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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

CONG VO et al., Plaintiffs and Appellants, v. POMONA VALLEY HOSPITAL MEDICAL CENTER, Defendant and Respondent.	B277409 (Los Angeles County Super. Ct. No. BS157898)

APPEAL from a judgment of the Superior Court of Los Angeles County, James C. Chalfant, Judge. Affirmed in part and reversed in part.

Law Offices of John D. Harwell and John D. Harwell; Golding + Lamothe, Rae Lamothe, for Plaintiffs and Appellants.

Francisco J. Silva and Long X. Do for the California Medical Association as Amicus Curiae on behalf of Plaintiffs and Appellants.

Manatt, Phelps & Phillips, Barry S. Landsberg, Doreen Wener Shenfeld, Joanna S. McCallum and Craig S. Rutenberg, for Defendant and Respondent.

Plaintiffs and appellants Dr. Cong Vo and Dr. Suha Newhide are neonatologists and former members of defendant and respondent Pomona Valley Hospital Medical Center's (the Hospital's) medical staff. The Hospital's Medical Staff Executive Committee (Medical Committee) determined Dr. Vo and Dr. Newhide's hospital privileges should be terminated for violations of certain rules and care standards. Drs. Vo and Newhide contested that determination by requesting a hearing before the Hospital's Judicial Review Committee (Review Committee). The Review Committee issued a report and recommendation that found Dr. Vo and Dr. Newhide committed some (not all) of the identified violations but concluded the violations did not warrant termination. Neither the doctors nor the Medical Committee administratively appealed this decision, but pursuant to Hospital bylaws, the matter went to the Hospital's Board of Directors (Board) for its review. The Board rejected the Review Committee's recommendation and terminated the doctors' hospital privileges. Dr. Vo and Dr. Newhide then sought administrative mandamus to overturn the Board's decision, which the trial court denied, and we are now asked to decide questions concerning the procedural and substantive fairness of the administrative disciplinary proceedings.

I. BACKGROUND

The Hospital is a private, nonprofit corporation that serves as a general, acute care hospital providing patient care, education, and research. The Board is the Hospital's governing body and "has the ultimate authority and responsibility for all aspects of the Hospital['s] operation." Pursuant to Hospital bylaws (Bylaws), the Board delegates responsibility for the

quality of medical care in the Hospital to the medical staff (i.e., the physicians practicing at the Hospital), subject to the Board's ultimate authority.

Dr. Vo and Dr. Newhide (collectively, plaintiffs) are neonatologists who began practicing at the Hospital in the 1990s. They eventually established their own practice, NeoPeds Medical Group, Inc. (NeoPeds), while continuing to maintain admitting and treating privileges at the Hospital.

During the summer of 2007, NeoPeds hired Dr. Viet Hoang, who likewise became a member of the Hospital's medical staff. That fall, Dr. Newhide visited a patient she and Dr. Hoang were treating. Dr. Newhide opened the patient's chart and saw Dr. Hoang had entered a progress note that day. She removed Dr. Hoang's note and replaced it with her own. Dr. Newhide did not look at Dr. Hoang's note before removing it from the patient's chart.

NeoPeds later terminated Dr. Hoang's employment, and Dr. Hoang sued NeoPeds for wrongful termination. The case was sent to arbitration. During the arbitration proceedings, Dr. Hoang identified 22 patients that were, in his view, relevant to his wrongful termination claims. Without revealing why, Dr. Vo asked Hospital medical records personnel to provide her with the medical charts for those patients, and the records personnel copied certain portions of the charts for Dr. Vo. Plaintiffs used those medical records and excerpts to defend themselves in the arbitration against Dr. Hoang. A subset of the records Dr. Vo obtained were provided to the arbitrator.

A. The Medical Committee's Investigation and Recommendation, and Commencement of Review Committee Proceedings

In May 2010, the Medical Committee informed plaintiffs they were the subject of a corrective action investigation into their continued fitness for medical staff membership and clinical privileges at the Hospital. An investigative subcommittee was specifically tasked with determining whether there had been an unauthorized disclosure of patient medical records in the Hoang arbitration proceeding and whether there were any other incidents in which plaintiffs may have disregarded the rights of others or the sensitivity of the Hospital's records and information. The investigation was later expanded to explore allegations related to substandard care for certain of plaintiffs' patients.

Following investigation, the Medical Committee issued a corrective action report. The report concluded both Dr. Vo and Dr. Newhide had engaged in a pattern of disregard for the confidentiality and sensitivity of the Hospital's medical information and records by, among other things, obtaining and using Hospital medical records without permission. The report also concluded plaintiffs had engaged in a pattern of disregard for the responsibilities of medical staff membership by, among other things, failing to comply with the Neonatal Intensive Care Unit's (NICU's) policy regarding physician/patient assignments and exhibiting a pattern of over-aggressiveness in attempts to preserve life and care for severely ill newborns.

The Medical Committee voted to demand plaintiffs unconditionally agree to certain corrective terms and conditions. If they were unwilling, the Medical Committee recommended

termination of plaintiffs' Hospital privileges. Neither Dr. Vo nor Dr. Newhide were willing to agree to the terms and conditions, which they believed would hold their medical decisions to an inappropriate standard of care. Instead, plaintiffs sought review of the Medical Committee's corrective action recommendation via a Review Committee hearing.

Plaintiffs were provided formal notice of the "charges" against them once they requested the Review Committee hearing. The charges were amended several times. In broad strokes, the charges alleged plaintiffs exhibited (1) a pattern of disregard for the confidentiality, integrity, or sensitivity of information or records maintained by the Hospital or its medical staff; (2) a pattern of disregard for the responsibilities of medical staff membership at the Hospital; and (3) errors in clinical judgment. The charges specifically referenced plaintiffs' use of patient medical records in the Hoang arbitration and Dr. Newhide's removal of Dr. Hoang's note from a patient medical record.

The Review Committee, which was comprised of five physicians and two alternates, and presided over by an attorney, thereafter held 41 sessions over three years to take evidence and hear argument from the parties. More than 40 witnesses testified.

B. The Summary Suspension of Dr. Vo's Clinical Privileges and Amendment of the Charges

On June 9, 2012—while proceedings in the Review Committee were underway—Dr. Vo was the in-hospital neonatologist responsible for the care of approximately 30

infants.[1] Another neonatologist, Dr. Shahid Kamran, was present in the Hospital and responsible for the care of a different group of children.

While on duty at the Hospital, Dr. Vo received a call from a colleague at another hospital who needed assistance with a patient. Dr. Vo contacted Dr. Newhide and informed her she (Dr. Vo) needed to leave the Hospital. Dr. Newhide said, "Yes, okay," and Dr. Vo left. She was absent from the Hospital for approximately 75 minutes, and Dr. Vo did not inform Dr. Kamran she was leaving.

Dr. Newhide was in San Diego when Dr. Vo called. During her brief conversation with Dr. Vo, Dr. Newhide did not reveal where she was (which of course prevented her from being physically present in the Hospital). Dr. Newhide also did not inform Dr. Kamran that both she and Dr. Vo were away from the hospital.

During Dr. Vo's absence, Dr. Newhide received several calls from Hospital nurses; according to one nurse, Dr. Newhide said she was two minutes away from the Hospital. Dr. Newhide provided orders for patient treatment over the phone, and one child was intubated by a respiratory therapist during Dr. Vo's absence.

The Medical Committee summarily suspended Dr. Vo's neonatology privileges based on her June 9, 2012, absence from

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[1] The Hospital's Pediatric Department Rules and Regulations mandate that "[a]ny neonatologist admitting a patient to the NICU must be available, or must have [a] colleague who is qualified under these regulations available, in the hospital at all times."

the Hospital. (Proceedings before the Review Committee were still then pending.) The Medical Committee also amended the charges against plaintiffs to incorporate new allegations concerning the events of June 9. As amended, the charges alleged (1) Dr. Vo exhibited poor judgment and neglect for patient care on June 9, and (2) both she and Dr. Newhide had sought to mislead NICU personnel regarding Dr. Newhide's availability.

C. The Review Committee's Report and Recommendation

In December 2014, the Board's chairman sent a letter to plaintiffs and the Medical Committee advising the Review Committee would be issuing its decision the following month. The letter further advised the full Board would then be responsible for reviewing the Review Committee's decision and report "with or without a[n] . . . appeal by one or both part(y)/(ies)." The letter emphasized this Board review "is automatic and is mandated by the [Hospital] Medical Staff Bylaws . . . before final decisions in this [Review Committee] Hearing matter may be issued." (Emphasis in original.)

The Review Committee issued its report and recommendation as scheduled. The 68-page decision addressed each of the charges against plaintiffs and the propriety of Dr. Vo's summary suspension. The Review Committee's overall conclusion was that the severity of the Medical Committee's proposed sanction—termination of plaintiffs' Hospital privileges—was unreasonable and unwarranted. The Review Committee reached specific conclusions on five points pertinent to this appeal.

First, the Review Committee concluded the Medical Committee proved plaintiffs demonstrated a disregard for the

confidentiality, integrity, or sensitivity of Hospital medical records—based on the charge that plaintiffs made improper use of the 22 patient charts they used in connection with Dr. Hoang's wrongful termination arbitration. The Review Committee characterized plaintiffs' actions as not "a wholesale invasion of privacy" but "a failure to recognize that privacy and confidentiality are more nuanced now than in the past." In particular, the Review Committee believed the law might permit access to and copying of medical records for use in arbitration proceedings—but only if proper procedures were followed. The Review Committee concluded that, under the circumstances, termination of plaintiffs' Hospital privileges for improperly accessing and using patient information would be unwarranted.

Second, regarding Dr. Newhide's removal of the progress note Dr. Hoang placed in a patient's chart, the Review Committee agreed Dr. Newhide acted improperly in "'alter[ing] (through removal and destruction) the content of a hospitalized patient's medical record.'" In mitigation, however, the Review Committee believed this was an "unusual, and possibly unique act," one that Dr. Newhide may have undertaken because she and others already had significant concerns about Dr. Hoang's expertise. The Review Committee concluded the sustained charge of altering a patient's medical record did not, by itself or in conjunction with other findings, justify the Medical Committee's recommendation to terminate Dr. Newhide's hospital privileges.

Third, regarding Dr. Newhide's communication with NICU nurses on the day of Dr. Vo's 75-minute absence, the Review Committee concluded the Medical Committee had not proven the charge that Dr. Newhide attempted to mislead others. The Review Committee found it was unlikely that Dr. Newhide told a

nurse she would arrive at the Hospital in two minutes because her delay in arriving would soon become apparent. Significantly for purposes of this appeal, the Review Committee also expressly found "the evidence did not support the conclusion that Dr. Newhide deliberately misled her colleague, or anyone else, about her plans." (Emphasis in original.)

Fourth, as to Dr. Vo's absence itself, the Review Committee made several findings. The committee found Dr. Vo responded to a non-Hospital colleague's request for assistance and when she did so, the infants under her care at the Hospital remained "sufficiently compromised" to need NICU care. The Review Committee found, however, that the infants "were cared for adequately, if not optimally," during Dr. Vo's absence and none were in such a condition that their wellbeing was threatened. Thus, while the Review Committee concluded the Medical Committee had indeed proven Dr. Vo engaged in a course of conduct that violated the Pediatric Department's Rules and Regulations, the Review Committee determined this violation did not warrant termination of Dr. Vo's hospital privileges.

Fifth, although the Review Committee believed termination was too severe a sanction for Dr. Vo's 75-minute absence from the NICU, the Review Committee did agree the Medical Committee's summary suspension of Dr. Vo's neonatology privileges had been reasonable and warranted. The Review Committee noted Dr. Vo's conduct demonstrated a tendency to disregard established rules and standards of practice she found incompatible with her professional judgment. This was "exemplified" by Dr. Vo's decision to "absent herself from [the Hospital] and its NICU for 75 minutes without making clearly understood and clearly communicated arrangements for coverage." The Review

Committee further concluded the Medical Committee's decision to continue Dr. Vo's summary suspension throughout the hearing process was reasonable and warranted, but the Review Committee recommended the suspension end once the Review Committee's decision became final.

After the Review Committee issued its report and recommendation, the President/CEO of the Hospital sent letters to plaintiffs and the Medical Committee reminding them that if no party requested appellate review of the decision within 30 days, they would be deemed to have "waived the right to any appellate review" and the Review Committee decision would "become a final recommendation" that would then "'be considered and acted upon by the [Board]'" within 45 days. Neither the Medical Committee nor plaintiffs appealed the Review Committee's decision to the Board.

D. The Board's Decision

The Board formed an ad hoc committee to consider the Review Committee's report and recommendation, and to make a final recommendation to the Board concerning what action it should take on the matter. The ad hoc committee issued a recommendation to the Board, which the Board adopted in full and incorporated by reference into its final decision (the Board Decision). The Board did not invite any of the parties to the administrative discipline proceedings to submit further evidence or argument before arriving at its decision, and no such evidence or argument was submitted.

The Board Decision discussed the manner in which the Board reviewed the Review Committee's report and recommendation. The Board believed the Bylaws did not identify

a standard by which the Board must "review" a Review Committee recommendation (as distinguished from the various Bylaw provisions governing "appeals" to the Board), but the Board stated it would be "guided by" the appeal provisions in the Bylaws. The Board used a substantial evidence standard of review to the Review Committee's findings of fact, stating it had not reweighed evidence, reconsidered questions of credibility, or resolved conflicts in the evidence in a manner contrary to the Review Committee's findings. However, where the Review Committee made no relevant findings of fact, the Board acknowledged it had exercised its own independent judgment.

Rejecting the Review Committee's ultimate recommendation, the Board decided to terminate plaintiffs' Hospital privileges. The Board concluded that the Review Committee's recommendation (no further discipline beyond affirming the summary suspension of Dr. Vo during the administrative discipline proceedings) was unreasonable under the circumstances and could not be squared with the Review Committee's own findings.

Regarding the patient medical records that Dr. Vo obtained and plaintiffs used in the wrongful termination arbitration (which the Board discussed as "Unauthorized Copying and Dissemination of [Hospital] Medical Records"), the Board accepted the Review Committee's factual findings and concluded plaintiffs' conduct disregarded privacy protections embodied in Health Insurance Portability and Accountability Act and other rules and regulations. The Board deemed it "unacceptable that the [Review Committee] excused these physicians' disregard for this fundamental patient right of privacy as well as the

potentially compromising legal position in which they placed [the Hospital]."

Regarding Dr. Newhide's removal of a progress note from a patient's chart, the Board accepted the Review Committee's finding that Dr. Newhide altered the chart. The Board believed the alteration was contrary to the standard of care expected of Hospital physicians, unethical, and violative of California law. In the Board's view, Dr. Newhide's alteration of a patient record was a significant violation of patient care rules given the "self-evident" importance of ensuring accuracy in medical records.

As to Dr. Vo's absence from the NICU on June 9, the Board accepted the Review Committee finding that Dr. Vo had been absent from the NICU for approximately 75 minutes. It deemed this unacceptable under "any of the rules and applicable standards of care." Though it also accepted the Review Committee's findings that none of the infants in the NICU "'was in a condition such that the wellbeing of the infant would be threatened by the absence of Dr. Vo'" and that the infants "'were cared for adequately, if not optimally,'" the Board concluded "the fact that nothing bad happened does not excuse Dr. Vo's leaving" the NICU without ensuring her patients had an available neonatologist. The Board also faulted the Review Committee for finding Dr. Vo posed an "'imminent danger'" to patients—such that it upheld the doctor's summary suspension for over two years—while at the same time refusing to endorse termination of her Hospital privileges.

Finally, with regard to Dr. Newhide's involvement in Dr. Vo's absence from the NICU, the Board believed the Review Committee focused solely on whether Dr. Newhide told NICU nurses she would arrive at the Hospital in two minutes. The

Board accepted the Review Committee's finding that it was unlikely Dr. Newhide made such a statement. The Board, however, proceeded on the understanding the Review Committee made no findings regarding whether Dr. Newhide attempted to mislead others when she agreed to provide coverage for Dr. Vo, and the Board independently found "undisputed evidence" Dr. Newhide did attempt to mislead.

The Board ordered Dr. Vo and Dr. Newhide's medical staff membership and clinical privileges terminated effective May 11, 2015, and continued Dr. Vo's suspension through the date of termination.

E. Trial Court Proceedings

Plaintiffs filed a petition for a writ of administrative mandate to overturn the Board's termination of their Hospital privileges. The petition alleged the Board proceeded without jurisdiction, or in excess thereof; there had not been a fair trial or proceeding after the Review Committee's decision (i.e., before the Board issued its contrary decision); the Board had not proceeded in the manner prescribed by law; the Board's termination of plaintiffs' Hospital privileges and continuation of Dr. Vo's summary suspension were not supported by the administrative findings; and the Board Decision was not supported by substantial evidence in light of the whole record.

The trial court denied the petition. As to the writ petition's procedural claims, the court found plaintiffs were not entitled to further process before the Board issued its decision because (a) neither plaintiffs nor the Medical Committee appealed the Review Committee's report and recommendation and (b) the Board's decision was the final ruling based on the evidence

presented at the Review Committee hearing, not a new and separate adverse action. As to the writ petition's substantive claims, the court concluded the Board's articulated standard for reviewing the Review Committee's decision was consistent with Hospital Bylaws and applicable law, and the court found substantial evidence supported the Board Decision. Finally, with regard to Dr. Vo's challenge to her summary suspension, the trial court found the issue both waived (because Dr. Vo had not appealed the Review Committee's report and recommendation) and moot (in light of the Board's decision to terminate Dr. Vo's Hospital privileges).

II. DISCUSSION

Plaintiffs advance procedural and substantive challenges to the Board Decision terminating their Hospital privileges.

Procedurally, they assert provisions of the Bylaws governing appeals to the Board (e.g., the right to submit written argument) are equally applicable to Board review of Review Committee decisions that is undertaken even when no party appeals. This procedural challenge is forfeited, however, because the Board reminded plaintiffs well in advance that it would be reviewing the Review Committee's decision and plaintiffs made no objection they were being deprived of purportedly applicable procedural rights before the Board issued its decision.

Substantively, plaintiffs assert the Board applied the wrong standard of review when considering whether to accept, reject, or modify the Review Committee's report and recommendation and failed to give the committee's determinations "great weight," as required. They are only partly right. The Board used the substantial evidence standard of

review to evaluate the Review Committee's decision and accepted nearly all of the Review Committee's factual findings. That mode of analysis comports with applicable law, and nothing in the Bylaws required the Board to proceed differently. As to Dr. Vo, the Board's factual findings (which are, in essence, the Review Committee's findings) are supported by substantial evidence, and the findings are sufficient to entitle the Board to conclude termination of her Hospital privileges was warranted. As to Dr. Newhide, however, the Board made an independent factual finding that is inconsistent with a finding the Review Committee made—namely, that Dr. Newhide attempted to mislead Hospital personnel in agreeing to cover for Dr. Vo. That independent finding fails to accord great weight to the Review Committee's decision, and a remand is required under the circumstances so the Board may reconsider the matter as to Dr. Newhide.

A. Overview of the Medical Peer Review System

"Hospitals in this state have a dual structure, consisting of an administrative governing body, which oversees the operations of the hospital, and a medical staff, which provides medical services and is generally responsible for ensuring that its members provide adequate medical care to patients at the hospital." (*El-Attar v. Hollywood Presbyterian Medical Center* (2013) 56 Cal.4th 976, 983 (*El-Attar*).) "Decisions concerning medical staff membership and privileges are made through a process of hospital peer review. . . . The medical staff must adopt written bylaws 'which provide formal procedures for the evaluation of staff applications and credentials, appointments, reappointments, assignment of clinical privileges, appeals mechanisms and such other subjects or conditions which the

medical staff and governing body deem appropriate.' [Citations.] The medical staff acts chiefly through peer review committees, which, among other things, investigate complaints about physicians and recommend whether staff privileges should be granted or renewed. [Citation.] In 1989, California codified the peer review process at Business and Professions Code section 809 et seq.,[2] making it part of a comprehensive statutory scheme for the licensure of California physicians and requiring acute care facilities . . . to include the process in their medical staff bylaws." (*Mileikowsky v. West Hills Hospital & Medical Center* (2009) 45 Cal.4th 1259, 1267 (*Mileikowsky*).)

The Business and Professions Code's peer review statutes "guarantee[ ], among other things, a physician's right to notice and a hearing before a neutral arbitrator or an unbiased panel, the right to call and confront witnesses and to present evidence, and the right to a written decision by a trier of fact." (*El-Attar*, *supra*, 56 Cal.4th at p. 988.) "The statute[s] also permit[ ] hospitals to establish procedural protections above and beyond the minimum requirements specifically set out in the code." (*Ibid.*; see also § 809.6, subd. (b) ["The parties are bound by any additional notice and hearing provisions contained in any applicable agreement or contract between the licentiate and peer review body or health care entity which are not inconsistent with" the code].)

"The primary purpose of the peer review process is to protect the health and welfare of the people of California by excluding through the peer review mechanism 'those healing arts

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[2] Undesignated statutory references that follow are to the Business and Professions Code.

practitioners who provide substandard care or who engage in professional misconduct.' (§ 809, subd. (a)(6).) This purpose also serves the interest of California's acute care facilities by providing a means of removing incompetent physicians from a hospital's staff to reduce exposure to possible malpractice liability." (*Mileikowsky*, *supra*, 45 Cal.4th at p. 1267.) Another purpose of peer review, which is "also if not equally important, is to protect competent practitioners from being barred from practice for arbitrary or discriminatory reasons." (*Ibid*.) "Because a hospital's decision to deny a physician staff privileges may have a significant effect on a physician's ability to practice medicine, a physician is entitled to certain procedural protections before such adverse action may be taken." (*El-Attar*, *supra*, 56 Cal.4th at p. 983.) For this reason, the peer review process "establishes minimum protections for physicians subject to adverse action in the peer review system." (*Mileikowsky*, *supra*, at p. 1268.)

"A hospital's final decision in a peer review proceeding may be judicially reviewed by a petition for writ of administrative mandate." (*Ellison v. Sequoia Health Services* (2010) 183 Cal.App.4th 1486, 1495 (*Ellison*).) Review of the hospital's "final" decision, which in this case is the Board Decision, is governed by Code of Civil Procedure section 1094.5. (*Sadeghi v. Sharp Memorial Medical Center Chula Vista* (2013) 221 Cal.App.4th 598, 611-612; *Hongsathavij v. Queen of Angels etc. Medical Center* (1998) 62 Cal.App.4th 1123, 1135 (*Hongsathavij*).)

Under Code of Civil Procedure section 1094.5, subdivision (b), courts examine "whether the respondent has proceeded without, or in excess of, jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion."

(Code Civ. Proc., § 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." (Code Civ. Proc., § 1094.5, subd. (b).) In the private hospital context, 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." (Code Civ. Proc., § 1094.5, subd. (d).)

A Court of Appeal's function "in this context is the same as the superior court's . . . ." (*Hongsathavij*, *supra*, 62 Cal.App.4th at p. 1136; see also *Rosenblit v. Superior Court* (1991) 231 Cal.App.3d 1434, 1443.) When the court is asked to examine a private hospital board's final administrative determination, "the appellate court review[s] the administrative record to determine whether [the hospital's] findings are supported by substantial evidence in light of the entire record" (*Huang v. Board of Directors* (1990) 220 Cal.App.3d 1286, 1293), "giving no deference to the trial court's decision" (*Ellison*, *supra*, 183 Cal.App.4th at p. 1495). A court must generally make two determinations in conducting this review. "First, it must determine whether the governing body applied the correct standard in conducting its review of the matter. Second, after determining as a preliminary matter that the correct standard was used, then the . . . court must determine whether there was substantial evidence to support the governing body's decision." (*Hongsathavij*, *supra*, at p. 1136; see also *Ellison*, *supra*, at pp. 1495-1496.) When the court is asked to determine "whether the hospital's determination was made according to a fair procedure, the court will treat the issue as one of law, subject to independent review based on the administrative record. [Citation.]" (*Ellison*, *supra*, at p. 1496.)

B. Plaintiffs Cannot Now Complain About the Procedures the Board Followed

1. Pertinent provisions of the Bylaws

The Hospital's Bylaws outline a three-step administrative discipline process. At the first step, the Medical Committee or a subcommittee investigates allegations that a physician has committed certain behavior, including "engag[ing] in, mak[ing], or exhibit[ing] acts, statements, demeanor or professional conduct . . . [¶] . . . [that] is, or is reasonably likely, to be detrimental to patient safety or to the delivery of quality patient care within the Hospital; to be disruptive to Hospital operations; to constitute fraud or abuse; or, to be, in other respects, lower than the standards or the aims of the Hospital and the Medical Staff." Based on the results of the investigation, the Medical Committee may recommend corrective action, including the reduction or revocation of clinical privileges or the revocation of medical staff membership. The Medical Committee may also summarily suspend a physician's privileges if his or her "conduct . . . is such that immediate action must be taken in order to reduce a substantial likelihood of imminent danger to the health of any individual." Where a recommendation constitutes grounds for a hearing, such as where the Medical Committee recommends the termination of membership or revocation of privileges for a "medical disciplinary cause or reason," the physician is provided with written notice of the adverse recommendation and notified of his or her right to request a Review Committee hearing.

At the second step, which occurs only if the physician requests such a hearing, the Medical Committee provides him or her with formal notice of the charges. A Review Committee and a

hearing officer are then appointed, and the Review Committee conducts a hearing in which the parties are permitted to present testimony, cross-examine witnesses, introduce exhibits, and present opening and closing arguments. The Medical Committee bears the burden of proving by a preponderance of the evidence that its recommended action is reasonable and warranted. Once the presentation of evidence and argument is complete, the Review Committee is required to render a written "decision and report[, which] shall be considered final, subject only to the right of appeal to, and/or review by, the Governing Body [i.e., the Board] (as provided in Section 9.5)."

The Bylaw section referenced in the parenthetical just quoted, specifically section 9.5-1, describes how and when a party may notice an appeal. It provides, in pertinent part, that the parties to a proceeding have 30 days from receipt of their respective copies of the Review Committee decision to request an appellate review. After a party submits a request for appellate review, the Board has 35 days to schedule and arrange for "an appellate review."

Under section 9-5, a party may only appeal on one of three specified grounds, including the "clear erroneousness of the [Review Committee's] decision in light of all of the available evidence." The ensuing proceeding is conducted before an "appeal board" consisting of the full Board or a subcommittee thereof, and is conducted "in the nature of an appellate proceeding" based on the hearing record before the Review Committee. The parties are permitted to submit memoranda and be represented by attorneys. The appeal board presents the Board with a written report and recommendation, after which the Board must either issue a written decision "affirm[ing],

modify[ing] or revers[ing] the decision and report of the [Review Committee]," or remand the matter for further review and recommendation.

In the event neither party (the Medical Committee or the accused staff member) appeals, section 9.5-1 of the Bylaws states "both parties shall be deemed to have waived the right to any appellate review . . . and . . . be deemed to have accepted the [Review Committee]'s decision and report, which thereupon shall become a final recommendation." The Board, however, is required to "consider[ ] and act[ ] upon" the final recommendation, following procedures outlined in sections 6.3-9(c) through 6.3-11 of the Bylaws. Those sections provide that once a physician has exhausted or waived appellate rights and the Board has obtained any further clarification it desires, the Board "shall proceed to consider and to take final action upon the matter" and provide written notice of its final decision.

2. Plaintiffs forfeited their challenge to the Board's review procedures

Plaintiffs argue the Board did not proceed in the manner required by law because it did not follow the Bylaw procedures applicable to an appeal of a Review Committee decision. Though plaintiffs acknowledge they did not notice an appeal of the Review Committee's decision, they contend the Bylaws use the terms "appeal" and "review" interchangeably such that the Board was required to follow the procedures governing an "appeal" in conducting its own review. Specifically, plaintiffs argue the Board was required to give them an opportunity to appear and respond, submit briefing, and be represented by counsel before the Board could reverse the Review Committee decision.

We need not venture into the interpretive thicket created by the Bylaws' appeal and review provisions because the record indisputably shows plaintiffs received notice of the Board's intent to review the Review Committee decision[3] and they neither lodged an objection nor requested an opportunity to be heard. Plaintiffs' failure to object before the Board rendered its decision forfeits their ability to now challenge the procedures followed.

Plaintiffs received at least two communications informing them the Board intended to review the Review Committee decision. On December 29, 2014, the Board sent a memorandum to plaintiffs and the Medical Committee. The memorandum stated that "[o]ne purpose of this Memorandum is to remind all parties to the [Review Committee] Hearing that the [Board] will be responsible for reviewing [with or without a Staff Bylaw Section 9.5 appeal by one or both part(y)/(ies)]" the Review Committee decision. The memorandum further noted "[s]uch review by the [Board] is automatic and is mandated by the [Bylaws] . . . before final decisions in this [Review Committee] Hearing matter may be issued." (Emphasis in original.) The Review Committee issued its decision roughly three weeks later, on January 21, 2015. And four days after that, the President/CEO of the Hospital sent letters to plaintiffs reminding them that if no party requested appellate review of the decision, they would be deemed to have "waived the right to any appellate

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[3] Plaintiffs' opening brief asserts they "were given no notice that, absent an appeal by either party, the Board was even considering reviewing the [Review Committee's] decision." This assertion is belied by the administrative record, as we shall discuss in more detail.

review," and the Review Committee decision would "become a final recommendation" that would "'be considered and acted upon by the [Board].'"[4]

Plaintiffs and the Medical Committee had 30 days after receipt of the Review Committee's decision to notice an appeal. Neither party did so. However, as described above, plaintiffs were indisputably on notice that the Board intended to review the decision. If plaintiffs believed, as they now argue, that the "review" and "appeal" procedures set forth in the Bylaws are interchangeable, then plaintiffs should have expected the Board to schedule a review of the decision the same way it would have scheduled an appeal.

The Bylaws require the Board to schedule appellate review within 35 days and to provide the parties with notice of the time, place, and date of the review. Considering no party appealed, that deadline elapsed at the end of March 2015. The Board did not issue its decision until May 7, 2015. At no time before that decision issued did plaintiffs object they were not being afforded appellate procedure rights or seek leave to provide the Board

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[4] In its answer to the petition, the Hospital alleged "that on or about March 17, 2015 the Board sent a letter to counsel for plaintiffs and counsel for the [Medical Committee] notifying each of them that it was undertaking a review of the entire administrative record in connection with its obligation to consider and act upon the final recommendation of the Medical Staff." Because the letter does not appear in either the administrative record or the trial court record, we do not rely on the allegation. We note, however, that plaintiffs do not deny that the Board sent this additional letter but instead argue the letter is immaterial because it "conferred absolutely no rights on the Doctors."

with written memoranda arguing their position. By failing to do so, plaintiffs forfeited any complaint regarding the procedures followed by the Board. (*Hawthorne Savings & Loan Assn. v. City of Signal Hill* (1993) 19 Cal.App.4th 148, 156, fn. 3 [petitioner waived objections to procedures followed at administrative hearing by failing to object to manner in which hearing was conducted]; *Tennant v. Civil Service Com.* (1946) 77 Cal.App.2d 489, 498 [petitioner waived complaints about procedures followed at hearing by failing to object].)

C. The Board Did Not Abuse Its Discretion in Terminating Dr. Vo's Privileges, but the Result as to Dr. Newhide Requires Remand

Where, as here, a "medical staff's constitution, rules, and regulations make the Board the final decision maker in the peer review process, but . . . do not limit its role to that of an appellate body reviewing the [Medical Committee's] recommendation for the existence of substantial evidence, or otherwise identify the standard governing the Board's decisions," "the Board's decisionmaking is subject only to the standard found in section 809.05, subdivision (a)." (*Weinberg v. Cedars-Sinai Medical Center* (2004) 119 Cal.App.4th 1098, 1108 (*Weinberg*).)

Section 809.05 bars arbitrary or capricious action by a hospital's governing body, which means the governing body is not permitted to "exceed[ ] its proper authority, use[ ] unfair procedures, or act[ ] in a manner that [i]s ""arbitrary, capricious, or entirely lacking in evidentiary support."" [Citation.]" (*Weinberg*, *supra*, 119 Cal.App.4th at p. 1108.) So long as a governing body has given "great weight" to a hearing/review committee's findings, it is entitled to exercise its own judgment

on the evidence.[5] (§ 809.05, subd. (a) ["The governing bodies of acute care hospitals have a legitimate function in the peer review process. In all peer review matters, the governing body shall give great weight to the actions of peer review bodies and, in no event, shall act in an arbitrary or capricious manner"]; *Weinberg*, *supra*, at pp. 1110-1111; see also *Michalski v. Scripps Mercy Hospital* (2013) 221 Cal.App.4th 1033, 1043 ["Where permitted by a hospital's bylaws, its governing body may, using its independent judgment, completely overturn the decision of a medical staff-selected hearing committee"] (*Michalski*); *Ellison*, *supra*, 183 Cal.App.4th at pp. 1496-1497 [even where bylaws imposed substantial evidence standard on a hospital board and the board was required to defer to a hearing committee with respect to its findings on underlying facts, the board was permitted to exercise

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[5] Plaintiffs argue section 9.5-2 of the Bylaws, which provides a party may appeal to the Board based on the "clear erroneousness of the [Review Committee's] decision in light of all of the available evidence," applies to Board review of a Review Committee decision and, by implication, requires the Board to use a clear error standard of review when deciding whether to reverse a Review Committee decision. Assuming for argument's sake that plaintiffs are right about this and that the argument is not waived for failure to raise it in the trial court, they still have not established the Board used an impermissible standard of review. The Board employed the substantial evidence standard of review when considering the Review Committee's report and recommendation (except in one significant respect noted *post*), and that standard was functionally equivalent here to review for clear error. (See, e.g., *People v. Jackson* (1992) 10 Cal.App.4th 13, 22 [no practical difference between federal "'clearly erroneous'" test and review for substantial evidence].)

its independent judgment as to what constituted a reasonable disposition].)

Prior appellate decisions help define the boundaries of what it means to give great weight to a review committee's findings. In *Mileikowsky*, *supra*, 45 Cal.4th 1259, for instance, our Supreme Court held a hospital board could not have given great weight to the actions of a peer review committee where that committee's only action was to affirm the hearing officer's issuance of terminating sanctions. (*Id.* at p. 1272.) In other words, the hospital board in that case could not give great weight to a review committee's findings where no such findings were made. Relatedly, a hospital board need not adopt a review committee's recommendations wholesale, or agree with the committee's ultimate disciplinary conclusion.[6] Rather, a hospital board complies with the "great weight" standard when the board accepts findings on a specific factual matter but exercises its independent judgment as to the significance of the fact. (*Weinberg*, *supra*, 119 Cal.App.4th at p. 1110 [board accorded great weight to actions of review committee by accepting findings that involved medical expertise but rejecting inferences drawn from those findings in tendering recommendation]; see also *Michalski*, *supra*, 221 Cal.App.4th at p. 1046 [board permitted to

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[6] Plaintiffs argue that in order to comply with section 809.05, subdivision (a)'s direction to give "great weight to the actions of peer review bodies," the Board was required to give great weight to the Review Committee's decision, not just its findings. The argument runs contrary to the decisions in *Weinberg*, *Michalski*, and *Ellison*, which we follow, and plaintiffs cite no persuasive authority holding to the contrary.

accept finding that physician attended program regarding professional boundaries, but conclude other testimony suggested physician had learned nothing from the program]; *Ellison*, *supra*, 183 Cal.App.4th at pp. 1496-1497 [board may exercise its "own independent judgment about evidence presented to a peer review committee composed of medical staff, provided that it gives due weight to the findings of that committee"].)

1. Dr. Vo

The Board Decision demonstrates the Board accepted the Review Committee's factual findings concerning Dr. Vo's improper use of information from patient charts and her absence from the Hospital's NICU on June 9, 2012. This satisfies the "great weight" standard and we must accordingly uphold the Board's decision to terminate Dr. Vo's privileges so long as it is supported by substantial evidence. (*Ellison*, *supra*, 183 Cal.App.4th at p. 1498.)

The decision is so supported. Dr. Vo violated pediatric department rules and regulations when she left the Hospital without ensuring another physician could be present to cover her patients. Dr. Vo did not actually ascertain whether Dr. Newhide could arrive at the Hospital. She did not alert the other in-Hospital physician to the situation. Dr. Vo was responsible for approximately 30 infants in the NICU. Those infants were "sufficiently compromised to warrant presence . . . in the NICU." One patient required intubation in her absence. Dr. Vo was ultimately away from the hospital for 75 minutes. These facts establish Dr. Vo' s behavior was "reasonably likely, to be

detrimental to patient safety or to the delivery of quality patient care."[7]

We also reject Dr. Vo's contention that the Board's determination, even if appropriately grounded in the evidence, must be reversed for lack of a sufficient nexus to patient care. Dr. Vo believes (wrongly, in our view) that the Board violated its statutory mandate to act "'exclusively in the interest of maintaining and enhancing quality patient care'" and was instead motivated by the possibility that her actions placed the Hospital at risk for potential liability and civil fines.

As noted elsewhere in this opinion, the peer review statutes provide "[a] governing body and the medical staff shall act exclusively in the interest of maintaining and enhancing quality patient care." (§ 809.05, subd. (d).) The "peer review mechanism" (here, the process of review before the Medical and Review Committees prior to Board review) is meant to exclude "those healing arts practitioners who provide substandard care or who engage in professional misconduct . . . ." (§ 809, subd. (a)(6).)

"It cannot be denied that the providing of high quality patient care is, quite properly, the primary concern of all hospital institutions." (*Miller v. Eisenhower Medical Center* (1980) 27 Cal.3d 614, 628 (*Miller*); see § 809.05, subd. (d).) However, this does not require a hospital's governing board to consider only aspects which obviously and directly bear on the quality of

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[7] Because we conclude substantial evidence supported this ground for termination, and because the Board Decision identified this ground as sufficient on its own to require Dr. Vo's termination, we do not address the evidence supporting the charge of misuse of patient records.

patient care. Because "[t]he governing authority bears the responsibility for assuring that this goal is achieved to the greatest extent possible, . . . its decisions relating to medical staff must take into account all factors which have a legitimate relationship to it." (*Miller*, *supra*, at p. 628.) A hospital "is properly concerned with the maintenance of the goals and aims of its professional staff, and with avoiding disruption of hospital operations." (*Miller v. National Medical Hospital* (1981) 124 Cal.App.3d 81, 91-92.)

Here, the Board concluded Dr. Vo's behavior on June 9 was "unacceptable" and "mandate[d] that her Medical Staff membership and clinical privileges be terminated" based on her 75-minute absence from the NICU, during which she left approximately 30 patients without an on-site neonatologist assigned to care for them. There is no question that this ground for termination, which the Board expressly deemed alone sufficient to mandate her termination, was concerned with the quality of patient care.[8]

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[8] The other ground on which the Board based Dr. Vo's termination—violation of patient confidentiality rules—is also based primarily, though admittedly not solely, on concerns regarding the quality of patient care. As the Board Decision noted, "[i]f the confidentiality of [patients' personal information] were not protected, trust in the physician-patient relationship would be diminished[, and p]atients would be less likely to share sensitive information, which could negatively impact their care."

That the Board's consideration of this violation also included concerns regarding potential liability does not render it improper. As our colleagues in Division Two of this District stated in *Hongsathavij*: "A hospital has a duty to ensure the competence of the medical staff by appropriately overseeing the

2. Dr. Newhide

In addressing Dr. Newhide's agreement to cover for Dr. Vo on June 9, 2012, the Board accepted the finding that "it is unlikely that Dr. Newhide, in fact, said she would arrive in two minutes." The Board further stated "the [Review Committee] did not appear to consider, and made no findings, regarding whether Dr. Newhide's agreement to cover for Dr. Vo was misleading . . . ." On that understanding, the Board found "the undisputed evidence establishes that Dr. Newhide misled NICU personnel and [the Hospital] when she agreed to provide coverage for Dr. Vo, without telling Dr. Vo that she was in San Diego, making it impossible for her to cover the NICU when she was asked to do so."

The Board was factually mistaken about what the Review Committee found on this point, and that mistake means the Board in this instance failed to accord great weight to the Review Committee's findings. The Review Committee's report and recommendation expressly found "the evidence did not support the conclusion that Dr. Newhide deliberately misled her colleague, or anyone else, about her plans." (Emphasis in original.) Because the Board gave *no* weight to this finding—and, indeed, found to the contrary solely in its own independent judgment—the conclusion it drew is contrary to established law

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peer review process. [Citation.] Hospital assets are on the line, and the hospital's governing body must remain empowered to render a final medical practice decision which could affect those assets. A hospital's governing body must be permitted to align its authority with its responsibility and to render the final decision in the hospital administrative context." (*Hongsathavij*, *supra*, 62 Cal.App.4th at p. 1143.)

and invalid.[9] (§ 809.05, subd. (a); *Weinberg*, *supra*, 119 Cal.App.4th at pp. 1110-1111.)

That leaves, however, the question of whether the Board's ultimate conclusion—that Dr. Newhide's Hospital privileges should be terminated—must be reversed. The Board's decision indicates it upheld two other adverse determinations against Dr. Newhide, i.e., that she altered a patient medical record and, with Dr. Vo, used patient medical records without authorization.

The Board Decision states each of these was "a serious and significant breach of the standards expected of physicians practicing at [the Hospital]." The decision does not, however, state the Board would conclude Dr. Newhide's Hospital privileges should be terminated absent the faulty finding she attempted to mislead Hospital personnel. To the contrary, the Board Decision at one point emphasizes the result it reached was "based upon the [Review Committee's] findings of fact that the Medical Committee proved *multiple* Charges . . . ."

We hold there is a reasonable probability the Board would reach a different ultimate conclusion if it accorded great weight to the Review Committee's finding that Dr. Newhide's conduct was not deliberately misleading. A writ of administrative mandamus must accordingly issue to vacate the Board Decision as to Dr. Newhide and to remand the matter so the Board may reevaluate—consistent with section 809.05, subdivision (a)—

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[9] The Board has discretion to draw its own conclusions as to the discipline that is warranted as a result of facts properly found. The Board also has license to assess whether substantial evidence supports Review Committee findings. On this point, the Board did neither of these things.

whether and to what extent it should accept, reject, or modify the Review Committee's report and recommendation as it pertains to Dr. Newhide. Nothing we have said mandates the Board reach any particular result on remand; we require only that the result be consistent with section 809.05, the precedent we have cited, and the Bylaws.

D. Dr. Vo's Summary Suspension

Dr. Vo presents two arguments regarding the propriety of her summary suspension during the administrative proceedings, neither of which is persuasive. First, Dr. Vo argues the Medical Committee imposed the suspension in violation of the Bylaws. Second, Dr. Vo argues the Board and the Medical Committee failed to comply with Bylaw 8.2-3 by not terminating her suspension when the time to appeal the Review Committee report and recommendation expired.

The Review Committee concluded Dr. Vo's suspension and its continuation through the Review Committee proceedings was reasonable and proper, and Dr. Vo did not exhaust her administrative remedies by appealing that determination to the Board. Nor did Dr. Vo appeal to the Board seeking termination of the suspension once the Review Committee issued its decision. These failures to exhaust administrative remedies bar her from seeking reversal on either ground now. (*Sierra Club v. San Joaquin Local Agency Formation Com*. (1999) 21 Cal.4th 489, 510.)

DISPOSITION

The judgment of the superior court denying Dr. Cong Vo's petition for writ of mandate is affirmed. The judgment as to Dr. Suha Newhide is reversed, and the superior court is directed to issue a writ of mandate vacating the Board Decision as to Dr. Newhide and remanding the matter to the Board for further proceedings consistent with this opinion. All parties shall bear their own costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

BAKER, Acting P. J.

We concur:

MOOR, J.

KIN, J.*

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.