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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

LOIS A. JENSEN,

Plaintiff and Appellant,

v.

SALINAS VALLEY MEMORIAL HEALTHCARE SYSTEM,

Defendant and Respondent.
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H022004
(Monterey County
Super. Ct. No. M48150)

After her application for physician privileges was denied by the Board of Directors of the Salinas Valley Memorial Healthcare System, Lois Jensen, M.D., filed a petition in superior court for a writ of mandate. The petition was denied and judgment was entered for respondent. Appellant contends the petition should have been granted because the Board of Directors applied an incorrect standard of review to the evidence supporting her application. We will affirm the judgment.

Procedural History

Appellant, a certified specialist in obstetrics and gynecology, applied for staff privileges at the Salinas Valley Memorial Hospital (Hospital) in July 1998. She was granted temporary privileges on September 18, 1998 and was assigned a proctor pending review of her application.

After a series of incidents in which observers questioned her technical skills, the Medical Executive Committee (MEC) denied appellant's application. At her request a hearing was conducted, after which a Hearing Panel of three physicians concluded that she should be granted provisional membership.[1]

Pursuant to the staff bylaws, the MEC appealed the decision to the Board of Directors. The Board reversed the Hearing Panel's decision on the grounds that (1) there was "substantial non-compliance" by the Hearing Panel with the procedures established by the bylaws, and (2) the Hearing Panel's decision was not supported by substantial evidence.

Appellant sought review in the superior court by a petition for a writ of mandamus or prohibition. She claimed that she was denied notice and an opportunity to be heard, that the Hospital's notice of appeal violated the bylaws, that the Board's decision violated the bylaws, and that the Board's decision was misleading and erroneous in the face of substantial evidence to support the Hearing Panel's conclusions. After reviewing the administrative record and receiving argument, the court denied appellant's petition and entered judgment for the Hospital.

Evidence Before the Hearing Panel[2]

On October 7, 1998, Dr. Robert Sugar was the anesthesiologist during a Cesarean section performed by appellant. After observing appellant for about 10 minutes, Dr. Sugar became concerned about appellant's surgical technique. He felt he was "watching

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1 Provisional privileges follow initial staff appointments and last for 180 days, during which time the clinical department chair evaluates the staff member's performance.

2 California Rules of Court, rule 15, requires that every brief support any reference to a matter in the record by a citation to the record. Appellant's opening brief completely fails to comply with this rule. The respondent's brief is also deficient in this respect. We will disregard all factual statements that are not supported by appropriate and accurate citation to the record.

a very inexperienced surgeon, someone who [he] would have guessed would have been in very early training." Dr. Sugar called Dr. James Gilbert, who was on call and agreed to come in. When appellant tossed a roll of gauze to Dr. Sugar and asked him to tie it to the anesthesia machine, Dr. Sugar asked her to stop and wait for Dr. Gilbert, who was on his way. Appellant was attempting to initiate a procedure with which Dr. Sugar was unfamiliar, though it was commonly used in the hospital she had practiced in previously. Dr. Gilbert observed the rest of the operation, intervening only twice. The patient was in no danger. However, Dr. Gilbert found appellant's technique to be "immature," clumsy, and inefficient. At the hearing appellant testified that due to fatigue she had fumbled the retractor and decided to proceed slowly and carefully.

On October 8, 1998, the Medical Executive Committee (MEC) voted to suspend appellant's temporary privileges as a result of the concerns expressed about the surgery the previous day. On October 14, 1998, the MEC reinstated her privileges subject to certain conditions. For all abdominal surgeries appellant would be required to use a senior member of her practice group to assist her, along with an observing physician who was not a member of her group. The committee expected after two months to review her performance in at least four abdominal surgery cases and six cesarean sections. The committee reserved the right to "immediately suspend" appellant's temporary privileges "[s]hould any untoward event occur."

On October 22, 1998, appellant performed a cesarean section and tubal ligation, assisted by Dr. Jim Ross from her practice group, without an observer present. Dr. Ross described it as an uneventful procedure, though he had to return the patient to surgery to repair a postoperative hemorrhage that had resulted from a slipped suture. Appellant testified that she had told Dr. Ross that without an outside observer present she could only assist, but he repeatedly directed her to start the surgery, so she finally complied. Dr. Ross explained that he had not understood at that time that appellant was subject to more stringent conditions than were usual at this hospital.

On November 11, 1998, appellant again performed a tubal ligation without an observer. Appellant explained to the Hearing Panel that she had made a mistake on that occasion, because she had not been thinking of the procedure -- which required a small abdominal incision -- as abdominal surgery.

On November 25, 1998, the MEC wrote appellant a letter reminding her of the observer condition and warning her that any further violation would result in immediate suspension of her privileges.

On December 2, 1998, Dr. B. Sanders Watkins observed appellant perform a vaginal delivery by vacuum extraction, in which she repeatedly applied a suction cup to the baby's head. Dr. Watkins believed that the baby's distressed condition and the patient's difficult progress during this second stage indicated the need for an immediate cesarean section. Dr. Watkins was also concerned that appellant had not anticipated or prepared for the possibility that a respiratory therapist or pediatrician would be needed in the delivery room. Appellant disagreed with Dr. Watkins's opinion regarding the alternative of a cesarean section; she had thought she could get the baby out faster with vacuum extraction. Though a pediatrician had not been present, there had been a pediatric nurse who appellant thought was trained in intubation.

On December 14, 1998, appellant performed a cesarean section, observed by Dr. Gilbert. While noting a problem involving a loose suture he determined that appellant's technique was "significantly more average and competent" than her October 7 performance. Dr. Gilbert added, however, that "[t]his was at least partially due to the very directive and competent assistance of Dr. Ross."

On December 30, 1998, Dr. Watkins proctored a cesarean section. Dr. Nick Yaqub, a senior member of appellant's practice group, assisted her in the operation. Dr. Watkins was concerned that appellant had attempted to cut the rectus muscle when it was not necessary. Dr. Yaqub took away the scissors and delivered the baby. Dr. Watkins also observed appellant fail to respond when blood began spurting from a uterine artery

she had severed; appellant moved as if "in slow motion," and Dr. Yaqub had to tell her twice to clamp it. Dr. Watkins believed that appellant's performance was unacceptable and jeopardized the patient's safety. She "was never in control of this operation; she was never in control of the fate or outcome of this infant." Had Dr. Yaqub not been there to instruct and direct her, Dr. Watkins "would have been fearful of the outcome." In her testimony before the Hearing Panel appellant denied trying to cut the muscle; she said she had only considered enlarging the uterine incision before Dr. Yaqub suggested an alternative technique. Appellant had no recollection of the severed artery.

On January 6, 1999, appellant participated in a vaginal hysterectomy, which she had been told required an observer. When Dr. Falkoff, the Chief of Staff, asked her the next day how the surgery had gone, appellant told him she had not been able to find an observer, so Dr. Yaqub had performed the surgery with her assisting. The MEC subsequently learned, however, that appellant was the lead surgeon and that Dr. Yaqub had been the assistant on that occasion. Though appellant testified that she had only assisted and followed Dr. Yaqub's direction, other witnesses who had been present in the operating room submitted declarations stating that she was the lead surgeon. The Hearing Panel determined that appellant "probably" was the lead surgeon on that occasion.

On January 8, 1999, Dr. Norman Nelson observed appellant during an abdominal hysterectomy. He judged appellant's performance to be like that of a first-year resident; she was "too tentative, too slow, and too unsure of what to do next." She often deferred to the judgment of her assistant, Dr. Yaqub, who "seemed to be taking charge by default." Dr. Nelson recommended that she not receive privileges because he felt that an emergency or technically difficult case "would be beyond her." Appellant, however, considered this to be "an entirely uneventful hysterectomy." She agreed that she was slow, but that was a comfortable speed for her; she considered it more important to be careful.

On January 11, 1999, Dr. J.K. Hoffman observed an elective repeat-cesarean section in which appellant's overall performance was "adequate." She was "fairly slow" and had some difficulty elevating the baby's head and cutting the rectus muscle, but her assistant helped her "quite a bit." Though no other significant deficiencies were noted, Dr. Hoffman questioned the wisdom of performing this elective procedure at the baby's gestational age.

On January 13, 1999, appellant was observed by Dr. Pablo Romero in two cesarean sections. In one he commented that appellant was "very slow," and that her assistant, Dr. Yaqub, "frequently performed the role of the surgeon." In the second case he noted her failure to make a diagnosis that might have averted the need for the procedure, and he was not sure how well appellant would perform with a less capable assistant than Dr. Yaqub.

On January 15, 1999, the MEC advised appellant that it had voted again to suspend her temporary privileges. The committee cited appellant's performance of surgery without an observer on October 22, 1998 and November 11, 1998. It also confronted appellant with her unproctored performance of the January 6 hysterectomy, in which she had claimed to have only assisted Dr. Yaqub. The MEC explained that the Credentials Committee would review her file and make a recommendation regarding her application for staff privileges.

Appellant attended a meeting conducted by the Credentials Committee on February 1, 1999. After considering reports from observers, statements from witnesses to the January 6 surgery, and information appellant had provided, the committee recommended denial of appellant's application. The MEC reviewed the history and concluded that appellant was "not technically competent to perform surgeries without putting patients at risk." Her "ethical standards" were also in question because of her failure to obtain an observer for three surgical procedures. (*Ibid*.) Accordingly, the MEC

followed the recommendation of the Credentials Committee and denied appellant's application.

The hearing, which took place before three physicians and a hearing officer, consisted of testimony from several witnesses and submission of exhibits. The Hearing Panel determined that appellant had made an effort to comply with the proctoring requirement, she was competent, and the denial of her privileges was "improper." Any breach was "understandable." Moreover, the panel questioned the fairness of imposing the October 14 conditions of appellant's temporary privileges without giving her notice or invitation to respond. Addressing the common complaint that appellant was slow, the panel noted that the babies had been delivered timely with no compromise of patient care. Being "prompted and led" through surgery did not indicate that appellant's assistants -- her senior associates -- were concerned about patient safety or appellant's skills. The panel added "parenthetically" that it believed appellant should have been given an opportunity to review her performance with her observers. The Hearing Panel concluded that appellant should be granted provisional membership status.

Review of the Hearing Panel's Decision

The MEC appealed the Hearing Panel's determination to the chief executive officer on the grounds that (1) there was "[s]ubstantial non-compliance with the procedures required by [the] Bylaws or applicable law which has created demonstrable prejudice"; and (2) the panel's decision "was not supported by substantial evidence based upon the hearing record." The president of the Board appointed an appellate review panel (ARP) to review the evidence and recommend a final action to the Board.

Both the MEC and appellant submitted written and oral argument to the ARP, which agreed with the MEC on both issues. The Hearing Panel, it stated, had no power either to disregard Hospital policies or to excuse appellant's noncompliance. Any one of the deficiencies cited by the MEC was sufficient to deny her privileges: her "repeated disregard" of the conditions imposed to protect patients; her "poor ethics" as

demonstrated by her lying about who had performed an operation; or her "lack of competence" as described by the physicians who had observed her. Instead of limiting its determination to whether these deficiencies had occurred, the Hearing Panel had "far exceeded its delineated powers" and made several findings reserved to the MEC under Business and Professions Code section 800 and the hospital bylaws.[3] Once it found that appellant had violated the MEC's directives and displayed "insufficient" ethical standards, the Hearing Panel was not permitted to excuse appellant but "had to uphold the MEC's decision to deny her request for privileges." The Hearing Panel's determinations thus constituted "substantial non-compliance" with the Hospital bylaws and state law.

The ARP further found that the Hearing Panel's decision was not supported by substantial evidence. All five of the proctors had questioned appellant's technical skills as a surgeon and physician. The Hearing Panel had found these observers to be highly respected and truthful, but it dismissed their concurrent assessments because they "did

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[3] The following findings of the Hearing Panel were deemed inappropriate by the ARP: "1. In order to protect the Hospital's patients, the MEC should not have required an observer to watch Dr. Jensen. [¶] 2. The MEC should have provided Dr. Jensen with a formal response prior to imposing any conditions upon her exercise of privileges at the Hospital. [¶] 3. The MEC should have provided a formal procedure pursuant to which Dr. Jensen's observers could have instructed her on how to improve her performance. [¶] 4. Dr. Jensen was excused from following the directives in the MEC's letter to her which were provided to protect patients because the letter was not worded identically to the minutes of the MEC's meeting. [¶] 5. Dr. Jensen was excused from following the directives in the MEC's letter to her which were provided to protect patients because Dr. Ross told her so. [¶] 6. Dr. Jensen was excused from following the directives in the MEC's letter to her which were provided to protect patients because she could not remember that a post-partum tubal ligation (a surgery in which the physician opens up the patient's abdomen) was considered an abdominal surgical procedure. [¶] 7. Dr. Jensen was excused from following the directives in the MEC's letter which were provided to protect patients, as well as from following Hospital procedures regarding obtaining informed consent, because she claimed she was unable to find an observer. [¶] 8. The requirement that physicians must be ethical and honest in order to be on staff does not apply to Dr. Jensen. [¶] 9. Dr. Jensen must be granted privileges."

not provide enough concrete specific examples." Such examples were in fact provided, the Board noted, especially by Dr. Watkins. The only supporting evidence of competence came from appellant herself and Dr. Ross, who had practiced with appellant at the time of the events. The Hearing Panel had also improperly accepted appellant's excuses even after finding she had lied about who had performed the January 6 surgery.

The ARP concluded that the entire record demonstrated that "all three of the reasons given by the MEC for denying Dr. Jensen's request for privileges were in existence." As even one of those reasons would have been a sufficient ground for denial, the Hearing Panel was compelled to decide against appellant. The Board adopted the ARP's conclusions and denied appellant's request for staff membership and privileges.

In her petition in the superior court, appellant asserted the following: (1) the MEC had denied her due process by summarily suspending her privileges without notice and an opportunity to be heard; (2) the MEC's notice of appeal was deficient because it failed to contain a clear and concise statement of the facts supporting the appeal, as required by the bylaws; (3) the Board had grossly misstated the facts; and (4) substantial evidence supported the Hearing Panel's decision. The court, however, found that the Board had applied the correct standard of review and that its decision to deny appellant privileges was supported by substantial evidence. This appeal followed.

Discussion

1. Standard of Review

Code of Civil Procedure section 1094.5 sets forth the rules of review for administrative mandamus proceedings. The superior court's review of a final administrative decision extends to "questions whether the respondent has proceeded without, or in excess of jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion. Abuse of discretion is established if the respondent has not proceeded in the manner required by law, the order or decision is not supported

by the findings, or the findings are not supported by the evidence." (Code Civ. Proc., § 1094.5, subd. (b).)

Appellant has not disputed that the Hospital is a public hospital governed by a board of directors in a district organized under section 32000, et. seq. of the Health and Safety Code. Accordingly, with respect to the substantive medical issues, review of the Board's action is governed by the abuse-of-discretion standard. (Code Civ. Proc., § 1094.5, subd. (d).) 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).)

Our role on appeal "is the same as the superior court's, which was the same as the hospital's governing body. 'Like the trial court, we also review the administrative record to determine whether its findings are supported by substantial evidence in light of the whole record, our object being to ascertain whether the trial court ruled correctly as a matter of law.' " (*Hongsathavij v. Queen of Angels etc. Medical Center* (1998) 62 Cal.App.4th 1123, 1136-1137 (*Hongsathavij*).) Review, therefore, involves both a procedural and a substantive aspect. The court is to determine, on the basis of the administrative record, whether there was a fair hearing and whether the hospital's findings are supported by the evidence.

2. Procedural Due Process

Appellant first argues that she was denied due process both before the hearing and when the MEC appealed the Hearing Panel's decision. Before the hearing took place, her rights were infringed by the suspension of her privileges without giving her an opportunity to explain the events prompting the suspension. The summary suspension violated Business and Professions Code section 809.5, subdivision (a), because there was no showing of "imminent danger to the health of any individual." The Credentials Committee, which screened appellant's application for the MEC, made its

recommendation "in a due process vacuum" -- meaning, presumably, without seeking input from appellant.

Appellant notes that the parties were bound by notice and hearing provisions contained in the Hospital's bylaws, but she does not indicate which bylaws were violated by the summary suspension. She then argues her "due process" rights were violated, premised on the incorrect assertion that the "fair procedure" to which she was entitled is equivalent to due process, and without citation to any authority precluding summary suspension of temporary physician privileges.

Due process and fair procedure are distinct concepts, though "the essence of both rights is fairness. Adequate notice of charges and a reasonable opportunity to respond are basic to both sets of rights." (*Applebaum v. Board of Directors* (1980) 104 Cal.App.3d 648, 657; *Pinsker v. Pacific Coast Society of Orthodontists* (1974) 12 Cal.3d 541, 555; *Anton v. San Antonio Community Hosp.* (1977) 19 Cal.3d 802, 829-830.) "The common law requirement of a fair procedure does not compel formal proceedings with all the embellishments of a court trial [citation], nor adherence to a single mode of process. It may be satisfied by any one of a variety of procedures which afford a fair opportunity for an applicant to present his position. . . . [T]his court should not attempt to fix a rigid procedure that must invariably be observed." (*Pinsker v. Pacific Coast Society of Orthodontists, supra*, 12 Cal.3d at p. 555.) In the hospital context, "courts must not interfere to set aside decisions regarding hospital staff privileges unless it can be shown that a procedure is 'substantively irrational or otherwise unreasonably susceptible of arbitrary or discriminatory application . . . .' " (*Rhee v. El Camino Hospital Dist.* (1988) 201 Cal.App.3d 477, 489, quoting *Miller v. Eisenhower Medical Center* (1980) 27 Cal.3d 614, 626-627.) Furthermore, "[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, quoting *Rhee v. El Camino Hospital Dist., supra*, 201 Cal.App.3d at p. 489.) Consequently, 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.)

a. Pre-hearing Procedures

We see no deprivation of fair procedure in advance of the hearing. Before the suspension of her temporary privileges, appellant was twice warned of the consequences of noncompliance with the conditions of her temporary privileges. In the October 14 letter reinstating her temporary privileges, the Hospital reserved the right to suspend her temporary privileges immediately "[s]hould any untoward event occur." On November 25, following the first two breaches of the proctoring conditions, appellant was again warned that if she violated any condition again her temporary privileges would be suspended immediately. On both of those occasions appellant was invited to call the Chief of Staff, the hospital CEO, or the chairperson of the department if she had any questions about the conditions of her privileges. The same offer was extended in the January 15, 1999 letter notifying her of the suspension. Appellant apparently declined to avail herself of those opportunities to challenge the basis of the suspension. Appellant has not explained why either the law or the Hospital's bylaws required more.

Furthermore, the Credentials Committee met with appellant on February 1, 1999, thus giving her an opportunity to discuss the circumstances of the suspension. Appellant presents no facts supporting her assertion that the Credentials Committee made its decision in a "due process vacuum." Nor, of course, does she take issue with any procedures employed at the administrative hearing.

b. Post-Hearing Procedure

Appellant argues that she was also denied due process after the hearing, when the MEC failed to state the facts supporting its grounds for appeal. The bylaws require any request for appeal to include not only an identification of the grounds but also a "clear

and concise statement of the facts in support of the appeal." The MEC's request failed to contain a statement of supporting facts; consequently, appellant told the ARP, she did not know what the MEC's contentions were and thus had no way to respond.[4]

Two grounds were asserted by the MEC for its appeal to the ARP. Quoting the bylaws, the MEC listed "a. Substantial non-compliance with the procedures required by these bylaws or applicable law which has created demonstrable prejudice; [¶] b. The decision was not supported by substantial evidence based upon the hearing record." We find it unnecessary to reach the merits of appellant's contention as to the first ground, because we believe the MEC misinterpreted the "substantial non-compliance" provision in making its argument to the ARP. The MEC was entitled to argue that the Hearing Panel had failed to comply with the procedures established by the bylaws for the hearing. Its argument on review, however, was essentially that the Hearing Panel had exceeded its powers under the bylaws in rendering the decision. This argument went to the *substance* of the Hearing Panel's *decision* based on the evidence, not its compliance with hearing procedures.

Under the bylaws, the Board was required to affirm the Hearing Panel's decision if the hearing was fair and the decision was supported by substantial evidence.[5] Neither party complained of any unfairness or technical violations in the way the hearing was

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4 The bylaws allowed each party to submit a written statement in support of the party's position on appeal. Appellant submitted her statement before that of the party appealing, i.e., the MEC.

5 Section J(2)(f) of the Hospital's bylaws provides that "[t]he decision of the Hearing Panel shall be subject to such rights of appeal or review as described in these bylaws, but shall otherwise be affirmed by the Board of Directors as the final action if it is supported by substantial evidence, following a fair procedure." Section III(B)(6)(a) states that except where a fair procedure has not been provided, the Hearing Panel's decision must be affirmed if it is supported by substantial evidence.

conducted. Consequently, the only proper question before the ARP was whether substantial evidence supported the Hearing Panel's decision.[6]

Because the first ground was inappropriately invoked by the MEC, it is unnecessary to address the MEC's failure to state the facts supporting its assertion of procedural noncompliance. As to the second ground of the MEC's appeal -- insufficiency of the evidence -- we find no prejudice in its failure to state "the facts in support of the appeal," as required in the bylaws. "[T]he concept of due process in a hospital disciplinary setting does not require rigid adherence to any particular procedure. [Citation.] Moreover, it must be kept in mind that the hospital has a duty not only to accord due process protection to the doctor, but also to provide quality medical care to its patients. [Citation.] Consequently, it cannot be said that a violation of a hospital's bylaws establishes a denial of due process in every case. [Citation.] Rather the question is whether the violation resulted in unfairness, in some way depriving the physician of adequate notice or an opportunity to be heard before impartial judges." (*Rhee v. El Camino Hospital Dist.*, *supra*, 201 Cal.App.3d at p. 497.)

The MEC's second ground clearly challenged the sufficiency of the evidence to support the Hearing Panel's decision. That it did not lay out every factual finding with which it disagreed did not prejudice appellant, since the facts were set forth in the decision for both parties to review and discuss. Appellant was allowed -- and took -- the opportunity to review all of the panel's findings and make her argument that substantial evidence supported those findings, just as the MEC was permitted to review those same findings and argue why the evidence did *not* support them. Both parties orally argued the

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6 The MEC's expansive interpretation of "substantial noncompliance" was not anticipated by appellant, who argued to the ARP that the MEC should have objected to any violation of the bylaws during the hearing so that the Hearing Officer could correct the problem. Obviously appellant was assuming the MEC was going to raise procedural issues arising at the hearing.

issue before the ARP after submitting their written briefs. We conclude that there was sufficient notice of the MEC's position and opportunity to be heard on the question of the sufficiency of the evidence.

3. Substantial Evidence

The second ground for the MEC's appeal was the lack of substantial evidence to support the Hearing Panel's decision. The ARP agreed with the MEC that the evidence was insufficient in that the Hearing Panel had disregarded evidence contrary to its findings.[7] Appellant contends that the ARP improperly substituted its own judgment for that of the Hearing Panel, instead of applying the substantial evidence standard. Secondly, she argues, substantial evidence supported the decision of the Hearing Panel.

a. Standard used by the ARP

In *Huang v. Board of Directors* (1990) 220 Cal.App.3d 1286, 1293, 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. 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. 1292, 1294.) Because the appeal board had failed to adhere to the correct standard of

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7 Though unnecessary to our resolution of this appeal, we note that the ARP cited a completely inapposite case, *Northern Inyo Hosp. v. Fair Emp. Practice Com.* (1974) 38 Cal.App.3d 14, 24 for its assertion that the Hearing Panel improperly disregarded evidence contrary to its findings. In *Northern Inyo Hosp*. the appellate court 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*.) The ARP inappropriately assigns 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.

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.

We do not believe the ARP committed the error of the reviewing panel 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 relied on facts found by the Hearing Panel but reached a different conclusion from those facts regarding both appellant's competence and her integrity. For example, the Hearing Panel credited the statements of the five physicians who had observed appellant's performance, but it rejected their concerns, concluding that appellant was sufficiently skilled notwithstanding their criticisms. In one instance Dr. Watkins had criticized appellant's use of vacuum extraction on a baby in distress. The Hearing Panel viewed appellant's conduct as a "reasonable exercise in judgment." The ARP, however, cited this incident as an example of an observer's negative assessment of appellant's judgment. It formed the opinion that appellant's skill was "substandard for the Hospital."

Similarly, the Hearing Panel acknowledged that appellant had violated the observer condition; it determined, however, that appellant had not *intentionally* frustrated

the requirement. She had successfully arranged an observer for six of nine abdominal surgeries she had performed, and she had "clearly tried" to find one for two of the three other surgeries. The Hearing Panel thus concluded that any breach was "understandable." The ARP, on the other hand, was unwilling to excuse appellant's violations.

It is apparent from the analyses of these two panels that the ARP disagreed primarily with the ultimate judgment, not the factual findings, of the Hearing Panel. In the ARP's view, denial of privileges was warranted based on any one of the grounds proved by the MEC. Appellant maintains, however, that "[t]o substitute the Board's members [*sic*] own medical opinions was error." Apparently, in her view the Board was not permitted to overturn the recommendations of the Hearing Panel if the latter's factual findings were supported by substantial evidence. She cites neither case authority nor a provision of the bylaws to support this position. If the Board is not authorized to reach a different medical conclusion than the Hearing Panel, what then, is its function? The Board, like the appeal board in *Hongsathavij*, is the final decision-making entity. If the governing body has applied the correct standard of review, as the ARP and Board did in this case, judicial scrutiny is focused solely on whether substantial evidence supports the *governing body's* decision, not the recommendations of the committee or panel that hears the evidence. If the court were to review only the latter, "there would be no purpose for the bylaw provision [that] permits review of that decision by the hospital's governing body, which then issues the final administrative decision." (*Hongsathavij*, *supra*, 62 Cal.App.4th at p. 1136.)

"A hospital is required to establish high professional and ethical standards and to maintain those standards through careful selection and review of its staff." (*Unnamed Physician v. Board of Trustees* (2001) 93 Cal.App.4th 607, 617, citing *Rhee v. El Camino Hospital Dist.*, *supra*, 201 Cal.App.3d 477, 489.) " '[I]t is not the function of reviewing courts to resolve differences of medical judgment.' " (*Bonner v. Sisters of Providence Corp.* (1987) 194 Cal.App.3d 437, 447.) Our task is instead to determine whether the

Board's decision to deny appellant's application was supported by substantial evidence. (*Hongsathavij, supra,* 62 Cal.App.4th at p. 1137.)

b. Sufficiency of the Evidence

As noted earlier, our task on appeal is the same as that of the superior court. If the Board properly adhered to the substantial evidence standard, we review the administrative record as a whole to determine whether the Board's decision is supported by substantial evidence. (*Hongsathavij, supra,* 62 Cal.App.4th at pp. 1135-1136.) Because we have found that the Board did apply the correct standard of review, we independently examine the record before us[8] to determine whether substantial evidence supports the Board's decision to deny appellant privileges.

" 'The substantial evidence rule provides that where a finding of fact is attacked on the ground it is not sustained by the evidence, the power of an appellate court begins and ends with a determination whether there is any substantial evidence, contradicted or uncontradicted, which supports the finding.' [Citation.] The court must consider the evidence in the light most favorable to the prevailing party, giving him the benefit of every reasonable inference and resolving conflicts in support of the judgment. [Citation.] The court is without power to judge the effect or value of the evidence, weigh the evidence, consider the credibility of witnesses, or resolve conflicts in the evidence or in the reasonable inferences that may be drawn from it. [Citation.] Unless a finding, viewed in light of the entire record, is so lacking in evidentiary support as to render it unreasonable, it may not be set aside. [Citation.]" (*Huang v. Board of Directors, supra,* 220 Cal.App.3d at pp. 1293-1294.)

Code of Civil Procedure section 1094.5 "clearly contemplates that at minimum, the reviewing court must determine both whether substantial evidence supports the

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8 Only excerpts of the hearing transcript are contained in the administrative record.

administrative agency's findings and whether the findings support the agency's decision." (*Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 514-515.) "[I]mplicit in section 1094.5 is a requirement that the agency [that] renders the challenged decision must set forth findings to bridge the analytic gap between the raw evidence and ultimate decision or order. . . . By focusing . . . upon the relationships between evidence and findings *and between findings and ultimate action*, the Legislature sought to direct the reviewing court's attention to the analytic route the administrative agency traveled from evidence to action." (*Id.* at p. 515, emphasis added.)

The ARP focused on issues of both appellant's competence and her ethics. It described the October 7, 1998 surgery in which Dr. Sugar was concerned about appellant's "apparent inexperience" and "worried that if a difficulty occurred, Dr. Jensen would not be able to address it properly, and the baby could die." This description accurately reflected Dr. Sugar's testimony. The ARP also noted Dr. Watkins's accounts of the two procedures he had observed, the delivery in which she had used vacuum extraction on a compromised baby and the surgery in which she had failed to react immediately to a severed artery. The ARP acknowledged the testimony of Dr. Ross, who supported appellant, but pointed out that this physician, who was in practice with appellant, was the only witness (other than appellant herself) who expressed confidence in appellant's ability. This, too, was an accurate representation of the facts in the record.

Both the Hearing Panel and the ARP agreed that appellant had failed to comply with the conditions of her temporary privileges. Unlike the Hearing Panel, however, the ARP refused to excuse the violations and concluded that appellant's "ethics were insufficient." As for her lack of truthfulness to Dr. Falkoff, the Hearing Panel found that appellant was "probably the lead surgeon" in the procedure in which she had told Dr. Falkoff she had assisted Dr. Yaqub. The ARP agreed with this finding, which was supported by the documents in that patient's medical file and the sworn statements of three eyewitnesses. The ARP took the next inferential step in concluding that appellant

had "lied to the Chief of Staff about whether she [had] performed the surgery." This was a permissible inference based on the evidence, and it permitted the further conclusion that appellant's ethical standards did not merit staff membership at the Hospital.

Appellant offers no authority demonstrating that the ARP violated any of the bylaws or any provision of state law in reaching these conclusions. On the contrary, "a hospital [that] closes its eyes to questionable competence and resolves 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; accord *Webman v. Little Co. of Mary Hospital* (1995) 39 Cal.App.4th 592, 601). Indeed, it is the policy of this state "to exclude, through the peer review mechanism as provided for by California law, those healing arts practitioners who provide substandard care or who engage in professional misconduct, regardless of the effect of that exclusion on competition." (Bus. & Prof. Code § 809, subd. (a)(6).)

The ARP sought to correct the disparity between the facts established by the evidence and the Hearing Panel's determination that the Hospital should grant appellant privileges. Because the ARP's findings are supported by substantial evidence and its conclusions are supported by its findings, we are compelled to conclude that the Board did not abuse its discretion in denying appellant's application for privileges. The superior court therefore properly denied the petition.

Disposition

The judgment is affirmed.

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Elia, J.

WE CONCUR:

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Premo, Acting P.J.

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Mihara, J.