Filed 5/19/03 Ghanem v. Presbyterian Intercommunity Hospital CA2/7

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 977(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 977(b). This opinion has not been certified for publication or ordered published for purposes of rule 977.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

SHAHRAM GHANEM, Petitioner and Appellant, v. PRESBYTERIAN INTERCOMMUNITY HOSPITAL, Respondent.	B149840 (Los Angeles County Super. Ct. No. BS065671)

APPEAL from a judgment of the Superior Court of Los Angeles County. Dzintra Janavs, Judge. Affirmed.

Law Offices of Douglas B. Schwab and Douglas B. Schwab for Petitioner and Appellant.

Fulbright & Jaworski and Mark A. Kadzielski, for Respondent.

____

A physician appeals from a judgment denying his petition for a preemptory writ of mandate to compel his reappointment to the medical staff of a private hospital. He contends hearsay evidence was insufficient as a matter of law to support the Judicial Review Committee's findings. He also contends numerous flaws in the hearings denied him a fair procedure in determining whether his staff privileges at the hospital should be terminated. We affirm.

FACTS AND PROCEEDINGS BELOW

Appellant, Shahram Ghanem, M.D., had staff privileges at respondent Presbyterian Intercommunity Hospital (hospital) for over 15 years. He regularly admitted patients at the hospital and routinely treated very difficult patients with multiple medical problems. Appellant specialized in cardiology and used the hospital for over 95 percent of his hospital practice. During this period, he was also the on-call physician providing medical services to patients admitted to the mental health unit of the hospital who did not have a regular medical doctor.

In August 1995, the hospital asked appellant to sign an agreement as a condition for reappointment to the medical staff. The agreement recites he had been "counseled regarding compliance with required standards of behavior for a Medical Staff member at this Hospital." The agreement also recites the hospital cannot reappoint appellant to the medical staff unless appellant agrees to comply, and fully complies, with the standards of the medical staff. The agreement specifies appellant's failure to comply with these standards shall "result in his termination from the Medical Staff of the Hospital."

The agreement lists 15 factually specific conditions for reappointment, apparently based on prior incidents of alleged misconduct. Examples of these conditions include agreeing (1) not to raise his voice, or shout at any person in the hospital; (2) not to be discourteous to nurses, patients, visitors or anyone else in the hospital; and (3) not to

make unreasonable demands on nurses or other staff persons.[1] Conditional reappointment was only for one year.

---

[1] This section of the agreement states: "As an express condition of reappointment to the Medical Staff of this Hospital, without making any admissions, Dr. Ghanem agrees to all of the following:

"a. Dr. Ghanem will not under any circumstances shout or otherwise raise his voice with any individual in the Hospital, including but not limited to, nurses, administrative staff or other employees, Medical Staff members, patients or visitors. This includes responding to any individual who calls to discuss concerns or issues regarding Dr. Ghanem or his patients.

"b. Dr. Ghanem will not under any circumstances make discourteous comments, including but not limited to name calling, or give discourteous orders or demands to any individual in the Hospital, including but not limited to, nurses, administrative staff or other employees, Medical Staff members, patients or visitors. This includes responding to any individual who calls to discuss concerns or issues regarding Dr. Ghanem or his patients.

"c. Dr. Ghanem will not under any circumstances criticize any individual in the Hospital in front of or within earshot of any other individual in the Hospital, including but not limited to, nurses, administrative staff or other employees, Medical Staff members, patients or visitors. Dr. Ghanem will address any criticisms of or concerns about employees or staff members to the appropriate supervisor in a courteous manner and in private.

"d. Dr. Ghanem will not make unreasonable demands on any individual in the Hospital, including but not limited to requiring a nurse to immediately complete transcription of 25 minutes of dictated notes.

"e. Dr. Ghanem will not record any inappropriate comments in medical records, including but not limited to criticisms of any individual in the Hospital, including but not limited to, nurses, administrative staff or other employees, Medical Staff members patients or visitors. Dr. Ghanem will address any criticisms of or concerns about employees or staff members to the appropriate supervisor in a courteous manner and in private.

"f. Dr. Ghanem will not mention or indirectly make reference to any sexual matter, either seriously or jokingly, when conversing with any individual in the Hospital, including but not limited to, nurses, administrative staff or other employees, Medical Staff members, patients or visitors.

"g. Other than as required in the practice of medicine, Dr. Ghanem will not make reference to the physical appearance of any individual to any person in the Hospital, including but not limited to, nurses, administrative staff or other employees, Medical Staff members, patients or visitors.

Appellant signed a similar one-year conditional reappointment agreement in December 1996 to extend his staff privileges through 1997.

During 1996 appellant and other physicians at the hospital noted several deficiencies with respect to patient care. Hospital administration advised then chief of staff, Dr. Imparato, to provide written documentation of the alleged deficiencies in order to respond properly. Thereafter, Dr. Imparato encouraged nurses, doctors, and other staff persons to write up incidents of alleged deficiencies on what is known in this context as Notification Forms. In 1996 alone appellant filed approximately 59 such Notification Forms against hospital staff. He filed additional Notification Forms in 1997.

However, during this same period appellant was the subject of more Notification Forms than any other hospital staff person. Appellant received more than 20 percent of all complaints in his medicine unit and more than eight percent of all complaints hospital wide.

"h. Dr. Ghanem will not make gestures, touch anyone or use pictures or other indirect methods of raising sexual issues, criticizing people or referring to anyone's physical appearance, unless required by the practice of medicine.

"i. Dr. Ghanem will not examine any female patient without the presence of a female nurse.

"j. Dr. Ghanem will not make any sexually suggestive remarks or suggestions to any person in the Hospital, including but not limited to, nurses, administrative staff or other employees, Medical Staff members, patients or visitors.

"k. Dr. Ghanem will not touch any part of his own anatomy in any sexual manner while in the Hospital.

"l. Unless required by the practice of medicine, Dr. Ghanem will not touch any person in the Hospital, including but not limited to, nurses, administrative staff or other employees, Medical Staff members, patients or visitors.

"m. Dr. Ghanem will not exhibit any other inappropriate, unprofessional or disruptive behavior while on the Hospital premises.

"n. Dr. Ghanem shall notify Hospital immediately of any communication indicating any grievance or concern regarding his actions or behavior in the Hospital.

"o. Dr. Ghanem shall comply with utilization management, quality improvement and peer review activities and programs established by the Hospital as well as with the Medical Staff Bylaws, Rules and Regulations and the policies of the Hospital."

In February 1997 the hospital wrote appellant to inform him an incident had been reported in which he had reportedly shouted at a nurse and had been accusatory and rude. The letter informed appellant such behavior violated his reappointment agreement as well as the hospital's bylaws. The letter warned noncompliance with the reappointment agreement justified terminating his staff privileges. The letter concluded by stating the Medical Executive Committee might elect not to act if there are no further incidents.

In July 1998, the hospital again reappointed appellant to the medical staff for one year. This letter of reappointment acknowledged he had complied with the terms of his prior appointment, and the hospital "expect[ed] continued cooperation according to the hospital's standards of behavior." However, there had been an incident where appellant had delayed in intervening with a patient complaining of chest pain which evolved into acute myocardial infarction. Accordingly, as a condition of his reappointment in 1998 the hospital required appellant to attend at least 25 hours of continuing medical education in courses "with a focus on diagnosis and management of acute myocardial infarction syndrome." Appellant was to complete the course work within five months, or before December 1, 1998.

On August 14, 1998, an infectious disease specialist consulting on a patient for whom appellant was the admitting physician, found a progress note on the patient's chart written by appellant dated for the following day, August 15th. The specialist immediately showed the chart to Dr. Imparato who happened to be on the floor at the time. The consultant reported his findings to the nurses who filed a Notification Form against appellant. Suspecting appellant had deliberately falsified the progress note in the medical record, the Medical Executive Committee (MEC) elected to investigate this incident, as well as other alleged instances of appellant's recent misconduct.

The hospital appointed an ad hoc committee of appellant's peers to conduct the initial investigation. By letter dated September 23, 1998, the ad hoc committee notified appellant it was conducting an investigation and invited his input regarding allegations he had falsified medical records; had failed to take patient histories and physicals in a timely manner; and other charges. Appellant responded to the charges. Regarding the

potentially falsified medical record for August 15, 1998, appellant responded it was possible he was at the hospital late at night and visited the patient both late on the 14th and then in the early morning of the 15th. He pointed out a nursing note mentioned his presence on August 16th and stated he "certainly was present, both on the 15th and 16th of August."

On November 10, 1998, appellant wrote a letter to Dr. Patel, the head of the department of medicine, to request an extension of time to satisfy the continuing education requirement. Appellant explained he had not been able to attend the required courses because of major illnesses of close family members, including his mother who had been treated at the hospital. Appellant did not receive an extension of time or a response to his request.

After completing its review, the ad hoc committee noted appellant's conduct and behavior raised concerns about patient safety. The committee recommended terminating appellant's medical staff membership and clinical privileges. The MEC adopted the ad hoc committee's recommendation. On January 11, 1999, the MEC formally notified appellant of its decision to revoke his privileges which after the investigation it concluded showed he had "exhibited acts, demeanor and conduct which is 1) reasonably considered to be lower than the standards of the Medical Staff; 2) unethical; and 3) contrary to the Medical Staff Bylaws or Rules and Regulations." The notice explained his right to request a formal hearing in accordance with the hospital's bylaws and listed a summary of his rights at such a hearing.

Section 7.5.5.1 of the hospital's bylaws concerns representation at peer review hearings. This section provides: "A member shall be entitled to be accompanied by and represented at the hearing only by a practitioner licensed to practice in the state of California who is not also an attorney. No party shall be represented at any phase of the hearing by an attorney unless the Judicial Review Committee, in its discretion, permits all parties to be represented by legal counsel. The foregoing shall not be deemed to deprive the member, or any other party, of the right to legal counsel in connection with preparation for the hearing or for a possible appeal. If the member desires to request

representation by legal counsel, the request must be made along with the request for a hearing." By letter to the chief of staff appellant requested a formal hearing. He did not at the same time request representation by counsel at the hearing.

On February 22, 1999, appellant received formal notice of the charges against him; a list of potential witnesses against him; and copies of correspondence and other documents relied on by the MEC in bringing the charges. The charges included allegations of (1) falsifying progress notes in medical records; (2) failing to attend an education program imposed as a condition of continuing staff privileges; (3) failing to perform patient histories and physicals in a timely fashion; and (4) continuing to exhibit abusive and inappropriate conduct toward nurses and patients. In addition to these most recent alleged incidents of inappropriate conduct, the MEC noted in making its recommendation it had also taken into consideration the accusations brought against him before the Medical Board of California.[2]

The peer review hearing was scheduled to begin on March 25, 1999. However, appellant sought and received a 60-day continuance because of a scheduling conflict with his chosen attorney. He later sought an additional continuance due to another scheduling conflict of his counsel. This request was denied, as was his belated request for legal representation at the peer review hearing.

The hearing began on May 25, 1999, and continued for 11 sessions. Drs. John D. McCarthy and Neal Schindel represented appellant at the hearing. Drs. Mark Minkes and Gregory Polito acted as the hospital's representatives. In accordance with the hospital's

---

[2] Based on accusations of misconduct by certain of appellant's outpatients the attorney general initiated proceedings before the Medical Board to revoke or suspend appellant's medical license. Ultimately, the Medical Board adopted the decision of the administrative law judge to suspend appellant's license for one year, to stay the suspension, and place appellant on probation for a period of three years under specified terms and conditions. The hospital included these conditions in its subsequent reappointment agreements with appellant. Appellant's request for a writ of administrative mandate to reverse the administrative law judge's decision was still pending in the trial court when the present matter concluded.

bylaws, an experienced health care attorney with no prior involvement with the hospital, Ronald Traynor, acted in the capacity of hearing officer. At the first session both sides had the opportunity to ask the hearing officer, as well as the five physicians on the Judicial Review Committee, questions related to their possible bias or lack of impartiality. Neither side challenged any of the hearing participants for potential bias.

Appellant testified in his own defense and denied the charges against him. He claimed the nurses and ward clerk filed all the Notification Forms against him simply to retaliate for his earlier "whistle blowing" regarding substandard care of his patients. He testified the complainants were rude and obnoxious to him and were generally uncooperative. Regarding the specific instances of misconduct alleged in the charges, appellant admitted being frustrated with what he deemed incompetence or uncooperativeness on the part of the nurses. However, he denied intimidating or demeaning nursing staff, and denied he ever yelled at the patient or nurses described in the specific instances.

Appellant admitted there were occasions where it took more than the permitted 24 hours to perform histories and physicals on patients admitted without a regular physician. However, he explained many of those patients were in the mental health ward, and because they were sometimes too incoherent, too sedated or too violent at the moment for the necessary interviews, he sometimes had to defer histories and physicals to accommodate the patient. Appellant explained he did not believe patient safety had been jeopardized, even when several days elapsed, because patients who had been admitted through the emergency room had received at least preliminary review to ensure they were medically stable before being transferred to the mental health ward.

Regarding the progress note with the post-dated entry, appellant admitted he had not seen the patient on August 15th and opined he had simply been mistaken in writing the date.

For the first time at the hearing appellant explained it was impossible for him to find a continuing education course which both focused on myocardial infarction and provided a sufficient number of hours. He testified no one had clarified for him any

continuing education course regarding cardiology, which also covered the subject of myocardial infarction, would have satisfied the hospital's requirement. Appellant finally completed the required course work nearly a year after the deadline in November 1999.

Several nurses and doctors testified on appellant's behalf. Some of these witnesses testified generally to appellant's competence, generosity and overall good character. These witnesses also testified appellant had never acted inappropriately toward them, or they had never seen appellant deliberately falsify a medical record, or delay in preparing patient histories and physicals.

The Judicial Review Committee issued its decision on March 17, 2000. By unanimous vote the committee concluded the MEC failed to demonstrate by a preponderance of the evidence appellant (1) had been inappropriate and abusive with a particular patient; (2) had falsified three of the four medical records at issue; and (3) had generally failed to timely perform patient physicals and histories. By majority vote the committee found appellant (1) had falsified a medical record by post-dating a progress note when he had not actually seen the patient on the date noted; (2) was confrontational with, had inappropriately yelled at, or was demeaning to nurses on four different occasions; and (3) had failed to request an extension of time to complete the continuing education requirement in a timely fashion, manipulated the extenuating circumstances which might have justified an extension, and failed to treat his need to comply with the educational requirement in a sufficiently serious manner. Based on these findings, the Judicial Review Committee concluded the MEC's recommendation to terminate appellant's staff membership and clinical privileges at the hospital was reasonable and warranted.

Appellant appealed the decision to the hospital's appeals board. The appeals board is comprised of three members from the hospital's board of directors. Both appellant and the hospital were represented by counsel at these hearings. A unanimous appeals board made its written recommendation to the board of directors to affirm the findings and conclusions of the Judicial Review Committee. The remaining members of the hospital's board of directors unanimously affirmed the decision of the appeals board.

Appellant filed a petition for a preemptory writ of administrative mandate seeking an order to reverse the hospital's decision and to reinstate his staff privileges.[3] Appellant argued the hospital's conclusions were not supported by its findings and the findings were not supported by substantial evidence. In addition, appellant argued he had been denied fair procedure during the Judicial Review Committee hearings. The trial court denied his petition as well as his request for a stay of the Hospital's decision. This appeal followed.

DISCUSSION

I. THE HOSPITAL'S DECISION TO REVOKE APPELLANT'S STAFF PRIVILEGES IS SUPPORTED BY THE FINDINGS AND THE FINDINGS ARE SUPPORTED BY SUBSTANTIAL EVIDENCE.

A. Standard of Review of an Administrative Decision.

In reviewing the decision of a private hospital, both the trial court and the appellate court review the administrative record to determine whether the hospital proceeded without or in excess of jurisdiction, whether there was a fair trial, and whether the board's findings are supported by substantial evidence in the light of the whole record.[4]

"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. 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. The court is without power

---

[3] Code of Civil Procedure section 1094.5.

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. 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."[5]

Whether the administrative proceedings were fundamentally fair is a question of law reviewed de novo on appeal.[6]

We review the trial court's judgment with these standards in mind.

B. Inappropriate Conduct Toward Nursing Staff.

The charges against appellant included four instances of inappropriate conduct directed toward nurses.

On June 30, 1998, a patient was admitted to the mental health unit from the emergency room. The emergency room notes indicated the patient was diabetic but provided no orders for appropriate medications or glucometer checks to address the patient's diabetes. Nurse Leah Whitson was the charge nurse in the mental health department. Appellant was responsible for the patient's non-psychiatric medical care. According to Nurse Whitson, appellant was telephoned or paged on five separate occasions between the hours of 7 and 11 p.m. without response. Appellant telephoned the mental health unit just before midnight. Appellant seemed very agitated when Nurse Whitson answered the telephone. He yelled at her in a very loud voice, shouting, "Why are you calling me? Why are you bothering me? I am in the middle of an emergency!" Nurse Whitson told appellant his tone and remarks were rude, inappropriate, and that she would not accept this type of treatment from him. Nurse Whitson wrote up a Notification

---

[4] Code of Civil Procedure section 1094.5, subdivisions (b) and (d); *Rosenblit v. Superior Court* (1991) 231 Cal.App.3d 1434, 1443.

[5] *Huang v. Board of Directors* (1990) 220 Cal.App.3d 1286, 1293-1294, internal citations and quotation marks omitted.

[6] *Rosenblit v. Superior Court, supra*, 231 Cal.App.3d 1434, 1443.

Form against appellant regarding the incident. The nurse's supervisor reviewed the form and noted, "[appellant] exhibits this behavior frequently . . . [S]taff attempts to deal with [appellant] in a professional manner. [Appellant] does not always return the courtesy."

Two years later, and while this matter was before the hospital's appeals board, Nurse Whitson provided appellant a supplemental declaration. Nurse Whitson stated since this incident appellant has been neither rude nor inappropriate and opined his behavior had improved. The declaration further states appellant has been cooperative with the nursing staff and attempts to provide the best patient care, even to those patients who are uninsured. Nurse Whitson concludes her declaration by stating in her opinion it would be a great loss to the hospital and patients in the psych unit if appellant were no longer providing services at the hospital.

This declaration, while suggesting appellant had the potential to modify his behavior, nevertheless confirms the facts underlying the charged incident.[7]

In August 1998, Nurse Mary Jane Supnet wrote up a Notification Form against appellant about an event which occurred one evening. Appellant had a patient he wished to have discharged from the hospital and released to a particular skilled nursing facility. Appellant requested Nurse Supnet, the then case management and discharge planner, to make arrangements. Days went by and no opening became available for the patient. Nurse Supnet attempted to discuss the situation with appellant but according to the nurse, he was always in a hurry, or claimed to be in an emergency procedure, and thus did not have time to discuss the case. At some point appellant changed the order to provide for discharge to a nursing home of the patient's choice. The nurse informed appellant the

---

[7] Because Nurse Whitson's later declaration reaffirms, rather than disavows her original charge of misconduct, it clearly provides no ground for the Judicial Review Committee to reach a different decision regarding the validity of the particular charge. Moreover, as the record demonstrates, the hospital gave appellant numerous warnings and numerous opportunities over the years to conform his behavior to the hospital's standards. He seemingly ignored those warnings until the risk of losing his staff privileges became very real. Because of his record, there was no reason to remand the matter for reconsideration based on this single piece of positive new evidence.

patient agreed to be discharged to another facility. Appellant did not approve of the facility, did not believe the patient would be happy there, and did not believe the patient had actually agreed to the change in plans. He told the nurse to tell the patient, family members and social worker to wait until he arrived to speak with them directly. By the time he arrived the patient and the family members had left. According to Nurse Supnet, appellant told her "loudly" at the nurse's station, and within earshot of several people, she was "not doing a good job." Appellant also implied she had lied to the patient about the reason beds were unavailable at the more desirable facility. On the Notification Form Nurse Supnet wrote, "M.D. is very inappropriate professionally and mistreats nurses. Licensed nurses overheard conversation with M.D. and the way he treated me." The Notification Form is countersigned by the nurse supervising the ward who commented, "another example of this physician's inappropriate behavior."

In another incident, appellant had a patient he wished to discharge. The discharge planner was not then available so he informed the patient's nurse. He asked the nurse to fill out the discharge forms while he dictated the list of medications the patient required on discharge. The nurse stated she did not have time to fill out discharge forms. She explained she had six patients to attend to because they were one nurse short. He waited for the nurse for several minutes while she attended to her duties. Then appellant became impatient and informed her if she did not want to help him, he would ask her supervisor to intervene. Rather than argue with appellant the nurse took his dictation and filled out the necessary forms. The nurse stated she felt demeaned and threatened by appellant's behavior. This incident was reported to Dr. Hamilton, the Vice President of Medical Affairs who testified at the hearing. He personally investigated the incident and documented his findings.

On September 2, 1998, appellant admitted a patient to the hospital in the morning. On admission appellant provided orders for the patient, including orders for the patient's medications. In the late evening the patient requested sleeping pills. Nurse Adelaida Carrillo-Felt was the nurse on the evening shift. She noticed appellant had prescribed the sleeping pill, Restoril, for the patient but without specifying a dosage. The nurse

telephoned appellant to have him clarify the dosage. Appellant asked her, "Why are you calling me again?" The nurse replied she was trying to clarify the patient's dosage for Restoril. Appellant told her not to call him again for something like that next time and ordered the nurse to give the patient the lowest dosage. On the Notification Form the nurse prepared against appellant regarding the incident, the nurse wrote determining correct drug dosages was outside her scope of practice. The supervisor who reviewed the form concurred in the nurse's judgment.

In his testimony appellant explained he thought the nurse should have known the proper dosage from a list of medications the patient had brought with her on admission. However, both Dr. Hamilton and supervising nurse Judy Pugash testified relying on the list would have been inappropriate and potentially dangerous because it neither bore the patient's name nor a physician's signature.

The Judicial Review Committee found appellant engaged in inappropriate behavior toward nursing personnel on these four occasions[8] which violated the hospital's bylaws directing staff members to work cooperatively with hospital personnel. The committee also found appellant had a history of inappropriate behavior toward nursing staff. It relied for its conclusions on the evidence of the conditions imposed in prior reappointment agreements and Dr. Combs's testimony he had counseled appellant more than 50 times, at least half of the time regarding his behavior, prior to imposing the numerous conditions in his reappointment agreements. Based on appellant's recent and past behavior, the committee concluded appellant did not understand the inappropriateness of his behavior toward nurses, had not corrected his behavior despite numerous opportunities to do so, and was not likely to permanently correct such inappropriate behavior if given yet another opportunity.

Appellant argues the findings he had acted uncooperatively and inappropriately with nursing staff in the four charged incidents are not supported by the evidence because

[8] In addition to the Notification Forms, several of the complaining nurses and/or their supervisor filed sworn declarations describing the incidents.

none of the four complainants testified live at the hearing. He argues the Notification Forms prepared by the nurses at the time constitute nothing more than uncorroborated hearsay, which he claims is insufficient as a matter of law to support the Judicial Review Committee's factual findings.

The Legislature has determined more relaxed rules of evidence and procedure should apply in administrative hearings. The applicable statute provides administrative hearings "need not be conducted according to technical rules relating to evidence and witnesses, except as hereinafter provided. Any relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of the evidence over objection in civil actions.

"(d) Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but over timely objection shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions. An objection is timely if made before submission of the case or on reconsideration."[9]

The hospital in its bylaws has adopted a substantially similar rule for its private peer review hearings. Notably, it expressly permits hearsay evidence. Section 7.5.9 of the hospital's bylaws states: "Judicial rules of evidence and procedure relating to the conduct of the hearing, examination of witnesses, and presentation of evidence shall not apply to a hearing conducted under this Article. Any relevant evidence, including hearsay, shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the admissibility of such evidence in a court of law. . . ."

We will assume both the Notification Forms and the incident report constitute hearsay. These documents nevertheless satisfy the requirements for admissibility under both the Government Code and the hospital's bylaws. They thus accordingly have

---

[9] Government Code section 11513, subdivisions (c) and (d).

probative value on the issue whether appellant had been inappropriate and abusive toward nursing staff.

Numerous witnesses testified regarding the significance and function of these forms in the hospital's everyday business, including appellant. Indeed, with regard to the incident report, appellant himself relied on these sorts of documents to establish the vast majority of incidents relating to him personally, or to his practice, resulted in values of one or zero, indicating an insignificant impact on patient safety.

Because numerous witnesses laid the foundation for the admission of these documents, both the Notification Forms and incident report constitute business records within the meaning of Evidence Code section 1271.[10] In other words, the evidence showed these writings were made in the regular course of business; at or near the time of the act, condition or event; qualified witnesses testified to their identity and mode of preparation; and the sources of information and method and time of preparation indicate their trustworthiness.

The decision in *Gregory v. State Board of Control* does not assist appellant.[11] In *Gregory*, a mother sought reimbursement for her son's burial expenses from the state victims' of crime fund. The board inquired with the police department whether the son had in any way contributed to his own death. The board did not subpoena or review the police agency file of the matter, nor even the original police report, in deciding the son's actions had contributed to his death, and thus in deciding to deny reimbursement. Instead the board relied on two "in lieu" forms prepared 11 and 20 months after the son's death,

---

[10] Evidence Code section 1271 provides: "Evidence of a writing made as a record of an act, condition, or event is not made inadmissible by the hearsay rule when offered to prove the act, condition, or event if:

"(a) The writing was made in the regular course of a business;

"(b) The writing was made at or near the time of the act, condition, or event;

"(c) The custodian or other qualified witness testifies to its identity and the mode of its preparation; and

"(d) The sources of information and method and time of preparation were such as to indicate its trustworthiness."

[11] *Gregory v. State Board of Control* (1999) 73 Cal.App.4th 584.

and then only in response to the board's request for clarification. Finding the "in lieu" forms were not made at or near the time of the event, the appellate court held the evidence was insufficient as a matter of law to establish the son's acts had in fact contributed to his death.[12] The fact the documents were not made contemporaneously with the event distinguishes *Gregory* from the facts in the present case.

In conclusion, these writings alone constitute substantial evidence that after being warned appellant had still been confrontational and inappropriate with nursing staff on those four occasions.

C. Falsified Medical Record.

Appellant contends insufficient evidence supports the finding he intentionally falsified a patient's medical record by postdating a progress note for a day he did not visit the patient. Appellant explained the error in the date was simply an inadvertent mistake. Appellant tried to establish his lack of intent with the testimony of several witnesses who stated inadvertently misdating a record was a fairly common occurrence, even happening on occasion to the most careful doctors and nurses.

The record contains substantial evidence which supports the inference appellant deliberately postdated a progress note for a day he did not, and did not intend to, visit this particular patient.

There is no dispute several nurses and doctors saw appellant's progress note dated for August 15th on the evening of August 14th. Appellant testified because he had asked for a specialist consultation for the patient he believed the specialist would likely not be available to see the patient until the next day. Appellant stated he did not need to see the patient on the 15th because, in his view, it was unnecessary to be seen by both him and the specialist on the same day. However, as things turned out the specialist saw the patient the evening of the day he was requested and at that time discovered appellant's

---

[12] *Gregory v. State Board of Control, supra*, 73 Cal.App.4th 584, 597.

progress note dated for the next day. If, as appellant testified, the date was simply an error, then the patient's record would show appellant saw the patient an extremely unusual three times on August 14th, and then not at all the next day, in essence, abandoning the patient in violation of the hospital's rules and regulations requiring patients be seen every day. Moreover, this radical inconsistency in his treatment of this patient creates the inference he more likely than not only saw the patient twice on the 14th and then manufactured the note for the 15th believing no one would look at the patient's chart until the next day.

The information in the challenged progress note also raises the inference the data were manufactured. Appellant noted the patient was incontinent. According to the evidence, this was inconsistent with the patient's medical record and the fact the patient had a Foley Catheter, making it impossible to know this information about the patient. Appellant testified he took the patient's blood pressure readings himself. While unusual, this act in and of itself is not so remarkable. Nor particularly is the fact the patient's blood pressure readings as recorded by appellant varied somewhat from the nurses' data for the day. However, it is extremely unusual for a physician to also take a patient's temperature readings. Yet, according to the challenged progress note, appellant had taken this highly unusual step. Notably, the temperature indicated varied somewhat from the nurse's reading for the day which again called into question appellant's credibility about having simply made a mistake regarding the date of the entry.

This combination of evidence of unusual incidents, and reasonable inferences from this evidence, support the finding appellant deliberately manufactured a progress note for this patient's medical record because he did not intend to visit the patient on the day in question.

D. Failure to Timely Complete the Continuing Education Requirement.

The evidence is undisputed appellant did not take the required courses in his medical specialty by the deadline imposed as a condition of his 1998 reappointment

agreement. A month before the deadline appellant requested an extension of time, claiming illnesses of his family members prevented him from finding the time necessary to research and take the required courses. At the hearing appellant for the first time offered another excuse for failing to timely complete the course work. He claimed myocardial infarction was such a narrow subject it was impossible to find programs offering the necessary 25 hours. Appellant argues, given these circumstances, the finding his request for an extension of time was not reasonable should be reversed as unsupported.

The evidence supports the finding appellant did not consider the education requirement sufficiently important. The hospital imposed the condition after a specific incident in which appellant's delayed response jeopardized a patient's safety. Completing the coursework was an express condition of his continuing privileges at the hospital. The continuing education requirement was not in some obscure field, but was directly related to appellant's claimed specialty. The five months given to complete the required course should have been more than enough time had appellant taken the requirement seriously from the beginning. Only a month before the deadline did he offer the excuse of family illness. This suggests at that late date he had still not taken any steps to inquire whether courses were even offered with a focus on myocardial infarction because he did not even proffer that excuse until much later.

In short, the record evidence supports the finding his belated request for an extension of time was unreasonable in the circumstances.

II. APPELLANT WAS NOT DENIED A FAIR PROCEDURE IN THE HEARINGS BEFORE THE JUDICIAL REVIEW COMMITTEE.

Appellant asserts numerous events occurred during the Judicial Review Committee hearings which resulted in denying him a fair procedure.

As appellant recognizes, medical staffs of private hospitals must observe "fair procedure" though not necessarily "due process" in rejecting, revoking or terminating

staff privileges of a physician.[13] "Fair procedure" assumes peer review by physicians and does not require exactly the same rights and procedures guaranteed as due process rights to litigants in criminal or civil trials.[14] The "fair procedure" standards for peer review hearings at private hospitals are codified in Business and Professions Code sections 809 through 809.9.[15] The question whether fair procedures were employed is reviewed under the independent judgment, de novo standard.[16]

---

[13] See, e.g., *Ezekial v. Winkley* (1977) 20 Cal.3d 267, 269-270; *Westlake Community Hosp. v. Superior Court* (1976) 17 Cal.3d 465, 468.

[14] See, e.g., *Anton v. San Antonio Community Hosp*. (1977) 19 Cal.3d 802, 829-830; accord, *Anton v. San Antonio Community Hosp*. (1982) 132 Cal.App.3d 638, 652-654; *Goodstein v. Cedars-Sinai Medical Center* (1998) 66 Cal.App.4th 1257, 1265.

[15] Business and Professions Code section 809.3 governs procedural rights at peer review hearings. This section provides as follows:

"(a) During a hearing concerning a final proposed action for which reporting is required to be filed under Section 805 [for matters potentially impacting patient safety], both parties shall have all of the following rights:

"(1) To be provided with all of the information made available to the trier of fact.

"(2) To have a record made of the proceedings, copies of which may be obtained by the licentiate upon payment of any reasonable charges associated with the preparation thereof.

"(3) To call, examine, and cross-examine witnesses.

"(4) To present and rebut evidence determined by the arbitrator or presiding officer to be relevant.

(5) To submit a written statement at the close of the hearing.

"(b) The burden of presenting evidence and proof during the hearing shall be as follows:

"(1) The peer review body shall have the initial duty to present evidence which supports the charge or recommended action.

"(2) . . .

"(3) Except as provided above for initial applicants, the peer review body shall bear the burden of persuading the trier of fact by a preponderance of the evidence that the action or recommendation is reasonable and warranted.

"(c) The peer review body shall adopt written provisions governing whether a licentiate shall have the option of being represented by an attorney at the licentiate's expense. No peer review body shall be represented by an attorney if the licentiate is not so represented, ..."

[16] *Rosenblit v. Superior Court, supra*, 231 Cal.App.3d 1434, 1443.

A. Appellant's Claim the Hospital Deliberately and Improperly Interfered with Potential Defense Witnesses is Not Supported by the Record.

Appellant contends the hospital deliberately discouraged nurses from testifying on his behalf. The record does not support this contention.

Appellant asked Nurse Melissa Dover to testify on his behalf at the peer review hearing. She agreed. Later another nurse told Ms. Dover she had heard nurses were told "to stay out of it." Ms. Dover testified she got nervous, became concerned for her job, and spoke to her supervisor, Terry Pasula. Ms. Dover testified Ms. Pasula said nursing staff was advised not to get involved but, "said I was free to do whatever I chose."

Nurse Terry Pasula testified on rebuttal. She denied hospital administration had instructed her to advise nurses not to get involved with appellant's peer review hearings. She said no one in administration had tried to warn the nurses off so they would not participate in the hearings. Ms. Pasula testified she instead instructed Ms. Dover and other nurses, they could do whatever they wanted, and they should "follow their hearts." She told reluctant nurses they did not have to get involved if they did not want to, but that it did not matter either way.

On this record, it appears Ms. Dover simply misinterpreted her supervisor's words. We note Nurse Dover in fact testified at the hearing. We also note several other nurses testified on appellant's behalf at the hearing as well. Most significantly, however, appellant makes no claim any particular nurse or other hospital employee declined his request to testify on his behalf. Accordingly, we conclude the record does not support his claim.

B. The Decisions to Exclude Numerous Character Reference Letters Did Not Deprive Appellant of Fair Procedure.

At the hearing several nurses and doctors testified generally to appellant's good character. They testified variously they had never seen appellant falsify records, delay in

preparing patient histories and physicals, or be abusive toward hospital personnel. None were fact witnesses regarding the charged offenses.

The hearing officer decided to exclude 50 character reference letters from patients, physicians and nurses. The appeals board later excluded 33 similar character reference letters. Appellant had solicited the vast majority of these letters in 1996 and 1997 when the decision whether to suspend or revoke his medical license was under review before the Medical Board based on entirely different charges. Appellant claims the rulings excluding this evidence were error as the letters provided relevant information tending to prove he was more often than not professional, efficient, cooperative and respected by his peers and patients.

The information in the general character reference letters was cumulative to the testimony given by appellant's character witnesses at the hearings. This was a sufficient reason to exclude the letters.[17] We also note appellant was not charged with a general lack of character to which the letters could have served as an appropriate defense. Accordingly, on this record, we discern no error.

C. Appellant Received Adequate and Timely Notice of The Charges.

The incidents which formed the basis of the specific charges before the Judicial Review Committee primarily occurred in July, August and September of 1998. To recall, the ad hoc committee notified appellant of the results of its initial investigation in September 1998 and gave him an opportunity to respond. Appellant received notice of the hospital's charges in January, and again in February as is required in response to a

---

[17] For the same reason appellant was not denied fair procedure by the hearing officer's decision to limit the number of live character witnesses appellant wished to have testify. Much of the testimony appellant did introduce was repetitive and thus cumulative to other character witnesses' testimony. Additional witnesses providing general testimony regarding appellant's good character would have added little to the evidence already before the committee.

request for a peer review hearing. Appellant does not claim the notice he received in any way violated the Business and Professions Code or the hospital's bylaws for peer review hearings. Instead, appellant claims he had a special, separate agreement to be immediately told whenever anyone filed a Notification Form complaining about his behavior. He thus claims the notice he did receive was untimely, which in turn, he claims impaired his ability to recall, and his ability to defend against the charges.

The parties neither produced nor testified to any written agreement between the hospital and appellant for immediate notification. At best, Dr. Imparato testified it would be a lot more effective if the hospital had a system in place which would enable it to notify a person within 24 hours about any registered complaint. Notably Dr. Imparato did not testify the hospital had any verbal commitment to appellant specially to immediately notify him of any Notification Form filed against him.

In any event, appellant was placed on notice of the vast majority of the charges within a month or two of their occurrence in September 1998 when the ad hoc committee informed him of its findings and the grounds for its recommendation. He does not provide any example of how his defense was impaired by the few month delay. Accordingly, there is no basis on which this court could find prejudice in any event.

D. The Hearing Officer's Decision to Redact the Substantive Portions of the Notification Forms Appellant Filed Against Nursing Staff Did Not Deprive Him of Fair Procedure at the Hearing.

Appellant claims the hearing officer's decision to redact dozens and dozens of Notification Forms he prepared to put the hospital on notice of various patient care issues deprived him of a valid defense to the charges. Appellant argues had the Judicial Review Committee been aware of the seriousness of his complaints against the nursing staff it would have accepted his defense the nurses in their current charges were simply retaliating against him for his "whistle blowing" activities.

We note appellant wrote the vast majority of these notification forms in 1996. He also filed a few Notification Forms in 1997. It strikes us as unrealistic any of these

nurses would do nothing for two years and then all of a sudden in 1998 decide to retaliate by filing their own Notification Forms. That this is in fact unlikely is underscored by one of the charges in this case brought by a nurse who was only employed by the hospital for several months beginning in May 1998. She clearly had no motive to retaliate against appellant for Notification Forms filed well before her employment with the hospital.

In any event, the truth or falsity of the substance of appellant's earlier charges could not have helped to prove or disprove either the current charges against him or his claim of retaliation. The evidence established the present charges were not simply manufactured by disgruntled nurses but were grounded in fact.[18] In short, appellant can demonstrate no prejudice from the hearing officer's order to redact most of the content of these Notification Forms.

E. Appellant Had the Opportunity to Call the Witnesses He Wished to Cross-Examine.

In this argument appellant expressly does not challenge the propriety of hearsay evidence in peer review hearings. Instead, he argues because there is no subpoena power in the peer review setting, if the hospital chooses to rely on hearsay evidence rather than cross-examine the nurses who claimed he had acted rudely and inappropriately toward them denied him fair procedure.

Despite the lack of subpoena power each side in the peer review setting may call whatever witnesses it chooses. Appellant listed 80 potential witnesses he anticipated calling, including numerous nurses, and more particularly, one of the nurses who had

---

[18] Appellant also complains the hearing officer must have misinstructed the Judicial Review Committee because in its written findings the committee stated the evidence did not establish the charges "were made solely in retaliation for prior complaints . . . ." We fail to see the error. Even if appellant's prior complaints inspired a few of the nurses to more aggressively scrutinize appellant's behavior, the fact remains the current charges of misconduct are supported by substantial evidence, any one of which is sufficient to live witnesses, there is no opportunity for cross-examination. He claims his inability to warrant revocation of staff privileges under the terms of his reappointment agreement.

filed one of the Notification Forms at issue in this case. For whatever reason, appellant ultimately chose not to call the four complaining nurses. Accordingly, it is impossible to know whether they would have appeared voluntarily, or whether one or more would have declined. Absent at least a request of the nurses in question, it is inappropriate to characterize the lack of cross-examination of these witnesses as unfair procedure when appellant failed to take even the minimum step to ensure their presence.

In any event, several other witnesses testified regarding the behavioral issues. These persons included two former chiefs of staffs, Drs. Combs and Imparato; the Vice President of Medical Affairs, Dr. Hamilton; and the Care Center Coordinator, Nurse Judy Pugash. These witnesses had been personally involved in either investigating charges against appellant or in reviewing the charges with the complaining nurses at or about the time they occurred. Appellant had the opportunity to, and did, extensively cross-examine each of these witnesses.

F. Appellant Has Failed to Demonstrate the Hearing Officer Was Biased Against Him.

Appellant contends some of the hearing officer's rulings demonstrate he was biased against him. As examples, appellant cites (1) the denial of his second request for a continuance so his preferred counsel could be available to assist him at the hearing; (2) the admission of hearsay statements over his objection; (3) the exclusion of character evidence; (4) the redaction of the substance of the Notification Forms he filed against hospital personnel; and (5) the denial of an extra minute for closing argument.

Appellant does not allege any grounds for finding implied bias. Indeed, at the first session of the hearings he voir dired the hearing officer to ensure he did not have a personal or financial stake in the outcome or a family relationship with any of the parties to the proceeding.[19] Nor does appellant assert any basis for finding actual bias, such as

---

[19] See, e.g., *Haas v. County of San Bernardino* (2002) 27 Cal.4th 1017, 1032 [implied bias from financial stake in the outcome]; *American Motors Sales Corp. v. New*

personal embroilment in the dispute, or personal animosity toward him.[20] Instead, appellant asks this court to find the hearing officer's adverse rulings alone sufficient to disqualify the hearing officer.

"[B]ias in an administrative hearing context can never be implied, and the mere suggestion or appearance of bias is not sufficient."[21] "[A] party's unilateral perception of an appearance of bias cannot be a ground for disqualification unless we are ready to tolerate a system in which disgruntled or dilatory litigants can wreak havoc with the orderly administration of dispute-resolving tribunals."[22]

Motor Vehicle Bd. (1977) 69 Cal.App.3d 983, 987 [implied bias from financial stake in the outcome]; *Applebaum v. Board of Directors* (1980) 104 Cal.App.3d 648, 659-660 [because the same doctors had responsibilities as investigators as well as decision makers, there was too great a risk of bias from a potential personal interest in the outcome after having taken positions in their various overlapping roles]; Code of Civil Procedure section 170.1, subdivision (a) [close familial relationship is a ground to disqualify a judge].

[20] See, e.g., *Mennig v. City Council* (1978) 86 Cal.App.3d 341 [city council was so embroiled in the dispute over the proper administration of the police department, it was disqualified to be an impartial decision maker regarding the decision whether to reinstate the police chief].

[21] *Hongsathavij v. Queen of Angels/Hollywood Presbyterian Medical Center* (1998) 62 Cal.App.4th 1123, 1142.

[22] *Andrews v. Agricultural Labor Relations Bd*. (1981) 28 Cal.3d 781, 792 [a belief bias exists from a subjective appearance of bias is an insufficient ground for disqualification].

Citing a particular charge of alleged inappropriate and abusive conduct toward a patient, appellant argues Dr. Hamilton, who investigated the charges as the Vice President of Medical Affairs, demonstrated bias toward him by failing to discuss the matter with him before forwarding the charge to the MEC for its review and possible action. Appellant can demonstrate no prejudice even assuming the truth of the allegation. The Judicial Review Committee unanimously found the particular charge not proved by a preponderance of the evidence. Accordingly, this particular incident could have had no effect on the outcome.

G. Appellant Can Demonstrate No Prejudice From the Denial of His Belated Request For Legal Counsel at the Hearing.

As noted, the hospital's bylaws provide both sides have the right to be represented by a doctor representative at a peer review hearing, and that neither side has the right to legal counsel at the hearing unless the Judicial Review Committee, in its discretion, permits all parties to be represented by legal counsel. However, if a doctor wishes to be represented by legal counsel he or she must so state when requesting a peer review hearing.

The hospital's bylaws regarding legal representation is consistent with the Business and Professions Code governing peer review hearings. To recall, the statute provides: "The peer review body shall adopt written provisions governing whether a licentiate shall have the option of being represented by an attorney at the licentiate's expense. No peer review body shall be represented by an attorney if the licentiate is not so represented, ..."[23]

Appellant did not request legal representation at the same time he requested a peer review hearing. When he requested legal representation several months later the hearing officer advised neither side would be represented by legal counsel. Appellant does not claim either the statute or hospital bylaws were violated by the denial of his belated request for legal representation. Instead, he claims he should have had the right to insist on legal representation given the number and seriousness of the charges.

Contrary to his suggestion, the requirement of a fair hearing is not violated when the hospital does not permit the doctor to be represented by counsel at a factual peer review hearing.[24] This is because "the purpose of the peer review process is to resolve intraprofessionally matters bearing upon a physician's competency and conduct. To this

---

[23] Business and Professions Code section 809.3, subdivision (c).

[24] See, e.g., *Anton v. San Antonio Community Hosp., supra*, 19 Cal.3d 802, 827; *Gill v. Mercy Hospital* (1988) 199 Cal.App.3d 889, 901-903; *Cipriotti v. Board of Directors* (1983) 147 Cal.App.3d 144, 157.

end, the affected physician is entitled to be represented by another physician on the medical staff or from the local professional society. Furthermore, the bylaws specify numerous provisions which are meant to guarantee the affected physician a fair proceeding. These include prompt notice of the charges, together with the documentary support for the charges; adequate time to prepare to meet the charges; a hearing before a committee of doctors who have no prior involvement in the charges; representation by a fellow doctor; the right to appeal to the board of directors of the hospital [as well as the appeals board] and representation by counsel at the appellate hearing.

"The purpose of the proceeding is to review highly technical documents and medical reports dealing with the doctor's performance in an area where experts in the same field can arrive at a decision without the controversial and contentious atmosphere which would likely be created by the participation of attorneys. Medical staff hearings involve highly educated individuals. There is little risk that a physician will be erroneously deprived of staff privileges if he is not allowed counsel at the hearing . . . ."[25]

The *Gill* court's analysis applies with equal force to the case at bar. Dr. John McCarthy did a remarkable job of representing appellant's rights and interests. He was far more technically astute than any attorney might have been. He was also as zealous an advocate as any litigant would hope to have. In these circumstances, appellant can demonstrate no error and no prejudice.

III. A REVIEW OF THE ENTIRE RECORD REVEALS THE DECISION TO TERMINATE APPELLANT'S STAFF PRIVILEGES WAS REASONABLE AND WARRANTED.

Appellant argues, even assuming the charges are supported by substantial evidence, and even assuming he received fair procedure at the hearing, the situation did not warrant the draconian remedy of revoking his privileges. He points out he had been practicing at the hospital for 15 years, and because 95 percent of his practice had been at

[25] *Gill v. Mercy Hospital, supra*, 199 Cal.App.3d 889, 902.

the hospital, his loss of privileges means his professional livelihood will be seriously impacted. He emphasizes he caused no patient harm during his practice at the hospital, and that many doctors, nurses and patients considered him a capable, devoted, compassionate and professional physician.

The record evidence establishes appellant and his practice had many admirers. However, the hospital had to balance the finer aspects of appellant's performance and character against its experience of recurring problems with appellant over a several year period. The hospital gave appellant numerous formal and informal, and sometimes very serious, warnings regarding his conduct. The hospital also gave appellant numerous chances to retain his membership by addressing identified problems. Nevertheless, appellant failed to take either the warnings or the numerous opportunities to correct those problems seriously enough. In this situation, the hospital was warranted in deciding enough was enough.

DISPOSITION

The judgment is affirmed. Respondent to recover its costs of appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

JOHNSON, J.

We concur:

PERLUSS, P.J.

WOODS, J.