was prevented from presenting an adequate defense or otherwise prejudiced in rebutting any evidence presented by the MEC." Appellant thus failed to show that the delay in bringing any of the charges impaired his defense in the proceeding.

Appellant nonetheless maintains that it was the MEC's burden to show absence of prejudice because the charges were brought after the expiration of an "analogous" statute of limitations--i.e., Business and Professions Code section 2230.5, subdivision (a).[8] As this statute was not raised either in the administrative proceedings or to the superior court, the issue of its applicability is not properly before us. The MEC had no opportunity to dispute the strength of the analogy, and, if unsuccessful, to meet their burden of proof on the question of prejudice. Consequently, we will not consider this contention. (Cf. *City of Oakland v. Public Employees' Retirement Sys., supra,* 95 Cal.App.4th at pp. 52-53 [city's failure to argue laches to PERS board or trial court waives theory on appeal where employees had no opportunity to refute prejudice assertion].)

d. Discovery of Patient Records

Appellant next contends that he was unfairly denied his right to discover and present evidence relevant to his defense to the charges, in violation of Business and

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[8] This statute provides, with exceptions not applicable here, that "any accusation filed against a licensee pursuant to Section 11503 of the Government Code shall be filed within three years after the [Medical Board of California], or a division thereof, discovers the act or omission alleged as the ground for disciplinary action, or within seven years after the act or omission alleged as the ground for disciplinary action occurs, whichever occurs first." Government Code section 11503 governs procedures to revoke, suspend, or limit a "right, authority, license or privilege," such as a physician's license.

Professions Code section 809.2 and the Hospital bylaws. Before the initial hearing on the charges began, appellant had requested access to charts of other hospital physicians to demonstrate "selective prosecution by physicians who are in political control of the OB-GYN Department who are pursuing the ruin of his professional career for purposes not connected to the welfare of the hospital or the patients thereof." Appellant claimed that a comparison of his own cases with "most, if not all," of the other physicians in his specialty would reveal that he was actually "better qualified with better results." Appellant believed that certain doctors in his department had pulled his patient charts in an effort to build a case against him for their own personal or financial purposes.

The presiding officer of the Hearing Panel determined that appellant was certainly entitled to discover evidence potentially relevant to his defense or to prove his qualifications for staff privileges; but "[t]hese qualifications are to be measured *objectively* against the applicable *standard of practice*. Dr. Yaqub does not contend [that] he needs the charts of others to establish the *standard* applicable to his performance of any of the medical procedures here in question. It appears, instead, that he wants to show only that his performance has been as good [as] or better than that of other practitioners in the hospital. Such evidence, however, would not prove Dr. Yaqub's own medical competence to perform the privileges in question. Therefore, the evidentiary showing does not justify the burden of production, or the invasion of privacy that would naturally result from such production."

In the course of the hearing the presiding officer allowed appellant to review 14 charts used in a focus study of vaginal breech deliveries. Upon the MEC's announcement that it would withdraw the focus studies from evidence, the presiding officer rescinded his order.

In preparation for the hearing before the ARC, appellant again sought access to charts and data for cases similar to those charged against him. Now appellant argued that this evidence was necessary to show that his cases were "within the standard and customs

established within this hospital community." He believed that he had been denied discovery of important "statistical data that would establish an objective standard of practice within the community against which [his] performance could be compared." To the extent that the hospital standards were lower than the standards described by the MEC's expert at the hearing, the charts, in appellant's view, "constitute exculpatory evidence that could have been utilized by [appellant] to *mitigate* any deviation from that standard, should the statistical data establish that the standard of practice of the *community at large* falls below the standard testified to by [the expert witness]."

The MEC responded that "[w]hat other physicians do or do not do, does not establish an objective standard of practice," which is not local, but "objective and national." The ARP agreed with the presiding officer that the requested patient charts were irrelevant to the question of whether appellant himself had engaged in the alleged conduct. It also found no evidence of bias in the bringing of the charges.

Business and Professions Code section 809.2, subdivision (d), provides that in a peer review hearing the physician has "the right to inspect and copy at the licentiate's expense any documentary information relevant to the charges which the peer review body has in its possession or under its control." The hospital bylaws also state that "[t]he physician shall have the right to inspect and copy, at the physician's expense, all documents or other evidence relevant to the charges, including all evidence which was considered by the [MEC] in determining whether to proceed with the adverse action, and any exculpatory evidence in the possession of the hospital or medical staff as soon as practicable after the [MEC] receives a request from the physician to do so." (Bylaws Appx. II(H)(2)(a).)

The key point of the presiding officer's ruling was that the records pertaining to other physicians' cases were not relevant to the charges against appellant. This was an evidentiary determination within the discretion of the presiding officer. (Cf. *Gill v. Mercy Hospital* (1988) 199 Cal.App.3d 889, 908 [denial of access to monitor reports of

surgeon's performance was within committee's discretion, as relationship to specific charges was only tangential].) The ARP was further entitled to base its decision not on a comparison with other physicians at SVMH, but on broader standards of performance among practitioners in appellant's specialty.[9] Its evaluation of appellant's performance thus did not require records of procedures done by other doctors at SVMH, but could be based on the testimony of the MEC's witnesses regarding the standard of care applicable to appellant. As appellant concedes and the administrative record discloses, those witnesses provided substantial evidence supporting the ultimate conclusion that appellant had repeatedly failed to meet the broader standard of care applicable to all physicians in his field. No abuse of discretion is apparent in the exclusion of the requested records.

3. Bias

Appellant next contends that both the Hearing Panel and the ARP could not have evaluated him accurately and fairly because of conflicts of interest in the panel members. He first challenges Dr. Robert Van Horne, a member of the Hearing Panel. After the hearing appellant learned that Dr. Van Horne's general partnership had sold a telecommunications company to the Hospital, thereby obtaining a financial benefit. Because this had not been disclosed to him before the hearing, appellant argued that he had not been given the opportunity to question Dr. Van Horne about that transaction before the panel was selected. In his appeal to the ARP, appellant sought to have Dr. Van Horne retroactively disqualified from serving on the Hearing Panel. The ARP noted that

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[9] As one of the MEC's experts, Dr. Simon Henderson, explained, because of the availability of expert consultants all over the country, a community's standard of care has become "pretty well melded into one standard of care." Thus, all certified specialists "have all done the basic training and they should all be practicing to a certain standard." Similarly, expert witness Dr. Bert Johnson testified that the standard of care applicable to SVMH was the same as that of any other community hospital; and he was measuring appellant's performance by "the same yardstick" as any other physician certified by the American College of Obstetrics and Gynecology.

appellant had accepted Dr. Van Horne at the inception of the hearing, and that he provided no facts or argument supporting his challenge when invited to do so by the ARP. Consequently, the ARP denied the motion to dismiss this Hearing Panel member retroactively.

Appellant also challenged three of the five ARP members. Thomas Mill owned a construction company that had lost a bid on one of appellant's construction projects. Harry Wardwell had unsuccessfully solicited appellant's banking business on behalf of Wardwell's employer. Deborah Nelson was appellant's former employee and the ex-wife of Norman Nelson, a doctor with whom he had had an antagonistic relationship. Each of the challenged members believed that the cited event had not affected his or her ability to serve on the panel in a "fair, neutral, and unbiased manner." The ARP denied appellant's motion to disqualify these members.

We find no reason to overturn the ARP's judgment regarding the objectivity of the panel members in question. Appellant was given the opportunity to object to any member of the Hearing Panel when the hearing began. Although he was unaware of the asserted conflict at that time, he could have used the opportunity to voir dire the panel members and thereby discover the asserted conflict. Instead, he stated that he had no objection to the composition of the panel. In any event, appellant failed to show bias. The transaction evidently had been completed, and appellant offered no evidence that this past financial transaction had predisposed Dr. Van Horne to rule in the MEC's favor. As for the ARP members, any adverse effect of their past connections to appellant was a factual matter for the ARP to determine.[10] The ARP was entitled to conclude that each of

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[10] Disqualification of a member of an administrative hearing committee is appropriate if there is "actual bias" or a situation in which " 'human experience teaches that the probability of actual bias is too high to be constitutionally tolerable.' " (*Lasko v. Valley Presbyterian Hospital* (1986) 180 Cal.App.3d 519, 529, quoting *Hackethal v. California Medical Assn.* (1982) 138 Cal.App.3d 435, 443.) Such a probability is "too high" when

the challenged panel members was capable of deciding the case in a fair and impartial manner. The record does not suggest otherwise.

4. Restrictions on Privileges

The only ground asserted in the MEC's appeal to the ARP was that the restrictions imposed on appellant by the Hearing Panel were inadequate to protect future patients and ensure sufficient remedial training for appellant. The MEC argued specifically that the Hearing Panel's decision to allow appellant to continue performing hysterectomies and related surgical procedures was not supported by the record or by the Hearing Panel's findings. The ARP agreed. Its modification of the remedy limited appellant's privileges to Caesarean sections until completion of his re-training. It also required appellant to provide a plan naming the physicians who would care for his hospital patients during the 90-day suspension period. It further directed appellant to comply with all bylaws, rules, and regulations; should he fail to do so, he would be "summarily removed" from the Hospital's medical staff.

Appellant contends that the ARP applied the wrong standard when it increased the restrictions on his privileges and conduct at the Hospital. The ARP, he argues, was an appellate body and therefore bound by the substantial evidence rule; thus, it was *required* to uphold the Hearing Panel's factual determination if substantial evidence supported it. If, on the other hand, the restrictions found appropriate by the Hearing Panel were not supported by substantial evidence, the ARP could eliminate them, but "was no more empowered to fashion additional restrictions for Dr. Yaqub than is this Court." The ARP,

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" '(1) a [panel] member has a direct pecuniary interest in the outcome; (2) a member has been the target of personal abuse or criticism from the person before him; (3) a member is enmeshed in other matters involving the person whose rights he is determining; (4) a member may have prejudged the case because of a prior participation as an accuser, investigator, fact finder or initial decisionmaker.' " (*Ibid*.)

however, "turned this standard on its head" by assuming it could overturn the Hearing Panel's decision as long as it could find substantial evidence *contradicting* the decision.

We do not believe appellant has fairly characterized the ARP's approach to the evidence. Although the ARP cited inapposite precedent in criticizing the Hearing Panel,[11] it nonetheless based its decision on the conclusion that the Hearing Panel had reached the wrong decision in light of the facts it had found true.

In this respect the case before us is distinguishable from *Huang v. Board of Directors* (1990) 220 Cal.App.3d 1286, 1293, and *Hongsathavij v. Queen of Angels etc. Medical Center* (1998) 62 Cal.App.4th 1123, 1136, cited by appellant. In *Huang*, as in this case, the hospital's bylaws imposed the same standard of review on the appeal board as on the trial court and appellate court.[12] The appellate court, however, determined that the hospital's appeal board (composed of a quorum of its board of directors) had not applied the substantial evidence standard, but had instead reweighed the evidence and independently determined that the physician's testimony was not credible. (*Id*. at pp.

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[11] Having taken judicial notice of the entire record of *Jensen v. Salinas Valley Memorial Healthcare System*, H022004, we observe that we have already had occasion to admonish the board for inappropriately relying on *Northern Inyo Hosp. v. Fair Emp. Practice Com.* (1974) 38 Cal.App.3d 14, 24. As we explained in *Jensen*, the appellate court in *Northern Inyo Hosp.*was emphasizing the role of the *reviewing court*, which, in evaluating the record for substantial evidence, "may not isolate only the evidence [that] supports the administrative finding and disregard other relevant evidence in the record." (*Ibid*.) Again the ARP-- three members of which also served on the *Jensen* ARP-- incorrectly assigned this duty to the Hearing Panel, the body that originally heard the evidence and made the findings of fact. It then *faults* the Hearing Panel for failing to follow that inapplicable principle of review. This error does not, however, affect our resolution of the issue before us.

[12] Here the bylaws of the Hospital state: "Should the Board of Directors determine that the Hearing Panel's decision is not supported by substantial evidence, the Board of Directors may modify or reverse the decision of the Hearing Panel and may instead remand the matter to the Hearing Panel for reconsideration . . . where the Board of Directors determines that a fair procedure has not been afforded. . . ." (Bylaws, III(B)(6)(b).)

1292, 1294.) Because the appeal board had failed to adhere to the correct standard of review, the trial court's conclusion -- that the appeal board's decision was supported by substantial evidence -- was meaningless. (*Id.* at p. 1295.)

In *Hongsathavij, supra,* 62 Cal.App.4th 1123, the court applied the *Huang* reasoning to a hospital appeal board's reversal of a hearing panel's decision. The judicial review committee (JRC) had recommended reinstatement of a physician to the call panel of the hospital's emergency room. The appeal board reversed the JRC on the ground that the JRC's findings were "so lacking in evidentiary support as to render them unreasonable." (*Id*. at p. 1137.) The Court of Appeal concluded that the appeal board had applied the correct standard of review; consequently, the court's duty was to determine whether the *appeal board's* decision was supported by substantial evidence.

The ARP did not commit the error of the appeal board in *Huang*. There the board actually reweighed the evidence before it and reached contrary factual findings based on its own evaluation of the witnesses' credibility. The board independently determined that the physician did in fact verbally abuse and threaten a nurse, even though the judicial review committee had found he had not done so. (220 Cal.App.3d at p. 1294.) Here the ARP accepted the facts found by the Hearing Panel, but reached a different conclusion from those facts regarding appellant's ability to perform certain surgical procedures. The board was not in the position of a court and thus required to unequivocally accept the Hearing Panel's judgment, as appellant contends; on the contrary, under the bylaws it had the responsibility as the governing body for making the ultimate decision regarding limitations on the privileges of any physicians before it.[13] (Cf. *Hongsathavij, supra,* 62

[13] The bylaws identify the board as the final adjudicative body, which is empowered to "affirm, modify, or reverse the Hearing Panel's decision." (Bylaws, § III(B)(5)(b).) After considering the recommendation of the ARP, "the Board of Directors shall render a final decision. . . ." (Bylaws, § III(B)(6)(a).) If the board determines that the Hearing Panel's

Cal.App.4th at p. 1135 [governing body, not judicial review committee, made final decision regarding hospital privileges; court reviews decision of governing body, not committee].) Requiring appellant to name the physicians who would care for his patients during his absence was a minor modification, which merely formalized the obligation of any responsible physician to ensure that someone would be attending to his patients' medical needs while he was unavailable.[14]

Thus, the ARP sought to correct the disparity between the facts established by the evidence and the Hearing Panel's determination that appellant should retain certain privileges. We may not interfere with an agency's selection of a disciplinary measure absent " 'an arbitrary, capricious or patently abusive exercise of discretion by the administrative agency.' " (*Kazensky v. City of Merced* (1998) 65 Cal.App.4th 44, 54; accord, *Deegan v. City of Mountain View* (1999) 72 Cal.App.4th 37, 48.) Because the ARP's findings are supported by substantial evidence and its conclusions are supported by the findings, we are compelled to conclude, as did the superior court, that the board acted within its discretion in imposing the challenged restrictions. The superior court therefore properly denied the petition.

Disposition

The order is affirmed.

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decision is not supported by substantial evidence, the board "may modify or reverse the decision of the Hearing Panel . . . ." (Bylaws, § III(B)(6)(b).)

[14] It is premature to address appellant's complaint about the requirement that he comply with all Hospital bylaws, rules, and regulations on penalty of summary dismissal. There is nothing new in the obligation itself, and we will not presume or speculate that the board will have any occasion to execute the warning about summary dismissal.

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ELIA, J.

WE CONCUR:

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RUSHING, P. J.

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PREMO, J.