WHAT ABOUT THE *ECONOMY* CASE?: CONTINUED QUESTIONS ABOUT ITS APPLICABILITY ONE YEAR LATER.

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Among attorneys who advise peer review bodies and physicians[1] on fair hearing rights in California, no case has had a greater impact in the past year than *Economy v. Sutter East Bay Hospitals*[2] (*"Economy case"*). In that case, the First District Court of Appeal concluded that a physician's notice and hearing rights apply to situations where a hospital directs a medical group of a "closed" department to remove a physician from the hospital schedule.

Arguably, the principles established in the *Economy* case were not new. Statutory and common law have long-established that fair procedure rights arise when a peer review body takes an action or makes a recommendation, based on a medical disciplinary cause or reason, that limits a physician's ability to practice.[3] Moreover, Section 809.6 of the Business and Professions code clearly states language in the bylaws or a contract cannot waive a physician's hearing rights.

However, since the First District Court of Appeal filed its decision and the California Supreme Court subsequently denied review, it has become clear that the *Economy* case has led more attorneys and peer review bodies to wonder how future courts will extend the holdings to other fact patterns.

SUMMARY OF *ECONOMY* CASE

In the *Economy* case, Sutter East Bay Hospitals and Alta Bates Summit Medical Center ("the Hospital") operated closed anesthesia departments pursuant to a contract with East Bay Anesthesiology Medical Group ("the Group").[4] The contract required, *inter alia*, all anesthesiologists employed by the Group to be members in good standing of the Hospital medical staff,[5] and authorized the Hospital to require the Group to immediately remove from the schedule any physician providing services under the agreement who "performs an act or omission that jeopardizes the quality of care provided to hospital's patients."[6]

When the California Department of Public Health ("CDPH") conducted an unannounced survey at the Hospital, it placed the Hospital in "immediate jeopardy" upon finding numerous deficiencies attributed to one of the Group's anesthesiologists, Dr. Economy.[7] At the direction of the Hospital's Vice President for Medical Affairs ("VPMA"), the Group's president removed Dr. Economy from the schedule pending further investigation.[8] Upon learning that the physician had been referred to peer review and had been suspended from practice by the Group pending further investigation, CDPH thereafter lifted the immediate jeopardy declaration.[9]

In the weeks that followed, the anesthesia department peer review committees discussed the matter and recommended that Dr. Economy not be permitted to return to practice until he had completed a Physician Assessment and Clinical Education "PACE" program at the University of California, San Diego, as well as any recommendations by that program and the peer review committee.[10] The medical staff president informed the Group's president about the recommendation and requested that the Group implement it.[11] Upon learning of this requirement, Dr. Economy inquired whether he could meet with the "peer review body," but was told that this was his only alternative and that the medical executive committee would not look kindly on his appearing before them.[12] Dr. Economy eventually completed the PACE program and returned to practice.[13]

Shortly thereafter, after being alerted by the pharmacy manager of problems with Dr. Economy's documentation, the Hospital VPMA contacted the president and medical director of the Group and asked them to address the issue "immediately."[14] The Group again took Dr. Economy off the anesthesia schedule. In subsequent communications, the VPMA informed the Group's president that they could not approve anesthesia coverage schedules containing Dr. Economy and confirmed that the Hospital was asking Group to remove him under the provision of the contract allowing the Hospital to remove any physician that jeopardizes the quality of care provided to hospital patients. [15]

The Group's president informed Dr. Economy that the Hospital did not want him on the anesthesia schedule and that he could resign his employment, but if he refused, the Group would proceed with termination.[16] When he refused, the Group terminated his employment.[17]

Dr. Economy thereafter filed a complaint alleging the hospital had violated his right

to notice and a hearing under Section 809 of the Business and Professions Code and his common-law right to fair procedure. He also filed suit against the Group. [18]

The Hospital argued that Dr. Economy's statutory notice and hearing rights were never triggered because they had not taken action against his privileges. Rather, they argued, the Group had suspended and terminated him.[19] Thus, the Hospital asserted, any grievance related to the discipline and dismissal imposed must be directed to the Group since they were the entity responsible for the employment actions.[20] The Hospital further argued that the suspension and termination did not trigger a duty to file an 805 report with the Medical Board of California since the Group is not a "peer review body" as defined by the statute.[21]

The trial court rejected the Hospital's arguments, finding that under this approach "a hospital could effectively avoid complying with the notice and hearing requirements of sections 805 and 809 simply by relying on its contracts with third-party employers as a way to terminate the services of a physician whenever a hospital administrator determines there is a medical disciplinary reason." The Court of Appeal agreed, noting that if they were to accept the Hospital's position, Dr. Economy's "right to practice medicine would be substantially restricted without due process and, despite the hospital's concern that plaintiff was endangering patient safety, the state licensing board would never be notified."[22] The request by the Hospital to remove Dr. Economy from the anesthesia schedule, temporarily at first and then permanently, "necessarily resulted in a substantial reduction of plaintiff's staff privileges" and "was the functional equivalent of a decision to suspend and later revoke plaintiff's clinical privileges."[23]

The trial court also rejected the Hospital's argument that his privileges were not affected because he still had privileges at the hospital, finding that this narrow interpretation was an unjustified view of the meaning of privileges, which Section 805(a)(4) defines as "any arrangement under which a licentiate is allowed to practice or provide care for patients in a health facility."[24]

The court also concluded that the Hospital could not establish that it had delegated its peer review duties to the Group even though the contract required the Group to develop and maintain separate peer review processes. The contract did not clearly state that the Group's peer review committee would be responsible for the full fair procedure rights guaranteed under the law; the bylaws did not permit or authorize a closed department to conduct peer review in lieu of what was required in the medical staff's bylaws; and there is no evidence that the group had any policies or procedures to conduct peer review which would have been essential if the Hospital had in fact delegated these responsibilities.[25]

With respect to a provision in the contract stating that the continuation of the contract was not a condition of medical staff membership and that the contract could be terminated without the necessity of a hearing, the court concluded that this only applied to quasi-legislative decision of the Hospital.[26] They also pointed to the statutory prohibition on contractual waivers of peer review proceedings as justification for their ruling.[27]

In addition to affirming the trial court's determination that the Hospital had violated Dr. Economy's due process rights, the Court of Appeal also affirmed the award of damages, rejecting the hospital's argument that Dr. Economy was not entitled to lost wages since he had not presented any evidence that he would have prevailed at a hearing. Relying on a civil service employment case (*Skelly v. State Personnel Board* 15 Cal.3d. 194 (1975)), the court determined that Dr. Economy did not need to show he would have prevailed at the hearing in order to be entitled to lost income and awarded more than $3.8 million dollars. [28]

HOW WILL THE *ECONOMY* CASE APPLY IN OTHER SCENARIOS?

Following the *Economy* case, it is now clear that at least under these narrow factual circumstances a hospital cannot direct a group with an exclusive contract to take a physician off of the schedule without serious risk that such action will be construed as an action against the physician's clinical privileges and membership that triggers hearing rights.

What remains to be seen is how this case will be relied upon in other situations. For example, when a hospital directs a group to take action pursuant to a call coverage contract or a non-exclusive contractual arrangement, a physician would not necessarily be "effectively [prevented] ... from exercising clinical privileges at the hospital and engaging in the practice of medicine."[29] However, given the court's attention to the expansiveness of the definition of "staff privileges" under Section 805, which means "any arrangement under which a licentiate is allowed to practice in or provide care for patients in a health facility," consideration must be given to whether a physician is entitled to a hearing whenever *any* action or recommendation is taken for a medical disciplinary cause or reason that restricts a physician's ability to practice.

What about the situation where there is no contract provision similar to the one at issue in the *Economy* case, but the group takes action based on information from the hospital administration or the medical staff, or upon receiving pressure from these entities to "handle" the group members rather than following their own peer review procedures? Depending on the facts and the communications amongst the parties, a court could impute the actions of the group to the medical staff or hospital. Rather than relying on the group to act, the medical staff should follow its own peer review processes and procedures to ensure they are investigating complaints or event reports and address them appropriately.

Another uncertain situation arises when a Chief of Staff who also serves as a medical group leader suspends a fellow group member from practicing for a medical disciplinary cause or reason acting on information from, but not the direction of, the hospital's Chief Medical Officer. What about the *Economy* case in this scenario? Here, it will be critical for the Chief of Staff to clarify in what role he or she was acting when imposing the summary suspension in order to determine who is obligated to offer a hearing.

What about the *Economy* case when a medical staff and large medical group both take corrective action against a physician based on the same facts? Would the member be entitled to two hearings – one regarding

their employment and one regarding their medical staff membership? Depending on the relationship between the group and the hospital/medical staff, it is possible these hearings could be combined or that the hearing procedure can be delegated to one of the peer review bodies. However, entities interested in resolving issues via a joint hearing or delegated hearing process should establish these procedures in governing documents and/or contracts beforehand. Legal counsel should also be consulted to ensure such language still complies with legal requirements and is not considered a forbidden "waiver."

Hospitals and medical groups should no longer view the termination or suspension of a group employed physician at the direction of the hospital as a contractual matter. Given the significant risk of damages, particularly in light of the court's holding that a physician does not need to show that they would have prevailed at a hearing, peer review bodies must take the question of how the *Economy* case applies seriously. There is a legitimate risk of liability for hospitals and medical staffs who continue to rely on contract provisions allowing administrators to remove a physician from a service schedule when that physician will no longer be able to exercise his or her privileges at the hospital due to this limitation.

END NOTES

1 Although this article references "physicians," fair hearing rights also apply to other licentiates defined under Business and Professions Code Section 809(b) including podiatrists, clinical psychologists, marriage and family therapists, clinical social workers, professional clinical counselors, or dentists.

2 31 Cal.App 5th 1147.

3 "Medical disciplinary cause or reason" means that aspect of a licentiate's competence or professional conduct that is reasonably likely to be detrimental to patient safety or to the delivery of patient care. Cal. Bus. & Prof. Code Section 805(a)(6).

4 *Id.*, at 1152.

5 *Id.*, at 1153.

6 *Id*.

7 *Id.*

8 *Id*

9 *Id*., at 1154.

10 *Id*.

11 *Id*.

12 *Id*.

13 *Id*

14 *Id*., at 1154-1155.

15 *Id*., at 1155

16 *Id.*

17 *Id.*

18 Per the complaint, the causes of action against the group included: Violation of right to notice and hearing under Business and Professions Code Sections 805 and 809, violation of common law right to fair procedure, intentional interference with prospective economic advantage, intentional interference with right to practice profession, breach of employment agreement, and age discrimination. (2013 WL 322824).

19 *Id.*, at 1158.

20 *Id.*

21 *Id.* The court did not comment in this decision on whether the group was a peer review body under Business and Professions Code Section 805(a)(1)(B)(iv).

22 *Id.*

23 *Id.*

24 *Id.* Business and Professions Code Section 809(a)(4) defines "staff privileges" as any arrangement under which a licentiate is allowed to practice in or provide care for patients in a health facility. Those arrangements shall include, but are not limited to, full staff privileges, active staff privileges, limited staff privileges, auxiliary staff privileges, provisional staff privileges, temporary staff privileges, courtesy staff privileges, locum tenens arrangements, and contractual arrangements to provide professional services, including, but not limited to, arrangements to provide outpatient services.

25 *Id.*, at 1159-1160.

26 *Id.*, at 1160, citing *Mateo-Woodburn v. Fresno Community Hospital & Medical Center*, 221 Cal.App.3d 1169 (1990).

27 *Id.*, citing Business and Professions Code Section 809.6(c): "The provisions of Sections 809.1 to 809.4, inclusive, may not be waived in any instrument…for a final proposed action for which a report is required to be filed under Section 805."

28 *Id.*, at 1161-1162.

29 *Id.*, at 1159.