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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION TWO

HAMID SAFARI,
Plaintiff and Appellant,
v.

KAISER FOUNDATION HEALTH PLAN,
INC. et al.,
Defendants and Respondents.

A134619

(Alameda County
Super. Ct. No. RG10551842)

Hamid Safari, M.D., appeals from the judgment denying his petition for a writ of administrative mandate directed to Kaiser Foundation Health Plan (KFHP) and Kaiser Foundation Hospitals (KFH). Dr. Safari sought a determination that the administrative peer reviewing hearing process involving KFHP and KFH (collectively, Kaiser) resulting in findings that he should no longer treat patients violated his due process rights and was not supported by substantial evidence.¹ We affirm the judgment.

BACKGROUND

Dr. Safari's Background

Dr. Safari is a perinatologist who is board-certified in both obstetrics and gynecology (OB/GYN) and maternal fetal medicine (perinatology). He completed his

¹ Dr. Safari requests that we direct Kaiser to vacate its decision terminating his privileges and direct the superior court to permit him to file an action for damages and reinstatement.

fellowship in maternal fetal medicine at the University of Southern California and joined the medical staff of the KFH Medical Center in Fresno (Kaiser Fresno) in August 1997. When he joined the medical staff, he obtained privileges to practice in the hospital. In 2001, Gilbert Moran, M.D., the chief of Dr. Safari's department, ranked the quality of Dr. Safari's care as "exceptional."

The Kaiser Entities

KFHP, KFH, and The Permanente Medical Group (TPMG) provide care under the Kaiser Permanente name. Each organization makes its own decisions regarding the physicians who may be plan providers, the hospital's professional staff, and the shareholders or employees. The quality and health improvement committee (QHIC) has the authority to determine the scope of a physician's participation in KFHP and clinical privileges at the KFH hospitals in conjunction with each facility's physician professional staff, which is comprised of physicians.

Kaiser's Bylaws

Kaiser's bylaws specify the procedures for monitoring, investigating, suspending, or terminating the clinic practice of physicians. The bylaws provide that, in addition to being licensed, "[t]o qualify for, and continue membership on the Professional Staff a practitioner must": "Document and submit evidence of his or her experience, background, training, demonstrated ability, availability, and physical and mental health status, with sufficient adequacy to demonstrate to the Professional Staff and the Board that he or she will provide care to patients at the generally recognized level of professional quality, taking into account patients' needs, available hospital facilities, resources and utilization standards at the Hospital"

When there is a notice of an adverse action and the physician requests a hearing, Kaiser's bylaws provide that the chief of staff "shall appoint an ad hoc judicial review committee consisting of a chairperson and two additional members of the Professional Staff, who shall gain no direct financial benefit from the outcome, who have not acted as accusers, investigators, fact finders or initial decision makers in the same matter and who have not previously taken an active part in the consideration of the matter contested."

Kaiser's bylaws also provide for the appointment of a hearing officer. The bylaws state: "The Hearing Officer shall be an attorney at law qualified to preside over a formal hearing and preferably shall have experience in medical staff disciplinary matters. He or she shall not be biased for or against the practitioner, and shall not be an attorney who regularly advises the Professional Staff on legal matters. The Hearing Officer shall gain no direct financial benefit from the outcome, and must not act as a prosecuting officer or advocate for either side."

Kaiser's bylaws set forth the hearing officer's authority and duties as follows: "The Hearing Officer may participate in the deliberations and act as a legal advisor to the Judicial Review Committee, but he or she shall not be entitled to vote. He or she shall act to assure that all participants in the hearing have a reasonable opportunity to be heard and to present all relevant oral and documentary evidence, and that proper decorum is maintained. . . ."

Kaiser's bylaws provide that the rules of evidence during the hearing are as follows: "The rules of law relating to the examination of witnesses and presentation of evidence shall not apply in any hearing conducted hereunder. Any relevant evidence, including hearsay, shall be admitted by the Hearing Officer if it is the sort of evidence upon 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."

Dr. Safari's Complaints about Members on a Committee

Dr. Safari served as a member of the Kaiser Fresno OB/GYN department quality assurance committee (quality assurance committee or peer review committee) for approximately four years, beginning in 1997. Varoujan Altebarmakian, M.D., the physician in chief, and chief of staff of the hospital at Kaiser Fresno, acknowledged that, at some point between 2000 and 2002, Dr. Safari expressed to him concerns about how the quality assurance committee was functioning. Dr. Safari alleged that the process of the quality review was not fair and maintained that Dr. Moran, Robert Rusche, M.D., and other doctors were not treating him fairly. He also claimed that the peer review committee was concealing significant quality problems related to "Dr. A." and "Dr. B."

Dr. Safari indicated that he might go on a hunger strike if his concerns were not addressed.

Subsequently, Dr. Altebarmakian received a request from other doctors to change the structure of the peer review committee of the OB/GYN department. As a result, Dr. Altebarmakian changed the structure to have all of the members of the department represented on the peer review committee. He also removed Dr. Moran and two other doctors from their positions as chief and assistant chiefs of the department.

Thomas R. Kulterman, M.D., a Kaiser OB/GYN, met with Dr. Altebarmakian to discuss his concerns with reference to the quality assurance committee and signed a letter expressing concerns regarding the committee. Dr. Kulterman observed evidence of retaliation against Dr. Safari for complaining about the quality assurance committee. Dr. Moran, according to Dr. Kulterman, exhibited “clear animosity” towards Dr. Safari at meetings and belittled him. He also observed Dr. Moran questioning Dr. Safari’s judgment at a birthing center and his comments were witnessed by numerous individuals. He also heard heated exchanges between Dr. Moran and Dr. Safari and stated that Dr. Safari did not initiate the confrontation.

Recommended Restrictions on Dr. Safari’s Privileges

On April 22, 2005, Dr. Safari was the delivering physician when a mother, S.V., was giving birth to twins (the S.V. case). Dr. Safari stated that he elected to induce the delivery because the mother’s “fasting sugars were all elevated and because she had two (2) prior successful deliveries.” The first twin was delivered without any problem but the second twin was not progressing down the birth canal. Dr. Safari decided to use a vacuum extractor to facilitate the delivery. There were a number of vacuum applications applied and an assisting physician, Dr. A., attempted a manual rotation of the baby’s head. These attempts failed and, after the vacuum was applied again, a lifeless male infant was delivered.

In July 2005, the medical executive committee recommended that Dr. Safari’s privileges to do vaginal deliveries be restricted because of the S.V. case and other prior cases. The medical executive committee concluded that a vacuum delivery should not

have been done and the vigorous pull on the vacuum was inappropriate. The medical executive committee advised that a caesarean-section delivery “would have avoided fetal demise if it had been performed earlier in the vacuum extraction phase of delivery.”

Dr. Safari requested a fair hearing and a judicial review committee (JRC) of three doctors convened to hear his appeal of the decision of the medical executive committee. The JRC consisted of Markham Kirsten, M.D., Chairman; Steven Chen, M.D.; and Kenneth Latt, M.D. Dr. Safari had legal counsel. The JRC heard testimony from witnesses, reviewed documents submitted by the parties, and heard verbal closing arguments. Additionally, both parties submitted closing written briefs.

The Medical Board of California (the Medical Board) also commenced an investigation of Dr. Safari’s performance in the S.V. case. On March 28, 2006, the Medical Board provided a consultant review that had been prepared by Steven Polansky, M.D. Dr. Polansky wrote: “My educated guess is that this trauma occurred at either the attempts at manually rotation or if the vacuum was used to attempt to turn the vertex, which is contraindicated. It would almost have to be one or the other situation.” He wrote: “In all fairness to Dr. Safari, the timing of delivery of the second twin is a subject of much debate and no full consensus but I believe that most practicing OB/GYNs would agree that 99 minutes borders on an excessive amount of time Further, there is lack of consensus as to the number of times a vacuum can be applied It appears, however, that there is a suggestion that the vacuum was applied when the vertex was barely engaged . . . and it may have been appropriate to proceed with caesarean section or at least give the patient the option.”

Dr. Polansky summarized his conclusions as follows: “In summary, although some of the issues involved in the care of this patient are debatable, it seems clear to me that trauma occurred as a result of either attempts at manual rotation or attempts at rotation with the vacuum (not mentioned). . . .” Dr. Polansky also questioned the entire quality assurance process at Kaiser and concluded that it was “clearly flawed” and that the administration “was more concerned with [its] own legal situation rather than the safety of patients.”

In September 2006, the JRC unanimously voted to uphold the recommendation of the medical executive committee that Dr. Safari's clinical privileges be terminated (2006 JRC decision). The 2006 JRC decision summarized the evidence related to two cases other than the S.V. case. One of the cases, which occurred in December 2001, involved a patient with pre-eclampsia. An external reviewer concluded that the care was not acceptable and found that Dr. Safari should have admitted the patient at 34 weeks, that Dr. Safari's prescribing an antihypertensive medication was not appropriate, and that Dr. Safari did not safely manage the patient. The JRC found that this case illustrated Dr. Safari's questionable judgment. Another case considered by the JRC was the delivery of significantly discordant twins in December 2001. The case was sent for outside review and the reviewer found Dr. Safari's care inappropriate; the JRC concluded that this case also supported a finding of Dr. Safari's inappropriate judgment.

With regard to the S.V. case, the JRC found that Dr. Safari's decision to induce the mother at 37 weeks because her fasting sugars were " 'out of control' " was questioned by the expert witness of the medical executive committee. The expert believed that "the better course of action would have been to admit the mother and stabilize her blood sugars" rather than induce labor. The 2006 JRC decision reported that "there were insufficient clinical indications for use of the vacuum in the first instance" because the evidence was that there was no fetal or maternal distress at this time. The JRC determined that Dr. Safari's "initial and continuing use of the vacuum extractor made no logical sense and was contrary to the standards of practice" The JRC concluded that the evidence "presented was persuasive, if not overwhelming, that the cause of death of Twin B was the manner in which the vacuum had been applied and utilized." The JRC rejected Dr. Safari's statement that the action of Dr. A. of attempting the manual rotation of the twin caused the traumatic injury.

The 2006 JRC decision summarized its conclusions regarding the S.V. case as follows: "[The JRC] concluded that there were insufficient clinical indications for inducing the patient; insufficient clinical indications to attempt a vacuum extraction; that the vacuum extraction should have been halted when no progress was made; that Dr.

Safari should have proceeded to delivery by C-section, despite the fact that the C-section would have been difficult because of the size of the mother; and that Dr. Safari's manner of application of the vacuum on the last pull was, to a medical probability, the cause of death of Twin B. Viewed as a whole, Dr. Safari's judgment throughout the delivery of Twin B was flawed and seemed to be fatally permeated by his unwavering determination to succeed in a vaginal delivery of Twin B. ¶ The [JRC] was also disturbed by Dr. Safari's insistence that he did nothing wrong during the delivery. Indeed, Dr. Safari testified that, if faced with the same situation in the future, he would not do anything differently. . . .”

Dr. Safari initially appealed the 2006 JRC decision but later withdrew his appeal. He thus accepted the limitation of his privileges.

Subsequent Reviews of the S.V. Case Presented to the Medical Board

The Medical Board considered evidence regarding the S.V. case not presented to the JRC in 2006. At the request of counsel for Dr. Safari, the S.V. case was reviewed by Thomas Benedetti, M.D., a certified obstetrician gynecologist with subspecialty certification in maternal fetal medicine; Robert Hayashi, M.D., a perinatologist; Michael Fields, M.D., an obstetrician; Wilson C. Hayes, Ph.D., and Gary Thomas Moran, Ph.D., biomechanical experts; and Dr. Geoffrey Allan Machin, an expert witness in perinatal and placental pathology. Dr. Benedetti, Dr. Hayashi, Dr. Fields, and Hayes concluded that the decision to perform vacuum extraction was appropriate and did not cause the twin's death. They concluded that the cause of death appeared to be related to the high spinal cord disruption and such an injury was, in their opinion, likely caused by the assisting doctor's manual rotation of the infant's head.

Dr. Machin opined that “the application of vacuum in this case did not cause the injuries to the brain and spinal cord of this fetus” and “[u]pper cervical spinal damage has been reported in situations where assisted delivery is attempted to rotate the head” Dr. Gary Moran stated that it was his opinion that the twin's spinal disruption “was due to rotational forces executed on the fetus during delivery” and that there was testimony that both the assisting doctor and Dr. Safari “tried to rotate the fetus for an easier

delivery.” He added: “It is my opinion that doing one or more of these attempts, rotation forces were applied to the neck while a tension force was on the head, resulting in spinal column and spinal cord disruption. [¶] In addition, I believe that the subdural hemorrhage was due to head compression and the tearing of the tentorium (dura mater) and resultant bleeding. This occurred most probably during the attempts at repositioning the head and shoulders by [the assisting doctor].”

The Medical Board issued its proposed decision in January 2009. It found that the evidence did not “establish any cause for discipline” of Safari’s license.

Kaiser’s Actions Between the Issuing of the 2006 JRC Decision and March 2007

In December of 2006, the medical executive committee sent Dr. Safari to the Physician Assessment and Clinical Education Program (PACE Program) at the University of California, San Diego. He was referred to the PACE Program because of concerns in the following areas: “obstetrician confidence in Dr. Safari as a perinatologist; deficiencies of documentation; judgment in high-risk obstetrical management; and significant concerns about communication skills with physicians, support staff and patients.”

On February 5, 2007, William Norcross, M.D., a Professor of Clinical Family Medicine and the Director of the PACE Program, and Peter A. Boal, Senior Program Representative at the PACE Program, wrote an evaluation of Dr. Safari. They wrote: “Overall, Dr. Safari performed very well on all medical knowledge based exams. He has a solid fund of medical knowledge and excellent clinical judgment in his specialty of perinatology, obstetrics and gynecology, and general medicine. Dr. Safari clearly takes his continuing medical education seriously and he should be lauded for that.” They added: “While Dr. Safari’s knowledge base was quite impressive, his behavior and attitude during his oral clinical exam . . . was not. This type of behavior is somewhat unexpected given the nature of the assessment. However, [these] impressions do substantiate [Kaiser Fresno’s] concerns about Dr. Safari’s ‘communication skills for physicians, support staff and patients.’ ” They concluded: “Based on our findings, we believe that Dr. Safari is a bright physician who is medically competent to practice

perinatology and obstetrics and gynecology, but could benefit from some type of behavioral counseling to help modify his behavior and attitude. A professional coach might also be useful in this circumstance. . . .”

Dr. Safari stated that he met with Dr. Altebarmakian on March 23, 2007, and Dr. Altebarmakian informed him about the PACE Program report. Dr. Altebarmakian confirmed that he had done well but refused to give him a copy of the report. Dr. Safari maintained that he did not receive a copy of the report until May 9, 2007. Dr. Altebarmakian advised Dr. Safari that if he resigned from Kaiser and took an offer of \$2 million there would not be any negative publicity about him. Dr. Safari turned this offer down and indicated a desire to continue his practice at Kaiser Fresno.

On March 26, 2007, a number of obstetric physicians and staff of the OB/GYN department at Kaiser Fresno signed a letter to Dr. Altebarmakian stating the following: “Dr. Safari is a knowledgeable perinatologist in our department. He provides superb and timely in-patient and out-patient consultation for our high[-]risk pregnant patients. Dr. Safari always makes himself available for care and follow up of our high[-]risk patients. Dr. Safari’s patients express satisfaction with his manner, advi[c]e, care and follow up. [¶] Dr. Safari’s interaction with staff and patients is both professional and caring. We believe he is an asset to our department and we are strongly supportive of him.”

Referral to a Psychologist

On April 18, 2007, a notice was sent to Dr. Altebarmakian from Charito P. Sico, M.D., acting chief of OB/GYN, which stated that Dr. Safari had made a remark that had aroused concern. He wrote in pertinent part: “[Dr. Safari] stated that he has a countdown going on toward the day of the decision next week. He . . . stated that he is separating himself from everything that is material in this world. He stated his plan: He will open his mouth (probab[ly] to the media), Kaiser will need to grant him immunity, watch and see things will get nasty, I will name names, Kaiser will bring in the patient’s mother, and all of these will probably put him behind bars. I asked him: ‘Are you going to hurt yourself?’ He responded with a story about a religious Shiite leader who told his troops about to go for battle[.] ‘If you can kill, go ahead and kill. But if you can die for the

cause, it would be the same thing.’ I told him[,] ‘Look at me. I do not want you to hurt yourself.’ He would not look at me. He just kept silent.”

Dr. Safari was referred to psychologist Stephen White, Ph.D., an expert in workplace violence. White interviewed Dr. Safari and other physicians and staff at Kaiser Fresno. He summarized his findings in a letter written on May 9, 2007. In this letter, he indicated that he did not believe that Dr. Safari, at that time, “pose[d] a homicidal violence risk to anyone at Kaiser.” He added, that he thought it was “extremely unlikely that he ever would pose such a risk.” He also did not believe that Dr. Safari was clinically paranoid or suicidal. White wrote: “In my opinion, Dr. Safari’s modus operandi will continue to be to pursue legal remedies as long as they are available to him, and possibly to go to the media, especially if he believes losing his medical license is imminent.” He remarked that Dr. Safari “may refer, as he did in the conversation with Dr. Sico, to provocative Iranian idioms too-literally translated.”

White noted that Dr. Safari had “shown a defensiveness, rigidity, and self-righteousness when under stress that has contributed to hardened lines between him and his peers and superiors.” White had received “credible testimony regarding [Dr. Safari’s] episodes of angry outbursts, especially with nursing staff.” White explained: “[Dr. Safari] comes across as adamant in maintaining his point of view and his excellence, and that his dedication to patients surpasses that of others. He is described as one who does more talking and justifying than listening or collaborating. Some view him as remorseless and unable to admit any mistakes, let alone learn from this. This was particularly true after the infant death in 2004, for which he blamed only others. This combination of factors has contributed to his being viewed as arrogant, insensitive, inflexible, and as someone who would be incapable of dealing rationally with a damaged or destroyed career.”

The Recommendation to Limit Dr. Safari’s Practice to Consultative Care

On April 24, 2007, after considering the 2006 JRC decision and information about Dr. Safari’s threatening remarks, the QHIC approved the termination of Dr. Safari’s vaginal delivery privileges, tentatively recommended termination of Dr. Safari’s

professional staff membership and clinical privileges at KFH Fresno, authorized the summary suspension and recommended the termination of Dr. Safari's KFHP participation, and authorized the establishment of a practitioner review and oversight committee (the PROC) for a further review for Dr. Safari's clinical practice.

The PROC was comprised of three physicians: Benjamin Chut, M.D., president, of KFHP Southern California region, whose medical specialty is internal medicine; Norman Reynolds, M.D., a psychiatrist specializing in physician behavior issues; and James Smith, M.D., a perinatologist and faculty member of Stanford University School of Medicine. On May 22, 2007, the PROC wrote a report (the PROC decision) and found that it was unable to conclude that Dr. Safari posed an imminent danger to patients or others and it therefore lifted the suspension of Dr. Safari's ability to treat KFHP members. The PROC, however, recommended that Dr. Safari's "practice focus exclusively on being a consultative perinatologist providing services at the request of obstetricians and other physicians" at Kaiser Fresno. It stressed that his practice "should be strictly consultative, meaning he cannot directly manage patients, issue orders, or direct patient care." The PROC concluded that Dr. Safari "should not be the attending physician for, or directly manage, the labor and delivery of patients, including vaginal deliveries or caesarean sections."

On September 24, 2007, Dr. Safari received a letter notifying him that on June 11, 2007, the QHIC resolved to adopt the PROC decision (2007 QHIC decision). The letter stated that the PROC decision recommended limiting Dr. Safari's "Practice to perinatology consultation only, with no clinical management, participation in deliveries, or other patient care responsibilities." Dr. Safari requested a hearing. He also requested the appointment of a neutral hearing officer or a hearing officer agreeable to both Kaiser and him.

Newspaper Article

On October 18, 2007, an article appeared in the Los Angeles Times that discussed Dr. Safari and the S.V. case. The article stated that one of S.V.'s twins suffered a severed spinal cord after Dr. Safari "vigorously shook the vacuum, up and down, side to side" and

used the vacuum six times. It criticized Kaiser for not preventing this medical outcome because doctors and nurses had, according to the article, “repeatedly” complained “to higher-ups” about problems they saw in Dr. Safari’s skills and behavior. The article noted that Doctors Moran and Rusche had sued Kaiser and alleged in the lawsuit that Kaiser and TPMG had retaliated against them for drawing attention to Dr. Safari.

Notice of Charges

On October 30, 2007, Kaiser sent Dr. Safari a notice of the hearing and notice of the charges. The notice stated that the hearing was scheduled for November 29, 2007. The “Notice of Charges” provided the following: “The QHIC’s decision to recommend the further limitation of your clinical privileges is based upon the following charges: [¶] 1. There are substantial issues regarding your clinical judgment in the care and management of patients, as determined by both the [JRC] and the PROC. The PROC’s conclusion that your practice should be limited to consultative perinatology is based on the substandard care identified by the JRC, including very significant concerns in your handling of the vacuum extraction case, improper care and management of a patient with pre-eclampsia, an absence of growth or ultrasound documentation of discordant twins, and a failure to obtain adequate ultrasounds or a non-stress test in a high risk twin pregnancy. [¶] 2. Your inappropriate behavior and attitude limit your ability to interact and communicate with others, as determined by the PROC. Such behavior prevents you from working cooperatively and effectively with the Hospital and professional Staff and functioning safely in a team setting. Such inappropriate behavior, which jeopardizes patient care, includes defensiveness when offered critical feedback, a refusal to accept or learn from such feedback, significant outbursts of anger, including yelling and making threats, comments that have been viewed as harassing, disruptive and interfering with patient care and hospital operations, and failure to take responsibility for the impact of such comments.”

On November 8, 2007, Dr. Safari sent a letter to Kaiser’s board of directors (the Kaiser board) challenging the bylaws of KFH on the ground that the bylaws violated federal and California requirements of due process. He argued that the bylaws permitted

Kaiser to unilaterally appoint the hearing officer and hearing panel, creating a clear legal conflict of interest.

Offer to Dr. Safari

On November 28, 2007, Kaiser offered Dr. Safari \$2 million provided that he comply with a number of conditions, including an agreement to resign immediately from the medical staff at Kaiser Fresno and from participation as a provider in KFHP. Dr. Safari rejected the offer and indicated that the sum offered was insufficient. Counsel for Dr. Safari wrote in his letter to Kaiser that he could “not understand why Kaiser” was “unwilling to issue a favorable report to the . . . Medical Board about Dr. Safari’s performance at Kaiser.” The letter indicated that Dr. Safari wanted “nothing more than to continue his practice of perinatology at Kaiser”

According to Stephen D. Schear, counsel for Dr. Safari, Schear received an oral response to his letter from Mark A. Kadzielski and Robert M. Dawson, counsel for Kaiser, on December 7, 2007. Schear reported that Dawson told him, “ ‘Dr. Safari is leaving Kaiser, so he might as well take the money and leave.’ ”

External Peer Review in 2008

Dan Garcia, senior vice president and chief compliance officer for Kaiser, stated that Kaiser decided that it needed to have an objective person provide another opinion about the care that Dr. Safari had given to his patients. QHIC appointed Jeffrey P. Phelan, M.D., a board-certified OB/GYN and maternal fetal medicine subspecialist and attorney, to conduct an external review. On February 11, 2008, Phelan submitted his report after reviewing 51 maternal records and one neonatal medical record of Dr. Safari’s cases from 2001 until 2007. He found that the care provided by Dr. Safari was acceptable and within accepted standards of obstetrical care in 41 cases. Of the remaining 10 cases, he found the level of care to be unacceptable in seven cases, found Dr. Safari to be grossly negligent in two cases, and found Dr. Safari failed to obtain prior informed consent for the removal of a pedunculated myoma in one case and therefore committed a battery on the patient. He submitted his report stating that he “found the obstetrical care provided by Dr. Hamid Safari to be unacceptable and a deviation from

accepted standards of care of an obstetrician/gynecologist and especially a maternal fetal medicine subspecialist. . . . I must recommend that Dr. Safari be removed from the medical staff for the protection of the pregnant patients and their unborn children.” (Bold and underline omitted.)

QHIC’s Decision in 2008

On February 13, 2008, the medical executive committee conducted a focused practice review. It reviewed Dr. Safari’s cases after the 2006 JRC decision and reviewed cases from April 24, 2007, until December 2007. Charlah A. Robinson, M.D., a specialist in maternal fetal medicine, criticized the care provided by Dr. Safari in three of his cases. Based on these reviews, the QHIC determined that there were still significant concerns regarding Dr. Safari’s clinical judgment and providing of care and it asked the PROC to reconvene, to review the current status of Dr. Safari’s professional practice and behavior, and to recommend whether the QHIC should take any additional action regarding Dr. Safari’s participation in the KFHP plan.

The PROC met on February 29, 2008. A week later, on March 7, 2008, it unanimously recommended that Dr. Safari’s participation with KFHP be suspended and a majority recommended that his participation with KFHP be terminated. The PROC noted that Dr. Safari had not accepted its prior recommendation that he limit his practice to consultative perinatology and that this recommendation had not been formally implemented.

The QHIC subsequently ratified the summary suspension of Dr. Safari (2008 QHIC decision). It recommended that Dr. Safari’s plan participation and clinical privileges be terminated. Dr. Safari requested a hearing, which was consolidated with the pending hearing on the 2007 QHIC decision.

Notice of Charges based on the 2007 QHIC Decision and the 2008 QHIC Decision

On June 3, 2008, Dr. Safari received a consolidated notice of charges. The notice stated that Dr. Safari had requested a hearing to challenge the following decisions: “1. May 23 and June 11, 2007, recommendation that the scope of his participation in KFHP be limited to consultative perinatology; [¶] 2. September 11, 2007, recommendation that

the scope of his clinical privileges at KFHP Fresno be limited to consultative perinatology; [¶] 3. February 29, 2008, summary suspension of his participation in KFHP imposed by the President of the KFHP Northern California Region on, and ratification of that suspension by the QHIC on March 10, 2008; [¶] 4. March 10, 2008, recommendation that his participation in KFHP be terminated; and [¶] 5. May 5, 2008, recommendation that his Professional Staff membership and clinical privileges (‘membership and privileges’) at KFHP Fresno be terminated.”

The notice set forth the consolidated statement of charges, which were in pertinent part: “The QHIC’s 2007 recommendations to limit Dr. Safari’s participation in KFHP and his clinical privileges at KFHP Fresno were based upon the recommendation of the PROC that he should focus exclusively on consultative perinatology and should not directly manage patients, issue orders, or direct patient care” (Underline omitted.) The PROC based its recommendation on the 2007 JRC decision and the determination that Dr. Safari “ ‘seemed incapable [of] accepting, and learning from, clear mistakes’ ”

“The QHIC’s 2008 summary suspension of Dr. Safari’s participation in KFHP, and its 2008 recommendation that his participation, privileges, and membership be terminated were based upon the charges listed above, as well as the PROC’s determination that there were ‘still substantial concerns regarding Dr. Safari’s clinical skills and judgment since’ April 2007. (Underline omitted.) This determination was based on charts for all of Dr. Safari’s hospital discharges from April 24, 2007, until December 31, 2007, and 51 of Dr. Safari’s cases from the years 2001 until 2007. The notice summarized the conclusions after analyzing the above case. The determination was also based on PROC’s conclusion that there was “ ‘no indication that Dr. Safari has learned from peer reviews of his performance, has the ability to avoid future recurrence of problems, and has the ability to self-monitor his performance.’ ”

Voir Dire

Kaiser appointed Harry Shulman, Esquire, at Davis Wright Tremaine LLP, as the hearing officer. Voir dire of Shulman in his capacity as a hearing officer was conducted

on November 27, 2007. Shulman stated that he had been a medical staff attorney for most of his career. He acknowledged that he never represented individual physicians because he believed such representation posed a risk of a conflict of interest. He explained: “If I represent a physician, let’s say, in a peer review dispute, at a hospital, and then that physician, let’s say, applies for a medical staff membership at another hospital where I represent that medical staff, there would be a conflict of interest, and that would jeopardize my practice.”

When asked whether he had been a hearing officer for Kaiser prior to this matter, Shulman responded, “Yes.” He had been a hearing officer for Kaiser once about 10 years ago for a KFH hospital in Oregon. He added that there might have been one or two occasions when Kaiser asked him to be a hearing officer, but the hearings did not go forward. Recently he had served as legal counsel to a KFH board in San Francisco in connection with an appeal from a judiciary review committee hearing; the case was resolved before the matter went to an appellate hearing. He spent three to five hours on the case before it resolved. He also once provided legal counsel to TPMG about eight years earlier in a peer review proceeding involving a resident. He acknowledged that other attorneys at his firm work for KFH, KFHP, or TPMG, but he did not know who the attorneys were or what work they did.

When asked whether he had exchanged any e-mails with any Kaiser representative, Shulman admitted exchanging e-mails with Kaiser’s corporate counsel related to his engagement and to procedural issues, such as scheduling.² He agreed that he considered KFH and KFHP his client in this matter as they “engaged” him to provide legal services. He elaborated, “Those are legal services, not to be an advocate for Kaiser, but to provide services that are described [in the medical staff bylaws and the health plan bylaws].” He believed that his e-mails with Kaiser were protected by the attorney-client

² The e-mails were exchanged between Shulman and Jacqueline Sellers, the assistant secretary to the KFH board. Kaiser acknowledges that she is an in-house attorney, but insists that her role in the fair hearing was limited to working in her official capacity as assistant secretary.

privilege. He stated that there was no provision in the contract prohibiting him from doing future work for Kaiser.

Dr. Safari objected to having Shulman as the hearing officer on the basis of actual bias and the appearance of bias. Shulman denied Dr. Safari's request.

Voir dire was conducted with the doctors appointed by Kaiser to be on the judicial or appellate review panel (the hearing panel). The doctors were Mari-Paule Thiet, M.D.; Tracy Flanagan, M.D.; Mary E. Norton, M.D.; Erica V. Breneman, M.D.; and Sidney Carpenter, M.D. At the time of the hearing, Dr. Thiet was a board-certified maternal fetal medicine specialist and was the chief of obstetric services and the interim physician director of maternal fetal medicine at the University of California, San Francisco. When Dr. Thiet realized the amount of time required to be on the panel, she told Kaiser she could not be on the panel without compensation at her consultative hourly rate of \$600. Kaiser told her that it would pay her the consulting fee.

Dr. Flanagan was a board-certified OB/GYN at KFH Richmond and she was the chair of the OB/GYN chiefs group and the director of women's health for the KFH Northern California region. She was a senior shareholder in TPMG. She denied having a preconceived idea about Dr. Safari and confirmed that she knew statements in the press were not necessarily true. She maintained that she advocated "very strongly for physicians and the right to practice." She added: "I think one of my main responsibilities in my leadership role is to actually support and defend doctors, and I don't mean in a legal sense, but I mean in a leadership sense. I don't—it's just my view that doctors need to be helped in large organizations, so I actually am quite sympathetic to doctors, even when they've been maligned by something that may have been in their control or out of their control. [¶] So that is one of my core values that I've actually said to the chiefs over and over again, is 'I'm here to support you.' I'm here to support physicians." She stated that she was not "afraid of bucking systems" and that she was an advocate "for fairness." When asked whether she knew Dr. Moran and other doctors, she reported that she had no opinion of Dr. Moran's character or reputation.

Extensive voir dire was also conducted with the other doctors on the hearing panel. Dr. Norton, a board-certified maternal fetal medicine specialist, was the regional director of perinatal genetic services for TPMG. She was on a career track to become a shareholder in TPMG, but was not a shareholder at the time of the hearing. Dr. Breneman was a board-certified OB/GYN, and was practicing and teaching residents at KFH Oakland, and had extensive experience serving on its quality assurance committee. She was a shareholder in TPMG. Dr. Carpenter was a board-certified pathologist at KFH Fresno, and was a Fellow of the College of American pathologists. Dr. Carpenter did some of the pathology work in the S.V. case but the final autopsy was performed by someone else. He had made a diagnosis of chorioamnionitis in the S.V. case.

Following voir dire, Dr. Safari objected to the panel members appointed by Kaiser on the grounds of bias and the unilateral appointment of the panel by Kaiser. The hearing officer rejected Dr. Safari's objections.

Ruling Barring Evidence Challenging the 2006 JRC Decision

On December 1, 2008, Kaiser moved in limine to bar any evidence challenging the 2006 JRC decision, including the care rendered in the S.V. case. While this issue was pending, the Medical Board issued its proposed decision in January 2009. It found that the evidence did not "establish any cause for discipline" of Dr. Safari's license. On March 25, 2009, Shulman granted Kaiser's motion that neither party could introduce any evidence challenging the 2006 JRC decision.

The Fair Hearing

The first session of the hearing began on April 24, 2009, and the final session was held on April 26, 2010, for a total of about 145 hours. At the fair hearing, the QHIC presented testimony from nine witnesses and Dr. Safari presented testimony from 21 witnesses. The hearing panel called two witnesses on its own initiative.

On April 19, 2010, a discussion ensued regarding the hearing officer's contact with the hearing panel and the content of the bylaws. Shulman stated: "[T]he bylaws say, 'The hearing officer may participate in the deliberations and act as a legal advisor to the hearing panel, but is not entitled to a vote.' And it should be clear that my—

understanding, and the way I've been proceeding with this hearing from the very inception is that I have considered myself as the legal advisor to the hearing panel, and the hearing panel has considered me as legal advisor. [¶] We dine together. They ask me preliminary questions. I consider them—my communications with them to be confidential, just as they would be in any other attorney-client communication, and that—that is an essential element of the service that I have been engaged to perform, to be the legal advisor to the hearing panel.”

Counsel for Dr. Safari acknowledged that the bylaws stated that the hearing officer “shall act as a legal advisor to the judicial review committee,” but he maintained that this provision created a due process concern. Shulman responded: “There’s nothing secret going on here. It’s the process of performing a legal service for the [hearing panel], which means discharging certain functions on its behalf. If the hearing panel needs assistance in arranging for a witness meeting its specifications, I have viewed it part of my responsibility to assist them in that task as their legal counsel. [¶] And so, too, when I impart advice to them in our private deliberations. Those aren’t secret jury instructions. That’s advice from an attorney to a client. . . .”

The Findings and the Kaiser Board’s Decision

The hearing panel submitted its report and recommendation on July 12, 2010. The hearing panel unanimously found that the QHIC had met its burden of proving, by a preponderance of the evidence, that the 2008 QHIC decision was reasonable and warranted.

On September 23, 2010, the Kaiser board unanimously upheld the report and recommendation of the hearing panel (2010 decision). The 2010 decision stated that Dr. Safari’s professional staff membership and clinical privileges at KFH Fresno and his participation with KFHP were terminated. The findings in pertinent part were as follows: “The [hearing panel] fully considered and rejected Dr. Safari’s contentions that the process leading to the QHIC’s decisions was unfair and/or biased.” “The selection of the hearing officer and the members of the [hearing panel] was conducted fairly, and without bias.” “The extensive pre-hearing proceedings in 2008, as well as all of the actual

hearing sessions before the [hearing panel] in 2009 and 2010 were conducted fairly in all respects.” “The following findings of the [hearing panel] are hereby adopted: ‘the evidence as a whole supports the conclusion that Dr. Safari cannot be relied upon to function adequately as a specialty consultant to obstetricians and gynecologists, and to provide safe and competent perinatology care to the patients for whom KFH Fresno and KFHP are ultimately responsible. Given the high-risk nature of his practice, one can reasonably conclude that deficiencies of the type described translate into an imminent threat of harm to patients.’ ”

Petition for Writ of Administrative Mandate and Appeal

On December 17, Dr. Safari filed a writ of administrative mandate pursuant to Code of Civil Procedure section 1094.5 and Business and Professions Code section 809.8 against Kaiser. He filed an amended petition on July 11, 2011.

In his amended petition, Dr. Safari alleged that the determinations made at the medical staff administrative hearing were procedurally and substantively unfair. He asserted, among other things, that Kaiser chose “as the hearing officer one of its own attorneys” and the hearing officer had “secret ex parte communications with Kaiser’s corporate attorneys.” He also maintained that the hearing panel was not neutral and that the hearing panel was required “to accept as true and binding an erroneous” 2006 JRC decision on the S.V. case, while excluding evidence that the Medical Board “had completely exonerated Dr. Safari in the S.V. case after a full hearing.” He also asserted that no standard was used to evaluate Dr. Safari’s medical care in the charged cases and the hearing officer refused to provide Dr. Safari’s proposed legal instructions on the standard of care and other legal issues. He also attacked the findings and claimed that substantial evidence did not support the charges.

On December 22, 2011, the superior court filed its order denying Dr. Safari’s petition for writ of mandate. No party made a timely request for a statement of decision and none was issued.

Dr. Safari filed a timely notice of appeal. On May 10, 2012, we granted Kaiser’s unopposed motion to augment the record. On June 28, 2012, we took Kaiser’s request

for judicial notice of documents in the federal district court in the matter of *Safari v. Kaiser Foundation Health Plan* (N.D. Cal., May 11, 2012, No. C 10-05371 JSW) 2012 WL 1669351, under submission to be decided with the appeal. We hereby grant Kaiser's request for judicial notice.

DISCUSSION

I. *Rules of Court*

Preliminarily, we note that the briefs filed on behalf of Dr. Safari and Kaiser did not comply with the California Rules of Court. California Rules of Court, rule 8.204(a)(1)(C) specifies that each brief must “[s]upport any reference to a matter in the record by a citation to the *volume and page number* of the record where the matter appears. . . .” (Italics added.) Neither party identified the volume number in any of their citations to the record. This made this court’s task particularly onerous given that the administrative record consisted of 36 volumes and 10621 pages.

This court’s task was especially difficult given that—in addition to failing to specify the volume number—the index to the administrative record did not always specify the exact page where a particular witness’s testimony began. Thus, the index simply provided that the testimony for Feigel, Dr. Safari, and Dr. Safari’s counsel could be found in volumes 17 and 18 and provided no specific page number for when each individual’s testimony began. Similarly, six people were identified as having their testimony set forth in volume 10, but no specific page number was associated with any particular witness. Thus, this court had to expend a great deal of time locating the page identifying the witness who was testifying when a citation was made to testimony in the record.

Although we could have ordered all of the briefs returned for corrections and refiling or we could have stricken the briefs with leave to file new briefs, we have exercised our discretion to disregard the failure to comply with the requirement of specifying the volume number despite the fact that this failure to observe the requirements made this court’s review of the record significantly more time consuming. (See Cal. Rules of Court, rule 8.204(e)(2).)

II. Standard of Review

A hospital's final decision in a peer review proceeding may be judicially reviewed by a petition for writ of administrative mandate. (Code Civ. Proc., § 1094.5; Bus. & Prof. Code, § 809.8; *Smith v. Selma Community Hospital* (2008) 164 Cal.App.4th 1478, 1499.) A writ shall issue when necessary to correct a prejudicial abuse of discretion by the hospital's governing body, which is established when "the findings are not supported by substantial evidence in light of the whole record." (Code Civ. Proc., § 1094.5, subd. (b) & (d).) In an appeal from an order granting or denying the writ, the appellate court must apply the same standard of review as the trial court, giving no deference to the trial court's decision. (*Smith*, at p. 1499.)

Whether the Kaiser board's determination was made according to a fair procedure is a question of law, and subject to independent review based on the administrative record. (*Pomona Valley Hospital Medical Center v. Superior Court* (1997) 55 Cal.App.4th 93, 101.) Where a physician challenges the governing board's findings on the basis that they are not supported by substantial evidence, we make a " 'determination whether there is any substantial evidence, contradicted or uncontradicted, which supports the finding[s].' " (*Huang v. Board of Directors* (1990) 220 Cal.App.3d 1286, 1293.) We view the evidence in the light most favorable to the governing board's decision, resolving all conflicts and drawing all reasonable inferences in favor of the decision. (*Id.* at p. 1294.) We "must uphold administrative findings unless the findings are so lacking in evidentiary support as to render them unreasonable." (*Hongsathavij v. Queen of Angels etc. Medical Center* (1998) 62 Cal.App.4th 1123, 1137; see also *Goodstein v. Cedars-Sinai Medical Center* (1998) 66 Cal.App.4th 1257, 1266 [" ' ' ' [j]udges are untrained and courts ill-equipped for hospital administration' " ' ' and therefore should not second-guess policies made rationally and in good faith unless the policy is clearly unlawful"].)

III. The Fairness Requirements

Dr. Safari contends that he was deprived of his fundamental property right to maintain hospital privileges without affording him due process of the law guaranteed under the Fourteenth Amendment of the United States Constitution and under article I,

section 7(a) of the California Constitution. In particular, he claims that Kaiser's unilateral selection of the hearing officer and members of the hearing panel was unfair, and the hearing officer and the hearing panel members were biased. Kaiser responds that Dr. Safari was not entitled to constitutional due process but was entitled only to a "fair procedure." Thus, we must first determine whether Dr. Safari was entitled to constitutional due process.

The Fourteenth Amendment to the United States Constitution provides, in part, that no State shall "deprive any person of life, liberty, or property, without due process of law." Private action is immune from the restrictions of the Fourteenth Amendment; it is axiomatic that the state must affirmatively take action, in some way, in order to deprive an individual of his or her right to due process. (*Jackson v. Metropolitan Edison Co.* (1974) 419 U.S. 345, 359-350.) Accordingly, constitutional due process applies in the present case only if the peer review process at Kaiser involved state action.

In *Mileikowsky v. West Hills Hospital and Medical Center* (2009) 45 Cal.4th 1259 (*Mileikowsky*), our Supreme Court summarized the peer review system that applies to the termination of a physician's hospital privileges. "Decisions concerning medical staff membership and privileges are made through a process of hospital peer review. Every licensed hospital is required to have an organized medical staff responsible for the adequacy and quality of the medical care rendered to patients in the hospital. (Cal. Code Regs., tit. 22, § 70703, subd. (a); *Arnett v. Dal Cielo* (1996) 14 Cal.4th 4, 10) The medical staff must adopt written bylaws 'which provide formal procedures for the evaluation of staff applications and credentials, appointments, reappointments, assignment of clinical privileges, appeals mechanisms and such other subjects or conditions which the medical staff and governing body deem appropriate.' (Cal. Code Regs., tit. 22, § 70703, subd. (b); see Bus. & Prof. Code, § 2282.5; Cal. Code Regs., tit. 22, §§ 70701, 70703.) The medical staff acts chiefly through peer review committees, which, among other things, investigate complaints about physicians and recommend whether staff privileges should be granted or renewed. [Citation.] In 1989, California codified the peer review process at Business and Professions Code section 809 et seq.,

making it part of a comprehensive statutory scheme for the licensure of California physicians and requiring [hospitals] to include the process in their medical staff bylaws. ([Bus. & Prof. Code,] § 809, subd. (a)(8).)” (*Mileikowsky*, at p. 1267.)

The *Mileikowsky* court set forth the purposes of the peer review process. (*Mileikowsky*, *supra*, 45 Cal.4th at pp. 1267-1268.) “The primary purpose of the peer review process is to protect the health and welfare of the people of California by excluding through the peer review mechanism ‘those healing arts practitioners who provide substandard care or who engage in professional misconduct.’ [Citation.] This purpose also serves the interest of California’s acute care facilities by providing a means of removing incompetent physicians from a hospital’s staff to reduce exposure to possible malpractice liability. [Citations.]” (*Id.* at p. 1267.) “Another purpose, also if not equally important, is to protect competent practitioners from being barred from practice for arbitrary or discriminatory reasons. . . . Peer review that is not conducted fairly and results in the unwarranted loss of a qualified physician’s right or privilege to use a hospital’s facilities deprives the physician of a property interest directly connected to the physician’s livelihood. [Citation.]” (*Ibid.*)

“The peer review process, while generally delegating responsibility to the private sector to monitor the professional conduct of physicians, establishes minimum protections for physicians subject to adverse action in the peer review system. [Citations.] ‘The hearing shall be held, as determined by the peer review body, before a trier of fact, which shall be an arbitrator or arbitrators selected by a process mutually acceptable to the licentiate [i.e., the physician] and the peer review body, or before a panel of unbiased individuals . . . which shall include, where feasible, an individual practicing the same specialty as the licentiate.’ [Citation.] At the hearing, both parties have the right to call, examine, and cross-examine witnesses and to present and rebut evidence. [Citation.] Upon the completion of the hearing, the parties are entitled to the written decision of the trier of fact, ‘including findings of fact and a conclusion articulating the connection between the evidence produced at the hearing and the decision reached.’ [Citation.]” (*Mileikowsky*, *supra*, 45 Cal.4th at pp. 1268-1269.)

Since Kaiser and TPMG are private institutions, whatever fair procedure rights Dr. Safari has arise from Business and Professions Code section 809 et seq. and not from the due process clauses of the state and federal Constitutions. The law is well settled that doctors are entitled to due process in the respect that they have a right to notice and a fair procedure prior to termination of clinical privileges but—contrary to Dr. Safari’s argument—they do not have a right to due process of law under the state and federal Constitutions. (*Kaiser Foundation Hospitals v. Superior Court* (2005) 128 Cal.App.4th 85, 101-102.) “ “[S]ince the actions of a private institution are not necessarily those of the state, the controlling concept in such cases is fair procedure and not due process. Fair procedure rights apply when the organization involved is one affected with a public interest, such as a private hospital.” ’ ’ (*Id.* at p. 102.) California state courts have made it clear that a physician in a private hospital is entitled to minimal due process protections consistent with a fair procedure.

In support of his argument that he has a constitutional due process right in his private hospital privileges, Dr. Safari argues that physicians have a vested protected property interest in their private hospital privileges (see, e.g., *Anton v. San Antonio Community Hosp.* (1977) 19 Cal.3d 802, 823-825 (*Anton*), overruled by statute on the issue of standard of review; *Sahlolbei v. Providence Healthcare, Inc.* (2003) 112 Cal.App.4th 1137, 1146-1147), and Kaiser is acting as a state actor because California has expressly delegated to private healthcare corporations the power to take physicians’ property interests. (See, e.g., *Shacket v. Osteopathic Medical Board* (1996) 51 Cal.App.4th 223, 231 [Legislature “delegated to the private sector the responsibility to provide fairly conducted peer review in accordance with the notice, discovery and hearing rights of due process”]; *Unnamed Physician v. Board of Trustees* (2001) 93 Cal.App.4th 607, 617 [same]; *Weinberg v. Cedars-Sinai Medical Center* (2004) 119 Cal.App.4th 1098, 1108-1113 [Legislature delegated peer review process in hospital to hospital’s governing body, “which is entitled to act in accordance with principles of sound corporate governance”]; *Kibler v. Northern Inyo County Local Hospital Dist.* (2006) 39 Cal.4th 192, 198-201 [hospital’s peer review process qualified as an “ ‘official

proceeding authorized by law’ ” for the purposes of a special motion to dismiss the complaint pursuant to Code of Civil Procedure section 425.16, because the peer review process is required by statute and is subject to judicial review by administrative mandamus].) Dr. Safari maintains that the “pervasive entwinement” of public and private bodies supports a finding of state action. (See *Brentwood Academy v. Tennessee Secondary School Athletic Assn.* (2001) 531 U.S. 288, 296 [a private entity may be classed as a state actor “when it is ‘entwined with governmental policies’ or when government is ‘entwined in [its] management or control’ ”]; *Chudacoff v. Univ. Med. Center of Southern Nevada* (9th Cir. 2011) 649 F.3d 1143, 1150 [a “nominally private actor is ‘controlled by an agency of the State, when it has been delegated a public function by the State, when it is entwined with governmental policies or when government is entwined in its management or control’”].)

None of the cases cited by Dr. Safari in support of his argument that he has a vested due process right in his hospital privilege suggests that this is a right under the state or federal Constitution. *Anton, supra*, 19 Cal.3d 802, merely holds that peer review not conducted fairly and resulting in the unwarranted loss of a physician’s right or privilege to use a hospital’s facilities deprives the physician of a property interest directly connected to the physician’s livelihood, which is a vested “ ‘fundamental’ ” right. (*Id.* at p. 823.) The court, however, made it clear that the physician does not have a constitutional due process right, as the physician can be divested of this privilege “only after a showing of adequate cause for such divestment in a proceeding *consistent with minimal due process* requirements.” (*Id.* at pp. 824-825, italics added.) The *Anton* court elaborated: “ ‘The common law requirement of a fair procedure does not compel formal proceedings with all the embellishments of a court trial . . . nor adherence to a single mode of process. It may be satisfied by any one of a variety of procedures which afford a fair opportunity for an [affected party] to present his [or her] position. As such, this court should not attempt to fix a rigid procedure that must invariably be observed. Instead, the associations themselves should retain the initial and primary responsibility for devising a method which provides an [affected party] adequate notice of the “charges” against him

and a reasonable opportunity to respond. In drafting such procedure . . . the organization should consider the nature of the tendered issue and should fashion its procedure to insure a *fair* opportunity for an [affected party] to present his [or her] position. Although the association retains discretion in formalizing such procedures, the courts remain available to afford relief in the event of the abuse of such discretion.’ ” (*Id.* at p. 829, quoting *Pinsker v. Pacific Coast Society of Orthodontists* (1974) 12 Cal.3d 541, 555-556, fn. omitted; see also *Sahlolbei v. Providence Healthcare, Inc.*, *supra*, 112 Cal.App.4th at pp. 1146-1147, quoting *Anton* when setting forth the minimal due process requirements required.)

Similarly, none of the cases relied upon by Dr. Safari holds that the state’s regulation of the decisions by private hospitals to modify or terminate a physician’s privilege constitutes, by itself, state action.³ To the contrary, “[t]he mere fact that a business is subject to state regulation does not by itself convert its action into that of the State for purposes of the Fourteenth Amendment.” (*Jackson v. Metropolitan Edison Co.*, *supra*, 419 U.S. at p. 350.) Indeed, the Ninth Circuit has specifically held that compliance with a statutorily created system of physician peer review and with reporting requirements is insufficient to establish state action. (*Pinhas v. Summit Health, Ltd.* (9th

³ We note that Dr. Safari argued in the federal district court that the medical peer review proceedings and the statutory scheme governing peer review violated the Due Process Clause of the Fourteenth Amendment to the United States Constitution, and the federal court when considering motions to dismiss by Kaiser and Sutter Central Valley Hospitals (Sutter) held that there was no state action and therefore no constitutional due process violation. (*Safari v. Kaiser Foundation Health Plan*, *supra*, 2012 WL 1669351.)

In *Safari*, *supra*, 2012 WL 1669351, the federal district court granted in part and denied in part as moot, the motions by Kaiser and Sutter to dismiss. The court granted Dr. Safari leave to amend the complaint to name a proper defendant. Dr. Safari gave notice on May 18, 2011, that he would not amend the complaint to add different defendants. The federal district court dismissed the case with prejudice on May 21, 2012. On May 25, 2012, Dr. Safari filed a notice of appeal indicating that he was appealing the order to dismiss to the Ninth Circuit.

Cir. 1989) 894 F.2d 1024, 1034.)⁴ The cases are clear that when the *sole state link* is that the private hospital is subjected to state regulation, there is insufficient entwinement to convert the action into that of the State for the purposes of the Fourteenth Amendment. The peer review decisions “ultimately turn on medical judgments made by private parties according to professional standards that are not established by the State.” (*Ibid.*) There are no public officials involved in the composition of the hospital boards and, therefore, such decisions do not constitute state action. (See *Blum v. Yaretsky* (1982) 457 U.S. 991, 1008, fn. omitted.)

Dr. Safari’s reliance on *Culbertson v. Leland* (9th Cir. 1975) 528 F.2d 426 is also misplaced. In *Culbertson*, the court held that the owner of a hotel was acting under color of state law when, after she evicted the plaintiffs, she seized their personal property as collateral, pursuant to the Arizona Innkeeper’s Lien statute. (*Culbertson*, at p. 427.) The court concluded that “the lien statute [at issue] here gave [defendant] a right . . . she would not have had at common law.” (*Id.* at p. 429.) The statute provided the owner of the hotel with the “sole authority for the seizure,” would not otherwise had any legal authority to take the property. (*Id.* at p. 432.) “[S]ince the statute was the sine qua non for the activity in question, the state’s involvement through the statute is not insignificant.” (*Ibid.*)

Dr. Safari argues that Kaiser, similarly to the owner of the hotel in *Culbertson v. Leland*, is acting under color of law because the peer review process is state regulated. We disagree. Kaiser always had the right to terminate the privileges of its physicians; Business and Professions Code section 809 simply regulated this right Kaiser had at

⁴ Dr. Safari argues that the holding in *Pinhas v. Summit Health, Ltd.*, *supra*, 894 F.2d 1024, has been abrogated because it did not consider that doctors have a vested property right to practice their profession and this decision was issued prior to the enactment of Business and Professions Code section 809. We disagree that *Pinhas* is no longer good law. Section 809 of the Business and Professions Code may not have been enacted but the peer review process was regulated by California regulations at the time *Pinhas* was decided. (See Cal. Code Regs., tit. 22, § 70703.) Furthermore, we are not aware of any case that holds a private hospital’s action is transformed into state action on the sole basis that the state regulates the peer review process.

common law. Thus, the peer review process is not “traditionally and exclusively governmental.” (See *Lee v. Katz* (9th Cir. 2002) 276 F.3d 550, 555.)

In his reply brief, Dr. Safari argues that the present case is similar to the situation in *Lugar v. Edmondson Oil Co., Inc.* (1982) 457 U.S. 922. In *Lugar*, the court held that there was official involvement in the seizure of the debtor’s property. (*Id.* at pp. 937-938 & fn. 19.) The *Lugar* court set forth the following two-part test: “First, the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible. . . . Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor.” (*Id.* at p. 937.) The second prong, as explained in *Pinhas v. Summit Health, Ltd., supra*, 880 F.2d 1108, does not apply in a private hospital’s peer review process. (*Id.* at pp. 1117-1118.) “Only private actors were responsible for the decision to remove” the physician and “the decision ultimately turned on the ‘judgments made by private parties according to professional standards that are not established by the State.’ ” (*Id.* at p. 1118.)

Finally, Dr. Safari concludes that it is immaterial whether he was entitled to due process under the federal Constitution or a fair process because there is no difference as courts have held that “[t]he distinction between fair procedure and due process rights appears to be one of origin and not of the extent of protection afforded an individual; the essence of both rights is fairness.” (*Applebaum v. Board of Directors* (1980) 104 Cal.App.3d 648, 657 (*Applebaum*)). “Due process . . . always requires . . . a fair hearing before a neutral or unbiased decision-maker.” (*Nightlife Partners, Ltd. v. City of Beverly Hills* (2003) 108 Cal.App.4th 81, 90.)

Kaiser argues that courts have recognized that fair procedure closely resembles due process, but it does not rise to the same level of formality required of constitutional due process. We agree that Dr. Safari is entitled to a fair procedure or administrative due process, but not to constitutional due process. The court in *Kaiser Foundation Hospitals v. Superior Court, supra*, 128 Cal.App.4th 85, explained that the hospital board does not necessarily have to comply with all of the formal requirements under the regulations.

Thus, the failure to bring a hearing by a certain date might be a due process violation under the Constitution. This failure, however, is not an unfair administrative procedure because “[t]he failure to begin a hearing by a certain date cannot be equated with the denial of basic due process protections such as the right to adequate notice of charges and a reasonable opportunity to respond to those charges.” (*Kaiser Foundation Hospitals*, at pp. 102-103.)

“[T]he overriding goal of the state-mandated peer review process is protection of the public and that while important, physicians’ due process rights are subordinate to the needs of public safety.” (*Medical Staff of Sharp Memorial Hospital v. Superior Court* (2004) 121 Cal.App.4th 173, 181-182.) “Since the actions of a private institution are not necessarily those of the state, the controlling concept in such cases is fair procedure and not due process. Fair procedure rights apply when the organization involved is one affected with a public interest, such as a private hospital.” (*Applebaum, supra*, 104 Cal.App.3d at p. 657.) “ “[A] private hospital may not deprive a physician of staff privileges without granting him [or her] minimal due process of law protection.” [Citations.] However, “[t]he common law requirement of a fair procedure does not compel formal proceedings with all the embellishments of a court trial . . . nor adherence to a single mode of process. It may be satisfied by any one of a variety of procedures which afford a fair opportunity for an [affected party] to present his [or her] position.” ’ ’ ” (*Huang v. Board of Directors, supra*, 220 Cal.App.3d at p. 1295; see also *Ezekial v. Winkley* (1977) 20 Cal.3d 267, 278 [in disciplining its professional staff, a hospital must afford physicians “rudimentary procedural and substantive fairness”].) Furthermore, “it must be emphasized that this is not a criminal setting, where the confrontation is between the state and the person facing sanctions. Here the rights of the patients to rely upon competent medical treatment are directly affected, and must always be kept in mind. An analogy between a surgeon and an airline pilot is not inapt; a hospital which 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.* (1988) 201 Cal.App.3d 477, 489.)

Accordingly, we evaluate Dr. Safari’s challenges to the fairness of the hearing he received to determine whether he received a fair procedure, rather than whether he received constitutional due process. Thus, although we use the term “due process” and “fair procedure” interchangeably in this opinion, we are not referring to constitutional due process unless we specify that it is constitutional due process or that the state is involved.

III. *The Fairness of the Hearing Dr. Safari Received*

A. *The Requirements for a Fair Hearing*

Dr. Safari contends that he did not receive a fair hearing when Kaiser terminated his physician privileges. He objects to the procedure used and maintains that the Kaiser board, hearing officer, and hearing panel members were biased against him.

Due process under any standard requires that the person receive “[a] fair trial in a fair tribunal” (*In re Murchison* (1955) 349 U.S. 133, 136.) “A person whose rights are being determined has a right to an impartial panel to determine those rights.” (*Hackethal v. California Medical Assn.* (1982) 138 Cal.App.3d 435, 443 (*Hackethal*).)

The members of the panel adjudicating the dispute should not have a “substantial pecuniary interest” (*Gibson v. Berryhill* (1973) 411 U.S. 564, 579 (*Gibson*).) “The decision may not be made by a decisionmaker who has become personally ‘embroiled’ in the controversy to be decided.” (*Mennig v. City Council* (1978) 86 Cal.App.3d 341, 351.) However, neither prior knowledge of the factual background which bears on a decision nor prehearing expressions of opinions on the result disqualifies an administrative body from acting on a matter before it. (*City of Fairfield v. Superior Court* (1975) 14 Cal.3d 768, 782.) Other categories identified where the probability of actual bias is too high include a situation where the member of the panel “has been the target of personal abuse or criticism from the person before him” or her, and the member might “have prejudged the case because of a prior participation as an accuser, investigator, fact finder or initial decisionmaker.” (*Hackethal, supra*, 138 Cal.App.3d at p. 443.)

Business and Professions Code section 809.2 expressly requires: “(a) The hearing shall be held, as determined by the peer review body, before a trier of fact, which shall be

an arbitrator or arbitrators selected by a process mutually acceptable to the licentiate and the peer review body, or before a panel of unbiased individuals who shall gain no direct financial benefit from the outcome, who have not acted as an accuser, investigator, factfinder, or initial decisionmaker in the same matter, and which shall include, where feasible, an individual practicing the same specialty as the licentiate. [¶] (b) If a hearing officer is selected to preside at a hearing held before a panel, the hearing officer shall gain no direct financial benefit from the outcome, shall not act as a prosecuting officer or advocate, and shall not be entitled to vote.”⁵

Dr. Safari argues that he does not have to establish actual bias, but simply the appearance of bias. (See *Yaqub v. Salinas Valley Memorial Healthcare System* (2004) 122 Cal.App.4th 474, 485-486 (*Yaqub*)). The “appearance of bias that has constitutional significance is not a party’s *subjective, unilateral* perception; it is the *objective* appearance that arises from financial circumstances that would offer a possible temptation to the average person as adjudicator.” (*Haas v. County of San Bernardino* (2002) 27 Cal.4th 1017, 1034. (*Haas*)). There is more flexibility in the rules requiring disqualification in administrative proceedings than in court proceedings, and a claim of possible bias must “ ‘overcome a presumption of honesty and integrity in those serving as judges.’ ” (*Id.* at p. 1026.)

Our Supreme Court has stated that even when the challenge is based on a violation of constitutional due process, due process permits a single administrative agency to combine the “investigative, prosecutorial, and adjudicatory functions” (*Morongo Band of Mission Indians v. State Water Resources Control Bd.* (2009) 45 Cal.4th 731, 737.) Thus, “[i]n the absence of financial or other personal interest, and when rules mandating an agency’s internal separation of functions and prohibiting *ex parte* communications are observed, the presumption of impartiality can be overcome only by specific evidence demonstrating actual bias or a particular combination of circumstances creating an unacceptable risk of bias.” (*Id.* at p. 741.)

⁵ All further unspecified code sections refer to the Business and Professions Code.

We need not settle whether the appearance of financial bias is sufficient to show that the hearing was not fair in an administrative procedure. Here, we conclude that there was no actual financial bias or appearance of financial bias as the evidence does not demonstrate that the hearing officer or hearing panel members had a substantial financial interest in the outcome.

B. *Bias and the Kaiser Board*

The Kaiser board made the final decision to terminate Dr. Safari's privileges and Dr. Safari contends that his due process rights were violated because the Kaiser board was biased against him and had a pecuniary interest in the outcome. Dr. Safari argues that due process does not permit a party with a financial interest in the outcome to decide a case. (*Tumey v. Ohio* (1927) 273 U.S. 510, 523; *Caperton v. A.T. Massey Coal Co.* (2009) 556 U.S. 868, 877.) He maintains that the Kaiser board had decided to terminate his privileges prior to the hearing, which was evidenced by Dr. Altebarmakian's statement that there would be no negative publicity if he took the \$2 million offer and resigned and Kaiser's counsel's statement to the attorney for Dr. Safari that Dr. Safari was going to be leaving Kaiser. He also points to the article in the Los Angeles Times on October 16, 2007, that was critical of Kaiser for permitting Dr. Safari to practice, as evidence that the Kaiser board wanted him to leave before the hearing was held. He asserts that these facts showed that Kaiser had a "marketing incentive" to get rid of him because of the publicity and the cost and length of the proceedings related to him. He also cites Dr. Altebarmakian's testimony that he was told that this was the first time that KFHP suspended a physician in the organization.

Dr. Safari argues that the Kaiser board was the final decision maker, had a pecuniary interest in the outcome, and was thus the judge of its own cause. In advancing this argument, Dr. Safari principally relies on *Gibson, supra*, 411 U.S. 564. In *Gibson*, the United States Supreme Court affirmed a district court's conclusion that, because of a possible pecuniary interest in the reduction of competition, it was constitutionally impermissible for a state optometry board composed only of private practice optometrists

to judge whether the licenses of optometrists employed by corporate entities should be revoked. (*Id.* at p. 579.)

Here, there is no similar pecuniary interest in the outcome of Dr. Safari's fair hearing. There is no evidence that any member of the Kaiser board would gain financially by terminating Dr. Safari's privileges. The fact that Kaiser offered Dr. Safari \$2 million to resign simply established that Kaiser decided that it wanted to settle the matter.

Furthermore, as the Ninth Circuit explained in *Say v. Umatilla School Dist. 6* (9th Cir. 2010) 364 Fed.Appx. 385, a case not cited by either party, all administrative cases involving the termination of employment or privileges involve some form of prejudgment because "there would have been no need for a hearing unless the [governing board] had decided that there were grounds for termination [or terminating privileges]." (*Id.* at p. 386.) In *Say*, Brian Say argued that the process by which the school district terminated his contract as Superintendent did not comport with the requirements of the Due Process Clause because "the school board had already prejudged the case against him." (*Id.* at pp. 385-386.) In rejecting this argument, the court explained: "The [school board's] decision to terminate Say's employment could only be based on its *judgment* that Say's performance was not satisfactory. That the Board was familiar with Say's performance and the facts of his case, moreover, does not disqualify it from conducting the hearing. [Citations.] That the [school board] members had some view about Say's performance was inevitable; it was their responsibility to monitor him. It also does not diminish the process provided to Say: he had a full opportunity to persuade the [school board] members that he should keep his job." (*Id.* at p. 386.)

The fact that the Kaiser board would want to avoid bad publicity and that there had been negative publicity about Dr. Safari also did not establish bias. If the evidence had exonerated Dr. Safari, Kaiser's initial actions would have been supported and such a result would have countered the article's allegations that Kaiser had acted improperly by not terminating Dr. Safari's privileges. Thus, the record might indicate that the Kaiser

board wanted to avoid negative publicity but it did not establish that terminating Dr. Safari's privileges advanced the Kaiser board's interests.

C. Bias and the Hearing Officer

1. The Appointment

In the present case, Kaiser unilaterally appointed the hearing officer over Dr. Safari's objection. Dr. Safari contends that this procedure violated his due process rights.

As Dr. Safari acknowledges, section 809.2 does not specify the procedure for appointing the hearing officer but requires the hearing officer to be unbiased and to derive no direct financial benefit from the outcome. (§ 809.2, subds. (a) & (b).)

Dr. Safari supports his argument that the procedure for selecting the hearing officer violated his due process rights by citing authority articulating the well-settled principle that the hearing must be before a "neutral or unbiased decision-maker."

(Nightlife Partners, Ltd. v. City of Beverly Hills, supra, 108 Cal.App.4th at p. 90.)

However, our Supreme Court has expressly stated that, even in the situation where the state is involved and constitutional due process is implicated, "no generally applicable principle of constitutional law permits the affected person in such a case to select the adjudicator." (*Haas, supra, 27 Cal.4th at p. 1031; see also Kaiser Foundation Hospitals v. Superior Court, supra, 128 Cal.App.4th at p. 109 [after setting forth the requirements under section 809.2, the court concluded that "it is evident that the Legislature intended to permit the unilateral selection of panel members and a hearing officer by the peer review body"]*.) Moreover, the United States Supreme Court has held that due process is not automatically violated when the administrative body performs both investigative and adjudicative functions. (See, e.g., *Withrow v. Larkin* (1975) 421 U.S. 35, 47.)

Although section 809.2 does not specify the procedure for appointing the hearing officer, it provides that a fair procedure requires that the physician be given a sufficient opportunity to explore the possibility of bias. (§ 809.2, subd. (c);⁶ see also *Rosenblit v.*

⁶ Section 809.2, subdivision (c) provides: "The licentiate shall have the right to a reasonable opportunity to voir dire the panel members and any hearing officer, and the right to challenge the impartiality of any member or hearing officer. Challenges to the

Superior Court (1991) 231 Cal.App.3d 1434, 1448-1449.)

The selection of Shulman as the hearing officer complied with the requirements of section 809.2. Dr. Safari availed himself of the opportunity to explore possible bias by Shulman. The unilateral selection of the hearing officer by Kaiser, in itself, did not deprive Dr. Safari of a fair hearing.

2. Shulman's Prior Relationship with Kaiser

Dr. Safari contends that Shulman was actually biased against him because he had provided legal representation for Kaiser in the past and had other relationships with Kaiser. In particular, Shulman had been a hearing officer 10 years prior to the hearing for a matter involving a KFH hospital in Oregon; Kaiser also had asked him to be a hearing officer on one or two other occasions but those two hearings did not go forward. Shortly before the hearing, Shulman had served as legal counsel to a KFH board in San Francisco in connection with an appeal from a hearing from a judiciary review committee hearing; he spent three to five hours on the case before the matter resolved without going to an appellate hearing. He also once provided legal counsel to TPMG about eight years prior to the hearing in a peer review proceeding involving a resident physician.⁷ Shulman also acknowledged that other attorneys at his firm did work for KFH, KFHP, or TPMG.

impartiality of any member or hearing officer shall be ruled on by the presiding officer, who shall be the hearing officer if one has been selected.”

⁷ In his reply brief, Dr. Safari argues that Shulman made statements following the voir dire of Dr. Norton that indicated that he “concealed the extent of his actual experience with Kaiser during the voir dire, failing to disclose that he had also been engaged in two very lengthy Kaiser hearings.” On November 19, 2008, there was a discussion about the expected duration of Dr. Safari’s hearing. After hearing the estimates of time needed by counsel, Shulman stated; “So we’re looking at about a 20- to 25-session hearing; is that what this is going to be? That will set a record.” Counsel for Dr. Safari expressed concern that a doctor would be working four or five hours in the evening at the hearing after working all day. Shulman responded: “That’s just a longer hearing that I’ve ever been in, except for a couple of Kaiser ones.”

It is unclear that the foregoing statement indicated that Shulman’s statements during voir dire were false. He admitted that he was a hearing officer once before and that he had worked as a legal counsel to TPMG in a peer review proceeding involving a resident. Thus, he stated in voir dire that he had participated in two hearings.

Kaiser disputes Dr. Safari's contention that Shulman was its attorney. It maintains that the evidence established that over Shulman's 36-year career, he never provided legal services to KFHP or KFH Fresno, and that he had very limited interactions with a few of the separate Kaiser entities. The activities of other attorneys practicing at Shulman's law firm also, according to Kaiser, did not create any conflict.

We agree that the foregoing evidence was insufficient to establish an actual conflict. The few hours of legal service provided to KFH San Francisco and the other limited legal counsel provided to Kaiser entities did not indicate that Shulman was an attorney who regularly advised Kaiser on legal matters. The fact that other attorneys in Shulman's law firm provided some legal services for Kaiser was insufficient to show bias. Shulman testified that he could not identify who at his law firm performed work for Kaiser; he only became aware others were doing some work for Kaiser when he did a conflicts check. Procedural fairness simply requires "some internal separation between advocates and decision makers to preserve neutrality." (*Department of Alcoholic Beverage Control v. Alcoholic v. Alcoholic Beverage Control Appeals Bd.* (2006) 40 Cal.4th 1, 10.)

When advancing his argument of bias, Dr. Safari relies on *Absmeier v. Simi Valley Unified School Dist.* (2011) 196 Cal.App.4th 311 (*Absmeier*), but this case is unavailing. In *Absmeier*, a personnel director challenged his dismissal after the school district terminated his employment. (*Id.* at p. 314.) The school district's personnel commission (the Commission) appointed a hearing officer to conduct the hearing and the hearing officer took the case under submission after hearing the testimony, hearing closing arguments, and receiving the briefs. (*Id.* at p. 314.) The hearing officer did not render a decision and, subsequently, reported that he would no longer be involved in this matter. (*Id.* at p. 316.) The Commission's counsel reviewed the hearing transcripts and rendered a decision. (*Ibid.*) The reviewing court concluded that the Commission was not authorized to appoint a law firm to assume the role of the hearing officer. (*Id.* at p. 316.) The court explained that the law firm could not make credibility determinations and the

law firm had not presided over the case. (*Id.* at p. 319.) Additionally, having the Commission's own law firm decide the case was clearly unfair. (*Ibid.*)

The court in *Absmeier, supra*, 196 Cal.App.4th 311, emphasized that the unfairness of having the Commission's legal counsel render the decision was evident. (*Id.* at p. 319.) It elaborated: "The law firm wore two hats. On the one hand, it substituted for [the hearing officer] and completed his case. On the other, it acted as legal counsel for the Commission, appeared with the commissioners and advised them to sustain the firm's actions. This is a patent conflict of interest. The law firm could not balance its duty of loyalty to the Commission as its counsel, with the obligation to be a neutral fact finder for [the personnel director]. Seven witnesses testified for [the personnel director] at the administrative hearing, but the decision contains no summary of their testimony. The law firm essentially disregarded that testimony and credited the testimony of the [school district'] witnesses, even though it never presided over any administrative hearing and did not observe their demeanor." (*Ibid.*)

The *Absmeier* case is clearly not applicable to the present situation. Not only did Shulman not render any decision, but he also was not legal counsel for Kaiser on an ongoing basis. Neither Shulman nor a member of his law firm represented QHIC at the hearing or represented Kaiser's interests at the fair hearing. Thus, here, there is no patent conflict and Dr. Safari must present evidence that Shulman's rulings demonstrated actual bias or that he had a financial interest sufficient to create an actual conflict. (See *Morongo Band of Mission Indians v. State Water Resources Control Bd., supra*, 45 Cal.4th at p. 741.)

3. Shulman's Business and Financial Interest

Dr. Safari maintains that Shulman's career as a "medical staff attorney" and his financial interests in current or future work with Kaiser created both an objective bias and an appearance of bias. He asserts that there was a possibility of future employment for Shulman from Kaiser as either a hearing officer or as an attorney if Kaiser were satisfied with his performance as a hearing officer in his hearing. Additionally, Dr. Safari stresses that approximately 90 percent of Shulman's practice involved representation of organized

medical staffs and therefore his income was from hospitals, medical staffs, or medical groups. He argues that Shulman acknowledged that he never represented individual doctors because he feared that it would jeopardize his hospital business. Dr. Safari argues that “[a]ny reasonable person would conclude that Mr. Shulman’s dependence on business from hospitals and medical staffs would likely deter him from making important rulings in favor of a doctor in a medical disciplinary hearing, especially in a case as high profile as this one.” (See *Haas, supra*, 27 Cal.4th at p. 1034, *Yaqub, supra*, 122 Cal.App.4th at p. 484, *Benjamin, Weill & Mazer v. Kors* (2011) 195 Cal.App.4th 40 (*Kors*).)

The standard for measuring the impropriety of pecuniary interest is “whether the adjudicator’s financial interest would offer a possible temptation to the average person as judge not to hold the balance nice, clear and true.” (*Haas, supra*, 27 Cal.4th at p. 1026; see also *Gibson, supra*, 411 U.S. at p. 579.) When income from judging depends on the volume of cases before the hearing officer, the temptation exists to rule in favor of the entity selecting and paying the hearing officer. (*Haas*, at pp. 1031-1032.) Accordingly, we inquire whether the economic realities make the design of the fee system vulnerable to possible temptation to the average hearing officer. (*Yaqub, supra*, 122 Cal.App.4th at p. 485.)

The fact that Shulman’s legal practice was comprised primarily of clients that were organized medical staffs does not, by itself, establish actual bias or an actual personal or financial interest in the outcome of this case. “ ‘ “Bias and prejudice are not implied and must be clearly established. A party’s unilateral perception of bias cannot alone serve as a basis for disqualification. Prejudice must be shown against a particular party and it must be significant enough to impair the adjudicator’s impartiality. The challenge to the fairness of the adjudicator must set forth concrete facts demonstrating bias or prejudice.” ’ ” (*Linney v. Turpen* (1996) 42 Cal.App.4th 763, 773.)

The Supreme Court has expressly rejected the argument that the hearing officer’s practice of law automatically establishes bias. (*Andrews v. Agricultural Labor Relations Bd.* (1981) 28 Cal.3d 781, 789-790, superseded by statute on another issue.) The

petitioners in *Andrews* argued that the administrative law officer was biased, partially because his practice of law consisted of the representation of individual farm workers and the administrative law officer engaged in employment discrimination suits on behalf of Mexican-Americans. (*Ibid.*) The court explained, “Even if the nature of a lawyer’s practice could be taken as evidence of his political or social outlook, such evidence, as will appear, is irrelevant to prove bias.” (*Id.* at p. 790, fn. omitted.) “The right to an impartial trier of fact is not synonymous with the claimed right to a trier completely indifferent to the general subject matter of the claim before him.” (*Ibid.*)

Dr. Safari argues that Shulman’s “fear that representing a single individual doctor would jeopardize his career certainly raises the appearance of bias.” He, however, has not provided evidence based on concrete facts establishing that Shulman’s practice of law created a pecuniary interest in the outcome of this case. There is no evidence that any of Shulman’s clients were interested in Dr. Safari’s hearing or that the outcome of this particular hearing had any impact on his ability to retain his clients or obtain future clients.

To the extent Dr. Safari is asserting bias based on Kaiser’s payment of Shulman’s fee, we are not persuaded that this, by itself, shows bias. The *Haas* court explained, “Neither payment nor selection, considered in isolation, is the problem.” (*Haas, supra*, 27 Cal.4th at p. 1031.) “Certainly due process does not forbid the government to pay an adjudicator when it must provide someone with a hearing before taking away a protected liberty or property interest. Indeed, the government must ordinarily pay the adjudicator in such cases to avoid burdening the affected person’s right to a hearing.” (*Ibid.*; see also *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.* (2002) 99 Cal.App.4th 880, 885-886 [“fact that the agency or entity holding the hearing also pays the adjudicator does not automatically require disqualification”].)

Dr. Safari maintains that Shulman should have been disqualified based on financial bias because of his past work for Kaiser and/or his presumed desire for future employment with Kaiser. Shulman was a hearing officer in a case involving a Kaiser entity 10 years prior to this hearing and was going to be a hearing officer in two other

cases that settled. Additionally, he had provided about three to five hours of legal work in an appellate matter involving Kaiser that settled. This minimal work for Kaiser did not show financial bias or any expectation of work for Kaiser.

Hearing officers have had a significant entwinement with the hospital in those cases that have concluded that the hearing officer has a financial bias. For example, in *Yaqub, supra*, 122 Cal.App.4th 474, the hearing officer had previously served on the board of a foundation that had raised money for the hospital involved in the hearing, had served once as a mediator and once as an arbitrator in cases involving the hospital as a party, had been the hearing officer for two other cases concerning the hospital and physician privileges, and had been the presiding officer in the appellant's earlier fair hearing. (*Id.* at pp. 483-484.) In contrast to the hearing officer in *Yaqub*, here the record does not evince a “ ‘long-standing and continuous’ ” (*id.* at p. 483) relationship between Kaiser and Shulman.

Indeed, it could be said that any person serving as a hearing officer for an organization might want to please the organization since the organization might have work in the future. Here, Shulman admitted that there was no provision in his contract with Kaiser prohibiting him from doing future work for Kaiser, and we agree that a provision restricting any future work for Kaiser for a period of time would be desirable. However, when asked whether he had any expectation that he would receive more legal work from Kaiser, either as a hearing officer or in any other capacity, Shulman answered, “No.” He also testified that no one at Kaiser promised him or implied that he would receive any legal work from Kaiser in the future. Thus, the evidence in this record does not support Dr. Safari's claim of bias based on an expectation of future work for Kaiser.

Dr. Safari's reliance on *Haas, supra*, 27 Cal.4th 1017 is also unavailing. In *Haas*, the county appointed on a temporary ad hoc basis the hearing officers for hearings on business license revocations. (*Id.* at pp. 1021-1023.) The record showed that the county knew it might employ the same attorney in the future. Consequently, the appellate court concluded that the hearing officer had a direct pecuniary interest in future commissions from the county. (*Id.* at pp. 1020-1021.) The court in *Haas* held that “a temporary

administrative hearing officer has a pecuniary interest requiring disqualification when the government unilaterally selects and pays the officer on an ad hoc basis and the officer's income from future adjudicative work depends entirely on the government's goodwill." (*Id.* at p. 1024.)

Here, as already discussed, there is no evidence that Shulman's income was directly dependent on the outcome of the decision, as he had no expectation of future work with Kaiser. Dr. Safari argues that the present case is similar to the situation in *Haas* because the appointment was on an ad hoc basis and nothing in the agreement prohibited Shulman from working in the future for Kaiser. Dr. Safari, however, ignores a distinguishing fact: In *Haas*, the hearing officer's name was on a list and having one's name on the list established an expectation of future employment. As already discussed, Shulman testified that he had no expectation of future employment with Kaiser.

Finally, Dr. Safari cites *Kors*, *supra*, 195 Cal.App.4th 40, in support of his argument of financial bias related to future employment with Kaiser. In *Kors*, a law firm's action against a former client in a dispute over attorney fees went to binding arbitration. (*Id.* at p. 46.) The arbitrator's legal practice focused upon the professional responsibility of lawyers and law firms. At the time he was appointed chief arbitrator, the arbitrator was representing a large law firm in a case before the California Supreme Court involving an attorney fee dispute, and during the arbitration he was representing another major law firm in an action for attorney malpractice and related torts. (*Id.* at p. 71.) This Division concluded that the arbitrator's failure to disclose the nature of his legal practice violated the California Arbitration Act (Code Civ. Proc., § 1281.9). (*Kors*, at p. 73.)

Dr. Safari argues that this Division "concluded" in *Kors*, *supra*, 195 Cal.App.4th 40, "that the arbitrator's business interests created an unacceptable conflict of interest." This is simply an incorrect statement of the holding. We did not suggest in *Kors* that the arbitrator's business automatically created a conflict of interest. Rather, we made it clear that the arbitrator's business "could cause reasonable doubt about the ability of a person in [the arbitrator's] shoes to be impartial" and therefore disclosure of the nature of the

arbitrator's legal practice was required. (*Id.* at p. 71.) Indeed, we cautioned the following, even in the context of disclosure under the California Arbitration Act: "We are mindful that ' " 'ordinary and insubstantial business dealings' " arising from participation in the business or legal community do not necessarily require disclosure.' [Citations.] So, too, do we recognize that arbitrators 'cannot sever all their ties [to] the business world.' [Citation.] 'Because arbitrators are selected for their familiarity with the type of business dispute involved, they are not expected to be entirely without business contacts in the particular field.' [Citations.] However, to the extent these relationships are substantial and involve financial considerations creating an impression of possible bias, they must be disclosed." (*Id.* at pp. 72-73.)

Kors has minimal applicability to the present case. Unlike an arbitrator, Shulman was not making findings of fact. Furthermore, unlike the situation involving binding arbitration, the administrative action does not escape substantive judicial review. (See *Kors, supra*, 195 Cal.App.4th at p. 67.) Most significantly, as already discussed, *Kors* was concerned with the obligation to disclose under the California Arbitration Act, and did not suggest that disclosure of a particular business interest should result in an automatic disqualification.

Dr. Safari argues that there are no disclosure requirements in an administrative hearing and thus he could not disqualify Shulman based on connections to Kaiser revealed during voir dire. In contrast, such disclosures could result in a disqualification of an arbitrator. We agree that the requirements underlying arbitrations and administrative hearings are very different. Clearly, the two situations are not analogous as the statutes governing them are different and the arbitrator and hearing officer have different roles. Furthermore, as already discussed, the hearing officer's rulings are subject to appellate review and reversal would be warranted if Dr. Safari could *demonstrate* that Shulman's ruling evinced actual bias.

4. *Shulman's Roles and His Ex Parte Communications*

a. *Dr. Safari's Contentions*

Dr. Safari maintains that Shulman acted as an advocate and prosecutor in violation of section 809.2, subdivision (b), and he points to the ex parte communications Shulman had with Kaiser's corporate counsel, the hearing panel, and witnesses. He also contends that Shulman's position that both Kaiser and the hearing panel were his clients created dual representation, requiring disqualification.

b. *Ex Parte Communications*

(1) *Communications with Kaiser's Corporate Counsel*

When asserting that Shulman had improper ex parte communications regarding the selection of witnesses, Dr. Safari's citations to the record do not support his allegation of improper conduct. Specifically, Dr. Safari cites a letter written on September 8, 2009, by Shulman to Kaiser's corporate counsel.

On September 8, 2009, Shulman wrote a letter to Kaiser's corporate counsel and copied the letter to Dr. Safari's counsel and Kaiser's counsel at the hearing. The letter stated that the hearing panel had informed him that it wished to call and question individuals not identified as prospective witnesses by either Dr. Safari or the QHIC, but the hearing panel did not know the individuals' names. The letter specified that the hearing panel wished to question: "The nurse manager and/or assistant nurse manager for labor and delivery who worked for at least one year between 2004 and 2007"; "[o]ne or more other nurses who worked with Dr. Safari in labor and delivery"; [t]he manager for the outpatient clinic at which Dr. Safari practiced"; and "[a]n ultrasound technician who helped Dr. Safari with amniocentesis procedures."

Shulman wrote in the letter that "no individual should be compelled to appear as a witness in this proceeding—the [hearing panel] wishes to question only those who are willing to appear voluntarily." At the end of the letter, Shulman wrote that he believed the current administrator to KFH Fresno was relatively new and "[t]o promote objectivity in the selection process, it is requested he make an independent effort to identify

prospective witnesses in accordance with the [listed] specifications, and not consult with QHIC's attorneys or other representatives.”

Shulman wrote another letter to Kaiser's corporate counsel on October 12, 2009, and copied this letter to counsel for Dr. Safari and Kaiser's counsel at the hearing. With regard to “Dr. B.,” the letter stated: “In addition to the individuals described in my September 5th letter, the [hearing panel] would like to question [Dr. B.]. The Bylaws do not obligate the [hearing panel] to explain its reasons. However, for the general information of everyone concerned, the [hearing panel] notes that individuals who were interviewed by Stephen White, Ph.D., and have been identified [by] Dr. Safari in his testimony as his ‘supporters,’ either have testified or are expected to testify on his behalf at the hearing. The [hearing panel] also wishes to hear live testimony from at least one physician who was interviewed by Dr. White, [who] has worked with Dr. Safari, and is not considered by him to be among his supporters. Based on the evidence presented thus far, [Dr. B.] appears to meet this description, without having been personally involved in controversies raising substantial issues regarding her objectivity. Naturally, the [hearing panel] will reserve final judgment regarding her credibility and the potential value of her testimony until it is heard.”

We conclude that there was no appearance of impropriety related to these letters. A copy of these letters was sent to Dr. Safari's attorney. It was the hearing officer's responsibility to make sure that the hearing panel had an opportunity to question any witness the panel deemed necessary.⁸

Dr. Safari argues that the fact that Shulman failed to identify any neutral witness fitting three of the four job categories identified by the hearing panel in the letter of September 8, 2009, demonstrates that Shulman was acting as both a prosecutor and an advocate for Kaiser. Dr. Safari, however, does not support this contention with any

⁸ The bylaws specify that “[t]he [h]earing [o]fficer may participate in the deliberations and act as a legal advisor to the [hearing panel], but he or she shall not be entitled to vote. He or she shall act to assure that all participants in the hearing have a reasonable opportunity to be heard and to present all relevant oral and documentary evidence”

evidence indicating that such a witness was available and willing to testify. Without evidence that such witnesses were available, made known to Shulman, and not called, this argument does not support a conclusion that Shulman participated in the witness selection process in a manner that created actual or perceived bias.

In addition to the foregoing letters, Shulman divulged that he had privileged communications with Kaiser that included his engagement letters and certain procedural correspondence in the matter. Additionally, Kaiser provided him with the article about Dr. Safari written in the Los Angeles Times. Shulman explained that he had no ex parte communications with counsel for Kaiser or other Kaiser representatives that would conflict with his role as a neutral hearing officer.

In arguing that the ex parte communications were improper, Dr. Safari relies on *Department of Alcoholic Beverage Control v. Alcoholic v. Alcoholic Beverage Control Appeals Bd.*, *supra*, 40 Cal.4th 1, and *Alvarez v. Workers' Comp. Appeals Bd.* (2010) 187 Cal.App.4th 575 (*Alvarez*). In *Department of Alcoholic Beverage Control*, the Supreme Court held that the practice of permitting the ultimate decision maker on license revocations to receive ex parte briefings routinely by the attorney prosecuting the license revocation accusation was improper. (*Id.* at pp. 15-17.) The court explained that California's Administrative Procedure Act did not "permit prosecutors and other adversarial agency employees to have off-the-record contact about substantive issues with the agency head, or anyone to whom the agency head delegates decisionmaking authority, during the pendency of an adjudicative proceeding." (*Department of Alcoholic Beverage Control*, at p. 10.) In contrast, here, no statute forbids communications between the hospital and the hearing officer.

Alvarez, *supra*, 187 Cal.App.4th 575 also does not support Dr. Safari's argument that the ex parte communications with Kaiser were automatically improper. *Alvarez* involved a workers' compensation proceeding for death benefits, and a panel-qualified medical examiner had ex parte communications with defense counsel. (*Id.* at p. 580.) The Workers' Compensation Appeals Board denied the claimant's objection to the ex parte communication, finding that the statute did not prohibit the communication because

the panel-qualified medical evaluator, not a party, initiated the communication. (*Ibid.*) In rejecting this conclusion, the appellate court pointed out that the statutes had clear language prohibiting such ex parte communications. (*Id.* at p. 587.) The court noted that communications with a regular physician when the employee is unrepresented “ ‘with respect to the merits of the case unless ordered to do so by the Workers’ Compensation Appeals Board’ ” are prohibited. (*Id.* at p. 588.) The court observed that medical evaluators do not have the same background and experience as judges and arbitrators and cannot draw a distinction between “purely procedural and scheduling matters on the one hand and matters affecting the merits on the other hand.” (*Id.* at pp. 588-589.) The court stressed that the Legislature carved out exceptions to ex parte communications when they involved a judge or arbitrator but not in the context of an expert medical opinion. In the context of a medical expert, “there are justifications for a strict rule prohibiting all ex parte communications” (*Id.* at p. 589.)

In the present case, as already discussed, the statute does not ban any communications between the hospital and the hearing officer and communications are necessary since Kaiser is the entity responsible for hiring the hearing officer and paying for the hearing officers’ services. There is no evidence that there were ex parte communications affecting the merits of Kaiser’s case. None of the ex parte communications with Kaiser in the present case demonstrated a departure from the hearing officer’s role as being neutral, and Shulman testified that he had no communications with Kaiser regarding the substantive issues or the merits of Kaiser’s case. Dr. Safari argues that Shulman’s testimony cannot be sufficient to show no bias but he ignores that his claim of bias must “ ‘overcome a presumption of honesty and integrity in those serving as judges’ ” (*Haas, supra*, 27 Cal.4th at p. 1026.) He has not shown that any of the cited ex parte communications deprived Dr. Safari of a fair hearing.

(2) *Communications with the Hearing Panel*

Shulman also had communications with the hearing panel. Such communications, however, were in accordance with his role as the legal advisor for the hearing panel. Kaiser’s bylaws specifically permitted him to participate in the deliberations. We note

that the fact that a physician has been accorded all of the procedural rights specified in the bylaws does not necessarily make the process fair. (*Payne v. Anaheim Memorial Medical Center, Inc.* (2005) 130 Cal.App.4th 729, 742, fn. 7.) Here, Dr. Safari has not demonstrated that the bylaws did not accord him a fair hearing.

(3) *Communications with Dr. B. and Feigel*

Dr. Safari also complains that Shulman had ex parte communications with “Dr. B.,” who was hostile to him. He maintains that Shulman approached this doctor and asked her to identify nurses who could testify at the hearing. This doctor then contacted nurse Stacey Feigel and Fiegel, according to Dr. Safari, was also hostile towards him. After the doctor spoke to Feigel, she agreed to testify. Feigel, according to Dr. Safari, confirmed that Shulman spoke to her before she testified.

Dr. B testified that “there was a time when Mr. Shulman had requested names of nurses, and I think I misinterpreted the intent, and I spoke to a couple of nurses asking their permission to give their names, but, again, no specifics of the case, just that it was going on.” She mentioned that Feigel was one of the nurses she approached.

With regard to Feigel, Shulman stated that when Feigel was identified as a witness, he gave “her orientation on what the proceeding is like . . . [and] told her at the time that one thing [that is not] going to be talk[ed] about in this hearing is the [S.V.] case.” When questioned further about her conversations with Shulman, Feigel stated that Shulman contacted her and asked if she would be interested in appearing as a witness and she told him that she would. Prior to Shulman’s contacting her, the patient care services director approached Feigel and asked whether she would be willing to appear; she said that she would. Her conversation with Shulman, according to Feigel, was about five minutes long.

The transcript does not establish that Shulman selected particular witnesses because he believed they should testify or because their testimony would be hostile to Dr. Safari. Dr. B’s testimony simply showed that Shulman had requested names of nurses and, as disclosed in his letter of September 8, 2009, this request was at the behest of the hearing panel. Feigel’s testimony does not indicate that Shulman directly approached her

about testifying. Rather, once she was identified as a witness, he merely told her about the procedure and cautioned her that there would be no testimony about the S.V. case. This evidence does not establish that Shulman, as Dr. Safari argues, “recruited” a witness hostile to Dr. Safari.

Dr. Safari also maintains that Shulman “ ‘oriented’ ” Feigel, a hostile witness. The record, however, does not support this conclusion. Shulman stated that he provided Feigel with an “orientation on what the proceeding” was like. Nothing in the record suggests that he attempted to orient her in terms of the content of her testimony or in terms of encouraging her to be hostile towards Dr. Safari.

c. Shulman’s Roles with the Hearing Panel and Kaiser

Dr. Safari also argues that the fact that Shulman considered both Kaiser and the hearing panel to be his clients created an appearance of bias “and an ethical obligation to be actually biased.” He points out that Shulman dined with the members of the hearing panel and refused to reveal the content of any of his communications with his “clients” on the basis of attorney-client privilege. He maintains that Shulman could not represent both Kaiser and the hearing panel if their legal interests were in conflict. He argues that Kaiser’s legal interests were to terminate Dr. Safari’s hospital privileges and therefore “[i]f the hearing panel shared Kaiser’s legal interest, which is the only way Mr. Shulman could ethically represent both, then as a legal matter it was not a neutral ‘jury’ but rather an arm of the prosecution of Dr. Safari.”

Shulman did state that he considered Kaiser to be his client in the respect that Kaiser hired him to conduct the hearing. He, however, made it clear that Kaiser was not his client with regard to the providing of any legal services directed towards Dr. Safari. As Shulman explained, “Serving as the hearing officer in a clinical privileges dispute, as described by Sections 5.g.1 and 2 of Kaiser’s Fair Hearing Plan, involves the provision of ‘legal services.’ ” He observed that he had been engaged by Kaiser “to preside over the hearing in a neutral capacity, for the purpose of helping Kaiser to meet its legal obligation to provide a fair hearing.” He stressed that it was in Kaiser’s interests for the hearing to be fair and that it was “in nobody’s interest for there to be an unfair hearing.”

We agree that Kaiser had an obligation to hire a hearing officer and any hearing officer had the responsibility to facilitate a fair proceeding and the payment for the services. This relationship did not create actual or perceived bias.

D. Bias and the Hearing Panel

1. Voir Dire

Dr. Safari acknowledges that Shulman permitted voir dire of the hearing panel members regarding any bias they might have against him but he asserts that the hearing officer improperly would not permit any voir dire regarding any bias the members might have had in favor of Kaiser. He maintains that this limitation on voir dire deprived him of a fair hearing.

Section 809.2, subdivision (c) provides physicians “the right to a reasonable opportunity to voir dire” the hearing panel members. Dr. Safari cites Code of Civil Procedure sections 222.5, 227, subdivisions (c) and (d), and 229 to support his argument that he was impermissibly barred from asking questions regarding any bias in favor of Kaiser. Kaiser responds that the Code of Civil Procedure does not apply as Business and Professions Code section 809.2 provides the controlling standard.

We need not address the relevance of provisions in the Code of Civil Procedure because Dr. Safari has failed to show that he was impermissibly barred from asking questions about bias in favor of Kaiser. We note, however, that voir dire in a peer review hearing is clearly different from that in a civil or criminal trial since the hearing panel members are Dr. Safari’s peers rather than jurors who are completely unfamiliar with him.

In support of his argument that voir dire was improperly restricted, Dr. Safari cites to the record where the hearing officer told counsel for Dr. Safari that voir dire was to determine whether the hearing panel member had any actual bias or probability of bias toward Dr. Safari. Counsel responded that bias also could involve bias in favor of Kaiser. He added: “If that was the test, there would be no necessity of voir dire in most cases because the panel members generally don’t know the accused physician. [¶] The question in this matter is not bias against Dr. Safari, whom [Dr. Flanagan] doesn’t know,

but it's whether her relationship with Kaiser might bias her in Kaiser's favor." The hearing officer responded that counsel had "ample opportunity to cover" bias in favor of Kaiser and had, in fact, covered this area. Shulman added: "So, you know, we seem to be covering the same ground repeatedly, but not in an effective way, not in a well-framed way, just in a kind of half-handed way." Counsel answered, "My time is up, so I give up. . . ."

Physicians are afforded a reasonable opportunity to examine members of the hearing committee for bias. (*Lasko v. Valley Presbyterian Hospital* (1986) 180 Cal.App.3d 519, 530 [doctor denied fair hearing when doctor provided *no* opportunity to examine members of the hospital's hearing committee regarding possible *bias against him*]; § 809.2, subd. (c).) Here, the hearing officer expressly stated that Dr. Safari had asked questions related to any bias in favor of Kaiser, and Dr. Safari does not point to instances where his inquiry was improperly barred.

Our review of the record also supports the conclusion that Dr. Safari had an opportunity to assess any implied bias and the hearing officer did not restrict voir dire in such a manner as to preclude Dr. Safari from inquiring as to improper bias on the part of the hearing panel members. The hearing officer permitted questions about employment, responsibilities, familiarity with key witnesses, and reasons for agreeing to be on the hearing panel. Accordingly, we reject Dr. Safari's argument that his voir dire was impermissibly restricted.

2. Dr. Flanagan

Dr. Safari contends that Dr. Flanagan, a doctor at KFH Richmond, was actually biased or had the appearance of bias against him. He maintains that Dr. Flanagan's position at Kaiser as a shareholder, senior OB/GYN, chair of the OB/GYN chief group in Northern California, and Director of Women's Health for Northern California compels the conclusion that she was biased. Additionally, he emphasizes that Dr. Flanagan admitted reading the article about Dr. Safari in the Los Angeles Times, and acknowledged that she personally knew Dr. Moran and Dr. B. Furthermore, he points out that Dr. Flanagan was contacted directly by Kaiser's corporate counsel to serve on the

hearing panel and claims that her manager “instructed” her to serve on the hearing panel.

Dr. Safari adds that Dr. Flanagan described herself as a “fixer,” and therefore she would be likely to act in a manner to avoid any result that might reflect poorly on Kaiser’s treatment of Dr. Safari or that might impact negatively on Kaiser’s marketing of obstetrical services. Dr. Safari asserts that Dr. Flanagan’s loyalty was to Kaiser. He concludes that her position made it likely that other panel members would defer to her viewpoint during deliberations.

Kaiser responds that Dr. Flanagan was a shareholder of TPMG but TPMG was not a party to the fair hearing. The costs of the proceedings and any settlement paid to Dr. Safari were not TPMG’s responsibility; therefore, according to Kaiser, Dr. Flanagan had no financial benefit connected to the outcome of the hearing. Dr. Flanagan made it clear that she had never heard of Dr. Safari prior to being contacted about this hearing. Kaiser also stresses that Dr. Flanagan expressly stated that she had been an OB/GYN long enough to know that what was said in the press was not necessarily the truth. Moreover, she explained that she “advocate[d] very strongly for physicians [for] the right to practice.” Dr. Flanagan added that she had no preconceived idea about Dr. Safari. When specifically asked whether it would be better to get rid of Dr. Safari because that would avoid the problem of bad publicity, she answered: “That’s not the way I work, though. There [are] lots of things that create bad publicity, but you don’t get rid of them. That doesn’t resonate with me.”

Dr. Flanagan also indicated that she believed one of her “main responsibilities” in her leadership role was to support and defend doctors. She clarified that she did not mean in “a legal sense, but . . . in a leadership sense.” She observed that “doctors need to be helped in large organizations, so I actually am quite sympathetic to doctors, even when they’ve been maligned by something, that may have been in their control or out of their control. [¶] So that is one of my core values that I’ve actually said to the chiefs over and over again, is ‘I’m here to support you.’ I’m here to support physicians.” She also made it clear that she was not afraid of “bucking systems.” She remarked that she was an advocate for fairness.

We disagree with Dr. Safari's characterization of the record that Dr. Flanagan was instructed to serve on the hearing panel. The record shows that when Dr. Flanagan learned in voir dire about the time commitment required for the hearing, she stated that she was going to check with her "leadership" to determine whether serving on the panel was a desirable way for her to spend her time. Subsequently, she reported that she was told "that it would be a service to Kaiser" to be on the panel. Thus, the record does not indicate that she was "instructed" to serve on the panel.

Finally, we disagree that the record showed bias based on Dr. Flanagan's relationship with Dr. Moran or Dr. B. When asked about her opinion of the character or reputation of Dr. B., Dr. Flanagan asked if Dr. B. was in Fresno; she said she had no opinion about Dr. B.'s character or reputation or clinical capacities. She stated that she believed Dr. B. might have gone through some media training that Dr. Flanagan had conducted but she did not know Dr. B. very well. When asked about Dr. Moran, Dr. Flanagan responded that he had come into the chief group periodically but she had "[v]ery little one-on-one contact." She responded that she had no opinion about Dr. Moran's character or reputation.

We conclude that the evidence in the record does not support Dr. Safari's claim that Dr. Flanagan was biased or had an appearance of bias.

3. Dr. Norton

Dr. Safari objects to Dr. Norton because she was a high level OB/GYN manager with responsibility for Kaiser's corporate well-being. He maintains that this gave the appearance of bias. He also asserts that Dr. Norton is subordinate to Dr. Flanagan.

This challenge to Dr. Norton is entirely without merit. As already stressed, "[A] party seeking to show bias or prejudice on the part of an administrative decision maker [must] prove the same with concrete facts: 'Bias and prejudice are never implied and must be established by clear averments.'" [Citation.]' " (*Gai v. City of Selma* (1998) 68 Cal.App.4th 213, 219-220.) Here, Dr. Safari has not set forth any concrete facts to support his argument.

Dr. Norton, a board-certified maternal fetal medicine specialist, was the regional director of perinatal genetic services for TPMG. At the time of the hearing, she was on a career track to become a shareholder in TPMG, but was not a shareholder at the time of the hearing. Subsequently, she moved to the Lucile Packard Children's Hospital at Stanford, where she is the director of perinatal research.

The sole fact that Dr. Norton was a high level manager did not disqualify her from being on the hearing panel. When asked whether she could be unbiased despite her title and desire to become a shareholder, she unequivocally responded that she could be fair and unbiased. She also responded, "Yes," when asked whether she had the "strength of character" to take the position that Dr. Safari did not deserve disciplinary action despite "elements of Kaiser management" wanting that decision made. Also, the record is devoid of any evidence establishing that she had a direct financial interest in the outcome of Dr. Safari's hearing or that she would defer to Dr. Flanagan's opinions.

4. *Dr. Breneman*

Dr. Breneman was a board-certified OB/GYN, and was practicing and teaching residents at KFH Oakland; she had extensive experience serving on its quality assurance committee. She was a shareholder in TPMG. Dr. Safari claims in summary fashion that because Dr. Breneman was a shareholder, was subordinate to Dr. Flanagan in the chain of command, and was a friend of Dr. Flanagan, she was biased against him or that there was the appearance of bias.

As already discussed, being a shareholder or having a relationship with Dr. Flanagan—without any further showing—does not establish bias. When asked whether she would be "inhibited from deciding this matter if" it were inconsistent with the "wishes or objectives" of Kaiser, Dr. Breneman responded, "No." She elaborated, "I feel that where I work doesn't need to bias my opinions on what I think about clinical management of patients."

Accordingly, we conclude that Dr. Safari has failed to show "concrete facts" giving rise to an unacceptable probability of actual bias or appearance of bias with regard to hearing panel member Dr. Breneman.

5. *Dr. Thiet*

At the time of the hearing, Dr. Thiet was a board-certified maternal fetal medicine specialist and was the Chief of Obstetric Services and the Interim Physician Director of Maternal Fetal Medicine at the University of California, San Francisco. When Dr. Thiet realized the amount of time required to be on the panel, she told Kaiser she could not be on the panel without compensation; she told Kaiser her hourly consultative rate was \$600.

Dr. Safari objects to Dr. Thiet's presence on the hearing panel because she first claimed that she was not being paid for her time and had agreed to participate as "an obligation to my peers in the medical community" but then had ex parte communications with the hearing officer and corporate counsel for Kaiser regarding payment for her time. Since she was being paid for her time, Dr. Safari contends that she had a financial interest in the outcome of the hearing. He claims that Dr. Thiet "had a strong financial interest in pleasing Kaiser so that she might be considered for future compensation as a panel member or an expert witness."

"[T]he risk of bias caused by financial interest need not manifest itself in overtly prejudiced, automatic rulings in favor of the party who selects and pays the adjudicator." (*Haas, supra*, 27 Cal.4th at p. 1030.) " 'The Court's inquiry . . . is not whether a particular man has succumbed to temptation, but whether the economic realities make the design of the fee system vulnerable to a "possible temptation" to the "average man [or woman]" as judge.' " (*Id.* at p. 1029.)

Dr. Thiet testified that when she realized the amount of time required for this case and the amount of time that would be taken away from her practice, she realized that she could not be on the hearing panel without compensation for her time. She told Kaiser that her hourly rate for consultative work was \$600 and Kaiser approved the fee. She stated that her payment was not contingent upon the manner in which she decided the case; she said that she was free to exercise her own independent judgment.

Dr. Thiet made it clear that the fact that she requested her regular consultative work hourly fee from Kaiser would not influence her decision in the matter. There is

absolutely no evidence that she desired any further work with Kaiser. To the contrary, she had a practice completely separate from Kaiser and Kaiser was paying her the same hourly fee she would have received for any other consultation. The record does not indicate that Dr. Thiet's "future income from judging" depended on the goodwill of Kaiser. (See *Haas, supra*, 27 Cal.4th at p. 1037.) Indeed, the record lacks any evidence demonstrating that Dr. Thiet desired work as a hearing panel member. Dr. Safari has failed to show a probability of actual bias and has not shown that there was an appearance of bias.

6. Dr. Carpenter

Dr. Carpenter was a board-certified pathologist at KFH Fresno, and was a Fellow of the College of American Pathologists. Dr. Carpenter did some of the pathology work in the S.V. case but the final autopsy was performed by someone else. He made a diagnosis of chorioamnionitis in the S.V. case. Dr. Safari claims that the cause of death of the twin in the S.V. case was central to the charges against him and maintains that Dr. Carpenter had a professional interest in the correctness of the pathology results in the S.V. case. He also argues that Dr. Carpenter had the status as a percipient witness, which should have excluded his participation on the hearing panel. (See, e.g., *People v. Tidwell* (1970) 3 Cal.3d 62, 64-65, 67 [trial court should have granted a change of venue because some of the jurors selected to serve knew one or more of the victims or witnesses].).

Even if we were to presume that Dr. Safari has to demonstrate only an appearance of bias when the allegation does not involve a direct financial interest in the outcome, we conclude that Dr. Safari's argument is without merit. The hearing officer found that Dr. Carpenter was not a potential witness because he did not perform the actual autopsy and had not been listed as a potential witness by either side, and this ruling finds support in the record.

As already stressed, Dr. Carpenter arranged for an expert autopsy of the fetus in the S.V. case. Dr. Safari has not explained how Dr. Carpenter's diagnosis of chorioamnionitis, an inflamed placenta, had any bearing on whether Dr. Safari was responsible for the problems during the delivery of the twin. Dr. Safari has not set forth

what knowledge Dr. Carpenter had that was of particular importance. Indeed, Dr. Carpenter did not have any recollection of the placenta in the S.V. case, since he had looked at the placenta three years prior to the hearing.

When asked whether he would feel defensive if the autopsy in the S.V. case were criticized, Dr. Carpenter responded, “No.” Dr. Carpenter also stated that he would not have any concern if the criticism was related to his work or analysis of the placenta. He explained: “I—I mean, it’s hard to explain, but people do things differently, and so I wouldn’t expect—maybe someone looking at it might have some different conclusions, or maybe there’d be—I wouldn’t expect any major differences, but people have different ideas and different conclusions.”

The record does not indicate that Dr. Carpenter was biased. Dr. Carpenter stated that he knew Dr. Safari as a “fellow physician” at Kaiser Fresno and, based on his experience with Dr. Safari, he thought “he was a qualified physician.” He maintained that he did not have any opinion as to whether Dr. Safari had or had not been treated fairly by Kaiser. He declared that he thought he could be fair and asserted that he had not received any pressure by Kaiser to decide the case in a particular manner. He denied that there would be any repercussions to his career if he found in favor of Dr. Safari.

We therefore reject Dr. Safari’s claim that Dr. Carpenter was biased against him.

IV. The Hearing Officer’s Ruling to Exclude Evidence Challenging the 2006 JRL Decision

A. Background

In July 2005, the medical executive committee recommended that Dr. Safari’s privileges to do vaginal deliveries be restricted primarily because of the S.V. case. The medical executive committee concluded that a vacuum delivery should not have been done and that Dr. Safari’s vigorous pull on the vacuum was inappropriate. The medical executive committee stated that a caesarean-section delivery “would have avoided fetal demise if it had been performed earlier in the vacuum extraction phase of delivery.”

At Dr. Safari’s request, a fair hearing was conducted to challenge the decision of the medical executive committee. The JRC at the hearing was comprised of three

doctors. The 2006 JRC decision was that the evidence “presented was persuasive, if not overwhelming, that the cause of death of Twin B was the manner in which the vacuum had been applied and utilized.” Dr. Safari did not seek any judicial review of this decision.

At the hearing in 2010, the hearing officer ruled that the doctrine of collateral estoppel barred Dr. Safari from presenting evidence challenging the 2006 JRC decision that he was responsible for the death of the twin in the S.V. case. Dr. Safari maintains that he should have been able to introduce evidence of his experts and of the Medical Board showing that he did not cause the death of the twin and that he had not violated the standard of care. He also avows that he should have been able to impeach the testimony of witnesses related to this delivery as he had evidence that they provided false testimony.

Dr. Safari argues that excluding the evidence of his innocence related to the S.V. case violated Kaiser’s bylaws. He also insists that the hearing officer’s ruling that applied the doctrine of collateral estoppel exceeded the hearing officer’s authority under section 809.2, subdivision (b), and *Mileikowsky, supra*, 45 Cal.4th 1259.

B. Collateral Estoppel

“ ‘Res judicata’ describes the preclusive effect of a final judgment on the merits. Res judicata, or claim preclusion, prevents relitigation of the same cause of action in a second suit between the same parties or parties in privity with them. Collateral estoppel, or issue preclusion, ‘precludes relitigation of issues argued and decided in prior proceedings.’ ” (*Mycogen Corp. v. Monsanto Co.* (2002) 28 Cal.4th 888, 896, fn. omitted.) Here, the question is whether collateral estoppel or issue preclusion applies.

“Collateral estoppel precludes relitigation of issues argued and decided in prior proceedings. [Citation.] Traditionally, we have applied the doctrine only if several threshold requirements are fulfilled. First, the issue sought to be precluded from relitigation must be identical to that decided in a former proceeding. Second, this issue must have been actually litigated in the former proceeding. Third, it must have been necessarily decided in the former proceeding. Fourth, the decision in the former

proceeding must be final and on the merits. Finally, the party against whom preclusion is sought must be the same as, or in privity with, the party to the former proceeding. [Citations.]” (*Lucido v. Superior Court* (1990) 51 Cal.3d 335, 341 (*Lucido*)).) Once the threshold requirements are met, courts consider whether application of issue preclusion will further the public policies of “preservation of the integrity of the judicial system, promotion of judicial economy, and protection of litigants from harassment by vexatious litigation” (*Id.* at p. 343.)

Issue preclusion applies not only to claims or defenses presented in the administrative hearing, but also to claims or defenses, which were *not* raised in the administrative proceeding. (*Murray v. Alaska Airlines, Inc.* (2010) 50 Cal.4th 860, 871.) “[U]nless a party to ‘a quasi-judicial administrative agency proceeding’ exhausts available judicial remedies to challenge the adverse findings made in that proceeding, those findings may be binding in later civil actions.” (*Id.* at p. 876.)

In the present case, the hearing officer barred evidence related to the issue of the cause of death for the twin in the S.V. case. This identical issue had been decided in the 2006 JRC decision. The issue was actually litigated: Dr. Safari had legal counsel, presented evidence, submitted documents, presented closing argument, and submitted a written brief. The 2006 JRC decision directly addressed Dr. Safari’s care and responsibility in the S.V. case and this decision was final; Dr. Safari did not seek any judicial review of the administrative decision. Finally, Dr. Safari was a party to both proceedings.

Although we conclude that issue preclusion may be applied in the present case, we must still examine the public policy considerations set forth in *Lucido, supra*, 51 Cal.3d 335, to determine if the doctrine of collateral estoppel should apply. Dr. Safari maintains that one of the purposes of the peer review process “is to protect competent practitioners from being barred from practice for arbitrary or discriminatory reasons.” (*Mileikowsky, supra*, 45 Cal.4th at p. 1267.) He concludes that excluding the evidence of Dr. Safari’s innocence regarding the S.V. case contravened this public purpose of protecting

competent medical practitioners. He argues that collateral estoppel should not shield known “false facts from impeachment with the truth.”

We are not persuaded that policy considerations favor permitting Dr. Safari to argue an issue already decided and final in the 2006 JRC decision. This is not a situation where Dr. Safari was deprived of an opportunity to present evidence of his innocence regarding the S.V. case. It is true that the Medical Board’s decision was not available at the time of the 2006 JRC decision, but the witnesses involved at that hearing were available. The Medical Board’s decision did not establish that Dr. Safari had been deprived of a fair hearing on the S.V. case, and the standard for the Medical Board is clear and convincing evidence while the standard for the administrative hearing is a preponderance of the evidence.⁹ Furthermore, as discussed more extensively below, the hearing panel’s decision was not based solely or principally on the S.V. case.

In *People v. Sims* (1982) 32 Cal.3d 468 (superseded by statute on another issue), the Supreme Court considered whether collateral estoppel applied to obtaining welfare benefits fraudulently. The court found that the possibility of inconsistent judgments, which might undermine the integrity of the judicial system, precluded relitigation of the issue; the earlier administrative decision was that the evidence did not support a finding of fraud. (*Id.* at p. 488.) The court reasoned that allowing relitigation would diminish the

⁹ We note that the Medical Board’s decision did not establish Dr. Safari’s innocence or that the 2006 JRC decision was erroneous, as Dr. Safari argues. The hearing before the Medical Board is not concerned with the standard of care required by Kaiser to continue treating patients at KFH Fresno. The burden of proof under Kaiser’s bylaws is that the judicial review committee be persuaded “by a preponderance of the evidence that the action or recommendation is reasonable and warranted.” In a proceeding before the Medical Board involving an accusation against a physician, the standard of proof “to revoke or suspend a doctor’s license” is “*clear and convincing proof to a reasonable certainty* and not a mere *preponderance of the evidence.*” (*Ettinger v. Board of Medical Quality Assurance* (1982) 135 Cal.App.3d 853, 856.) Thus, the standard of care and the standard of proof in administrative peer reviewing hearings are significantly different from those applied in Medical Board hearings. (See also *Bonner v. Sisters of Providence Corp.* (1987) 194 Cal.App.3d 437, 446-447.)

value of the administrative process, which was the defendant's sole means of challenging the administrative charges. (*Ibid.*)

Similarly, here, allowing Dr. Safari to relitigate the question of his conduct during the delivery of the twin in the S.V. case would diminish the value of the administrative process that concluded that the evidence "presented was persuasive, if not overwhelming, that the cause of death of Twin B was the manner in which the vacuum had been applied and utilized." Judicial economy is also served by applying issue preclusion.

Additionally, the policy against vexatious litigation favors applying issue preclusion here because Dr. Safari had an adequate opportunity at the first administrative hearing to prove that he was not responsible for the twin's death in the S.V. case.

We thus conclude that the requirements of issue preclusion are satisfied and the public policy considerations favor application of the doctrine.

C. Kaiser's Bylaws and Rules of Evidence

Dr. Safari maintains that excluding the evidence regarding the S.V. case violated Kaiser's bylaws and Evidence Code section 210.¹⁰ Both Kaiser's bylaws and the Evidence Code state that all relevant evidence shall be admitted. Dr. Safari argues that his evidence concerning the S.V. case was clearly relevant and prevented him from raising a defense to the charges that he was responsible for the twin's death in the S.V. case.

The issue regarding collateral estoppel is not whether the evidence barred is relevant. In most cases the evidence is relevant because the issue decided in the first case has bearing on the issue to be decided in the subsequent case. "The purpose of collateral estoppel is to prevent a party from repeatedly litigating an issue in order to secure a different result." (*Direct Shopping Network, LLC v. James* (2012) 206 Cal.App.4th 1551,

¹⁰ Evidence Code section 210 provides: " 'Relevant evidence' means evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action."

1562.) Dr. Safari had a full and fair opportunity to litigate the relevant issues when he had his hearing in 2006 before three doctors.

D. *The Hearing Officer's Authority to Make Evidentiary Rulings*

Dr. Safari argues that the hearing officer exceeded his authority when he ruled on Kaiser's motion to exclude evidence based on collateral estoppel.

Section 809.2, subdivision (d) provides in relevant part that the "presiding officer shall consider and rule upon any request for access to information, and may impose any safeguards the protection of the peer review process and justice requires." Under Kaiser's bylaws, the hearing officer has the authority "to decide when evidence may or may not be introduced" Accordingly, the hearing officer had the authority to rule that the evidence challenging the 2006 JRC decision was inadmissible.

Dr. Safari relies on *Mileikowsky, supra*, 45 Cal.4th 1259, but this decision does not support his argument. The court in *Mileikowsky* considered whether a hearing officer had the authority to issue terminating sanctions for the physician's failure to cooperate with discovery. The court explained, "A hearing officer without the authority to determine sufficiency of the evidence may not entertain a motion to dismiss the proceedings for lack of evidence." (*Id.* at p. 1269.) "As it is the reviewing panel and not the hearing officer that determines whether the peer review committee's recommendation is warranted, it is the reviewing panel that should decide whether or not the physician's inability or refusal to engage in the reviewing process suffices to render any further proceedings unnecessary." (*Id.* at p. 1271.)

Dr. Safari's attempt to argue that the hearing officer's evidentiary ruling in the present case falls within the holding of *Mileikowsky* lacks merit. Here, Dr. Safari was not deprived of peer review by the hearing officer's ruling and the hearing officer did not exceed his authority under the statutes or Kaiser's bylaws.

V. *Due Process and the Standard of Care*

A. *The Standard of Care Applied*

Dr. Safari contends that his due process rights were violated because his medical practice was not evaluated according to any objective standard. He maintains that the

hearing panel did not use the standard of care used in medical malpractice cases, which is that the physician must exercise that “ ‘degree of skill, knowledge and care ordinarily possessed and exercised by members of [his] profession under similar circumstances.’ ” (*Barris v. County of Los Angeles* (1999) 20 Cal.4th 101, 108, fn. 1.)

Here, it is undisputed that the standard of care for a medical malpractice case was not used. Rather, Kaiser argued at the administrative hearing that Dr. Safari failed to meet the standard of care required of Kaiser’s physicians. (See *Hay v. Scripps Memorial Hospital* (1986) 183 Cal.App.3d 753, 761-762; *Bonner v. Sisters of Providence Corp.*, *supra*, 194 Cal.App.3d at pp. 446-447.) Dr. Safari acknowledges that Kaiser could use a higher standard of care than the one used in medical malpractice cases, but claims that his due process rights were violated because Kaiser never articulated any objective standard of care. He maintains that standards must be “clear, not vague, ambiguous or uncertain” and cannot be left to the “whim or caprice of the directors.” (*Wyatt v. Tahoe Forest Hospital Dist.* (1959) 174 Cal.App.2d 709, 715 (*Wyatt*)). Dr. Safari argues that Kaiser changed the standard of care throughout the hearing process and then argued that a perinatologist had a higher standard of care.

“Clinical privileges are hospital specific. So long as there is a rational basis for the medical staff’s requirements for clinical privileges, a hospital may make its requirements as stringent as it deems reasonably necessary to assure adequate patient care. [Citation.] Hospital review boards do not review their physicians’ conduct to determine whether they should be licensed to practice medicine in California. Their review is for the purpose of determining whether the medical staff members provide the quality of care the hospital requires.” (*Bonner v. Sisters of Providence Corp.*, *supra*, 194 Cal.App.3d at p. 446.)

A private hospital may not adopt rules for revocation of its staff membership, which permit action on an arbitrary or irrational basis. (*Miller v. Eisenhower Medical Center* (1980) 27 Cal.3d 614, 626.) “[A]n organization’s decision to exclude or expel an individual may be ‘arbitrary’ either because the reason for the exclusion or expulsion is itself irrational or because, in applying a given rule in a particular case, the society has

proceeded in an unfair manner.” (*Pinsker v. Pacific Coast Society of Orthodontists, supra*, 12 Cal.3d at p. 545.) Expulsion is arbitrary if the organization’s rules are not reasonably suited to provide a fair procedure. (*Ibid.*)

The rules as set forth in Kaiser’s bylaws specify that, in addition to being licensed, “[t]o qualify for, and continue membership on the Professional Staff a practitioner must:” “Document and submit evidence of his or her experience, background, training, demonstrated ability, availability, and physical and mental health status, with sufficient adequacy to demonstrate to the Professional Staff and the Board that he or she will provide care to patients at the generally recognized level of professional quality, taking into account patients’ needs, available hospital facilities, resources and utilization standards at the Hospital”

In its closing brief submitted to the hearing panel, Kaiser argued that “QHIC has determined that Dr. Safari does not provide quality care at the level expected of a KFHP/KFH Fresno perinatologist.” Kaiser wrote that “Dr. Safari did not provide the quality of care at the level expected of a Kaiser Fresno perinatologist and that he consistently demonstrated poor clinical judgment and provided care below the standard expected of him.” (Bold omitted.) Thus, the question is whether this standard was too vague.

In *Gaenslen v. Board of Directors* (1985) 185 Cal.App.3d 563 (*Gaenslen*), after an administrative hearing, a doctor was expelled from the hospital’s staff membership and the doctor’s clinical privileges were terminated. (*Id* at p. 567.) On appeal from the lower court’s denial of his petition for writ of mandate, the doctor argued, among other things, that he was denied his right to a fair procedure because the standard of care that was applied in his evaluation was vague, ambiguous, and uncertain. (*Id.* at p. 568.) The standards for medical staff set forth in the hospital’s bylaws in *Gaenslen* were as follows: “ ‘(a) Membership on the staff is a privilege which shall be extended only to professionally competent physicians . . . who continuously meet the qualifications, standards and requirements set forth in these bylaws. [¶] (b) Only physicians . . . licensed to practice in California, who can document their background . . . training and

demonstrated competence, their adherence to the ethics of their profession, their good reputation, and their ability to work with others, with sufficient adequacy to assure the staff and Board of Directors that any patient treated by them in the Hospital will be given a high quality of care, shall be qualified for membership on the staff.’ ” (*Id.* at pp. 568-569.)

The court in *Gaenslen* held that the hospital bylaws “adequately articulate the standard of care required by physicians.” (*Gaenslen, supra*, 185 Cal.App.3d at p. 569.) The bylaws specified that only those physicians who demonstrated “both the willingness and ability to provide high quality medical care to patients” would “be afforded continuing membership.” (*Ibid.*) The court explained that providing high quality patient care was the proper concern of the hospital. The court rejected the doctor’s argument that the bylaw provisions were inadequate under *Wyatt, supra*, 174 Cal.App.2d 709. The court explained that in *Wyatt*, the bylaw provision “required laypersons serving on the board of directors to determine what constitutes the *best possible care and professional skill*. In this case, those determining whether a physician’s practice meets the *high quality* standard are other medical doctors familiar with the standard of medical care in the community and” at this particular hospital. (*Gaenslen*, at p. 569.) The court concluded with the observation that a “ ‘ “[d]etailed description of prohibited conduct is concededly impossible, perhaps even undesirable in view of rapidly shifting standards of medical excellence and the fact that a human life may be and quite often is involved in the ultimate decision of the board.” ’ ” (*Ibid.*, quoting *Britton v. Humphreys Memorial Hospital* (Fla.App. 1979) 370 So.2d 433, 434.)

Here, similarly to the situation in *Gaenslen*, the bylaws stated that the physician must demonstrate “that he or she will provide care to patients at the generally recognized level of professional quality, taking account patients’ needs . . . at the Hospital.” Requiring a physician to provide professional quality care is the proper concern of a private hospital, and the physicians on the hearing panel were familiar with the care required of a perinatologist at Kaiser.

Dr. Safari argues that the hearing panel's decision does not evince any particular understanding of the standard of care. We disagree. The hearing panel's written decision indicates that it assessed Dr. Safari's level of care taking into consideration that he was a perinatologist.

The hearing panel's assessments of the care provided in the following two cases establish that the hearing panel understood the standard of care to be applied and properly applied it. When assessing the care given to a woman giving birth to twins in February 2004, the hearing panel concluded "that documentation was uneven, and that Dr. Safari did not consistently demonstrate performance at the level reasonably expected of a Maternal and Fetal Medicine ('MFM') specialist in his assessment and management before the patient's hospitalization. We agree with Dr. [] that most MFMs would have been more cautious in hospitalizing or offering hospitalization to this patient for a few days to monitor for cervical change in order to demonstrate no change in cervical length or contraction pattern." With regard to the level of care given to a 25-year-old woman on January 25, 2005, the hearing panel concluded that it did "not find major cause for concern about the management of this case" and "is satisfied that removal of a cerclage at 35-37 weeks is within the standard of care, as a general matter. However, Dr. Safari's reasoning with regard to the timing of the cerclage removal in relation to the amniocentesis was not documented, and it should have been explained in the record. Without documentation, it appears that there was no logical plan for management of this patient. Again, this is part of a pattern of poor documentation in the setting of unclear rationale for the decisions that were made, and is of legitimate concern in assessing Dr. Safari's professional performance as a perinatologist."

The hearing panel's conclusions showed that it recognized that Dr. Safari had to demonstrate that he could provide care to patients at the generally recognized level of professional quality for a perinatologist at Kaiser Fresno. The hearing panel wrote: "Dr. Safari's performance must be judged in light of his special role as perinatologist (in fact, the only perinatologist at KFH Fresno). [The hearing panel] does not find that all of the charges against Dr. Safari are supported by a preponderance of the evidence . . . but it

does find that the evidence as a whole supports the conclusion that Dr. Safari cannot be relied upon to function adequately as a specialty consultant to obstetricians and gynecologists, and to provide safe and competent perinatology care to the patients for whom KFH Fresno and KFHP are ultimately responsible. Given the high-risk nature of his practice, one can reasonably conclude that deficiencies of the type described translate into an imminent threat of harm to patients. With reference to the [medical executive committee's] recommendation that remedial education be pursued in lieu of termination, the [hearing panel] is not persuaded that any such efforts would be reasonably likely to result in the necessary changes, especially in light of Dr. Safari's consistent rejection of the notion that he has even committed substantial errors, even when faced with contrary evidence from experts."

Accordingly, we reject Dr. Safari's argument that the standard of care applied by the hearing panel violated his due process rights.

B. Refusal to Give Jury Instructions on the Standard of Care

Dr. Safari complains that he was denied due process because the hearing officer denied his request to have jury instructions provided to the hearing panel. At the hearing, Dr. Safari raised the issue of jury instructions and provided his proposed jury instructions. The hearing officer responded that he was serving as the legal advisor to the hearing panel and it was appropriate for him to advise the hearing panel during its private deliberations, as provided by Kaiser's bylaws. Dr. Safari requested that the deliberations be placed on the record and the hearing officer denied that request.

Dr. Safari contends that the hearing officer should have provided the hearing panel with the jury instructions he proposed and that the hearing officer's "secret" instructions to the hearing panel during the deliberations were contrary to fundamental notions of fairness. He also maintains that the hearing panel's decision did not identify any legal standard that it used to judge his performance.

Dr. Safari offers no authority to support an argument that jury instructions are required in a peer review case and nothing in section 809 et seq. suggests such a requirement. (See *Smith v. Ricks* (9th Cir. 1994) 31 F.3d 1478, 1487 [peer review

proceedings do not have to resemble regular trials to satisfy Health Care Quality Improvement Act and cardiologist's complaint that no jury instructions were given at peer review hearing terminating his privileges had no basis as "nothing in the statute requires such formalities"].) The doctrine of fair procedure requires that the decisionmaking process be substantively rational and the decisionmaking must be procedurally fair. (*Potvin v. Metropolitan Life Ins. Co.* (2000) 22 Cal.4th 1060, 1072.) Dr. Safari has not established that the refusal to provide jury instructions deprived him of a fair procedure.

We also reject Dr. Safari's characterization that the hearing officer decided "to secretly instruct the jury *ex parte* on unknown legal standards" When counsel for Dr. Safari argued: "Now, your instructions to the jury are an important part of the hearing, and I see no rationale for those instructions to be kept secret. . . ." The hearing officer responded: "There's nothing secret going on here. It's the process of performing a legal service for the [hearing panel], which means discharging certain functions on its behalf. If the hearing panel needs assistance in arranging for a witness meeting its specifications, I have viewed it [as] part of my responsibility to assist them in that task as their legal counsel. [¶] And so, too, when I impart advice to them in our private deliberations. Those aren't secret jury instructions. That's advice from an attorney to a client. . . ."

The Kaiser bylaws provide that the hearing officer may be present during deliberations but may not vote. There is nothing that requires the hearing officer to remain silent during those deliberations. Moreover, as already discussed, the hearing panel's decision established that it used the proper standard when assessing the charges against Dr. Safari.

VI. Notice of the Charges

Dr. Safari argues that the amended charges against him sent on June 3, 2008, did not identify the specific "behavioral acts or omissions" that he was alleged to have committed. He argues that his notice of the charges was therefore "legally inadequate."

Section 809.1, subdivision (c) provides: “(c) If a hearing is requested on a timely basis, the peer review body shall give the licentiate a written notice stating all of the following: [¶] (1) The reasons for the final proposed action taken or recommended, including the acts or omissions with which the licentiate is charged. [¶] (2) The place, time, and date of the hearing.”

In addition to the time, place, and date of the hearing, section 809.1, subdivision (c) requires notice of the proposed action and the reasons for it. Here, the notice specified the place, time, and date of the hearing, and also set forth the actions to be taken.¹¹ The notice provided Dr. Safari with the reasons for these actions, as it stated the following: “The QHIC’s 2007 recommendations to limit Dr. Safari’s participation in KFHP and his clinical privileges at KFH Fresno were based upon the recommendation of the PROC that he should focus exclusively on consultative perinatology and should not directly manage patients, issue orders, or direct patient care” (Underline omitted.) The PROC based its recommendation on the 2007 JRC decision, “which ‘noted substantial issues with Dr. Safari’s clinical judgment in the management of certain patients additional to the very significant concern from the vacuum extraction case . . . [, including] his care of a pre-eclamptic patient . . . , [and] an absence of growth or ultrasound documentation in a case involving discordant twins.’” The notice added: “Its determination that Dr. Safari ‘seemed incapable [of] accepting, and learning from, clear mistakes” and it cited Dr. Safari’s insistence that he did nothing wrong in the S.V. case and that he would not do anything differently.

¹¹ The notice stated that Dr. Safari had requested a hearing to challenge the following decisions: “1. May 23 and June 11, 2007, recommendation that the scope of his participation in KFHP be limited to consultative perinatology; [¶] 2. September 11, 2007, recommendation that the scope of his clinical privileges at KFH Fresno be limited to consultative perinatology; [¶] 3. February 29, 2008, summary suspension of his participation in KFHP imposed by the President of the KFHP Northern California Region on, and ratification of that suspension by the QHIC on March 10, 2008; [¶] 4. March 10, 2008, recommendation that his participation in KFHP be terminated; and [¶] 5. May 5, 2008, recommendation that his Professional Staff membership and clinical privileges (‘membership and privileges’) at KFH Fresno be terminated.”

With regard to the QHIC's 2008 summary suspension of Dr. Safari's participation in KFHP, and its 2008 recommendation that his participation, privileges, and membership be terminated, the notice stated this recommendation was based on the above as well as the PROC's "determination that there were 'still substantial concerns regarding Dr. Safari's clinical skills and judgment since April 2007,' as set forth in the March 7, 2008, PROC Recommendations" The notice then stated that this determination was based on a number of additional concerns, and it listed a number of matters.

The notice provided to Dr. Safari met the requirements of the statute. Dr. Safari complains that the notice did not specify the behavioral acts or omissions that he was alleged to have committed, but that is not the requirement of the statute. Furthermore, the notice did set forth particular acts that served as the basis for the decision. Thus, for example, the notice specified that Dr. Safari performed "a myomectomy without the patient's prior informed consent."

VII. Substantial Evidence Supported the Hearing

Panel's Findings Regarding Dr. Safari's Behavioral Problems

Dr. Safari argues that he requested instructions regarding Kaiser's legal burden to establish the behavioral allegations and he complains that the hearing officer refused to give the proposed instructions. He also argues that substantial evidence in the record did not support the hearing panel's findings on his behavioral problems.

As already discussed, the hearing officer did not have to give the hearing panel any instructions. We also reject Dr. Safari's claim that the evidence did not support the hearing panel's findings.

In the present case, the hearing panel concluded that Dr. Safari failed to accept and learn from mistakes or from peer review and criticized his attacks on the peer review process. Dr. Safari argues that much of this criticism was based on his alleged failure to learn from the S.V. case but he could not present evidence that "he was completely exonerated in the S.V. case after a full evidentiary hearing by the medical Board." He maintains that in the two years after the S.V. case there were no additional quality of care or behavioral issues. Furthermore, he maintains that there is no evidence that any of

these alleged behavioral problems impaired his ability to provide quality care.

The record needs to show “a demonstrable nexus between the [physician’s] ability to ‘work with’ others and the effect of that ability on the quality of patient care provided.” (*Miller v. Eisenhower Medical Center, supra*, 27 Cal.3d at p. 628 [the court held that a hospital bylaw requiring a physician applying for staff membership to have the “ ‘ability to *work with* others’ ” is not substantively irrational or arbitrary or otherwise violative of an applicant’s rights of fair procedure so long as there is a nexus between this requirement and the ability to provide quality patient care].) We therefore review the record to determine whether the evidence showed the required nexus with the quality of patient care to sustain Kaiser’s action as substantively rational.

Dr. Safari claims that after the 2006 JRC decision he was exonerated in the S.V. case, but the record does not show that he was “exonerated.” His experts opined that his care was reasonable but a number of experts expressed the opinion that the level of care he provided was substandard. As already noted, the Medical Board found that clear and convincing evidence to a reasonable certainty did not establish gross negligence, but such a finding did not “exonerate” him or establish that he could not have learned something from the S.V. case. The hearing panel had reason to be concerned that Dr. Safari continued to claim that he had done nothing wrong and would do nothing differently in a similar situation in the future despite this delivery resulting in the death of the baby and the opinion of some experts that his actions were inappropriate.

The hearing panel recognized that the cause of the baby’s death in the S.V. case was disputed, but it concluded: “Based on the JRC’s chilling description of the events that took place in the [S.V.] case, the [hearing panel] would expect Dr. Safari to be humbled by the experience and anxious to learn from it. This would be the case even if the ultimate cause of the baby’s death were open to dispute. Dr. Safari has exhibited no substantial insight regarding the shortcomings in his performance during that case.”

Dr. Safari’s defensive attitude was also noted by Dr. Norcross and Boal when Dr. Safari participated in the PACE program. Dr. Norcross and Boal commended Dr. Safari on his medical knowledge and clinical judgment but they noted that his “attitude during

his oral clinical exam” was not impressive. They noted that this attitude supported Kaiser Fresno’s concerns about Dr. Safari’s communication skills “ ‘for physicians, support staff and patients.’ ” Their evaluation of Dr. Safari after he participated in PACE supported a conclusion that his attitude would negatively impact the care he provided to patients.

Furthermore, the hearing panel did not rely exclusively on the S.V. case. The hearing panel heard evidence regarding another case that occurred in November 2007, after Dr. Safari’s “patient care management and lack of insight had been sharply criticized by the JRC in its Report upholding the restrictions.” This case involved a 23-year-old woman having her first baby. She had been given a diagnosis of type 2 diabetes mellitus (DM) in 2006. The hearing panel heard testimony from experts who believed the care provided by Dr. Safari was reasonable and from an expert who was critical of the care Dr. Safari provided. The hearing panel found that the care was not up to the standard reasonably expected of a perinatologist. The hearing panel stated that Dr. Safari did not “thoroughly” evaluate her record.

The hearing panel explained its concerns regarding the treatment of the woman in the case occurring in November 2007: “Although the patient was beyond the critical early pregnancy period of organogenesis when glucose control is particularly important, the [hearing panel] finds that Dr. Safari should have offered this patient admission as an option for obtaining faster sugar control and diabetes education. There is no record of his offering or recommending admission to this patient. Additionally, if Dr. Safari truly felt she had DM, and he did the glucola to prove it to her, it is unclear why he wanted to see her again in three weeks rather than contacting her within a few days with the results. It is also of concern that it was a week after the glucola before she was started on insulin. Moreover, she was started on a low dose. Dr. Safari could have, and should have, responded more quickly to the abnormal result and achieved better sugar control in a faster period of time. [¶] Finally, despite an ultrasound at 34 weeks showing a very large-for-gestational-age baby, Dr. Safari did not clearly spell out a delivery plan if the patient were to go into labor. . . . The [hearing panel] finds that he should have been more proactive at establishing a plan of care for his colleagues as he was not going to be

the delivering doctor.” The hearing panel concluded that it was “difficult to understand how Dr. Safari’s performance in [this case] could have demonstrated such poor decision making, documentation, and communication, given the intense scrutiny of his clinical practice.”

The hearing panel also explained the connection between Dr. Safari’s defensiveness and care of his patients. The hearing panel stated that it was “disturbed by Dr. Safari’s testimony that, after having done ultrasounds thousands of times on patients, to his knowledge: ‘I have not missed any case of oligohydramnios, and I don’t remember I missed anything in other case[.]’ ” The hearing panel observed that this was “highly implausible, and illustrate[d] the concern that Dr. Safari lacks insight into his fallibilities and [could] not be expected to acknowledge and learn from his mistakes.” In a footnote, the hearing panel noted that this was not the only instance during Dr. Safari’s testimony that he exhibited a refusal to acknowledge that he ever missed anything. The hearing panel wrote, “For example, he claimed that, since his training, he has not missed ‘anything’ on ultrasound He also claimed that, in ten years of experience, he has not ‘missed’ any cases in which his assessment of a patient’s stability was called into question by a nurse”

These findings explained that Dr. Safari’s poor communication skills and defensiveness impacted his care of his patients, and the findings cited specific testimony and documentary evidence supporting the hearing panel’s conclusions. We conclude that substantial evidence supported the hearing panel’s finding that “[i]t was, and is, foreseeable that a physician having the characteristics described [in the decision] will continue to have professional problems, and will not be able to provide patient care consistently meeting the Hospital’s reasonable needs and expectations.” Furthermore, Dr. Safari’s poor communication skills made “stressful situations even more stressful and discourag[ed nurses] from interaction[s] with him professionally.” As the hearing panel concluded, his personality and inability to work effectively with other physicians and staff had “an adverse impact, directly or indirectly, on patient care and safety in the hospital.”

VIII. Substantial Evidence in Support of the Summary Suspension

QHIC's summary suspension of Dr. Safari was not, according to Dr. Safari, supported by substantial evidence and therefore the hearing panel should not have concluded that this suspension was justified.

Section 809.5, subdivisions (a) provides that "a peer review body may immediately suspend or restrict clinical privileges of a licentiate where the failure to take that action may result in an imminent danger to the health of any individual, provided that the licentiate is subsequently provided with the notice and hearing rights set forth" in the statutes. Under subdivision (b) of section 809.5, "When no person authorized by the peer review body is available to summarily suspend or restrict clinical privileges under circumstances specified in subdivision (a), the governing body of an acute care hospital, or its designee, may immediately suspend a licentiate's clinical privileges if a failure to summarily suspend those privileges is likely to result in an imminent danger to the health of any individual, provided the governing body of the acute care hospital has, before the suspension, made reasonable attempts to contact the peer review body." (See *Sahlolbei v. Providence Healthcare, Inc.*, *supra*, 112 Cal.App.4th at p. 1149; *Hackethal v. Loma Linda Community Hosp. Corp.* (1979) 91 Cal.App.3d 59, 67.)

"In the context of patient care in the extraordinarily complex setting of a hospital, it is obvious that 'competence' is multi-dimensional. It includes not only medical knowledge and skill, but also a basic knowledge of the workings and needs of the institution and the ability to constructively interact with other healthcare providers in an institutional setting. . . . [S]ummary suspension would be warranted where a physician's behavior is sufficiently disruptive as to potentially jeopardize the flow of care to any patient anywhere in the hospital at any time." (*Jablonsky v. Sierra Kings Healthcare Dist.* (E.D.Cal. 2011) 798 F.Supp.2d 1148, 1154.) Moreover, section 809.5 "protects prospective as well as identified patients." (*Medical Staff of Sharp Memorial Hospital v. Superior Court*, *supra*, 121 Cal.App.4th at p. 182.)

The QHIC's 2008 summary suspension of Dr. Safari was based on the following: three cases referenced in the 2006 JRC decision; the determination that Dr. Safari seemed

incapable of learning from his mistakes; criticism of three of Dr. Safari's cases after Dr. Robinson, a specialist in maternal fetal medicine, reviewed all of his charts of hospital discharges from April 24, 2007, until December 31, 2007; and 10 cases that were criticized by Dr. Phelan, an outside expert, who reviewed 51 of Dr. Safari's cases from 2001 until 2007. The hearing panel considered evidence of 15 of the abovementioned 16 cases.

At the hearing, QHIC presented testimony from nine witnesses and Dr. Safari presented testimony from 21 witnesses. With regard to the three cases discussed in the 2006 JRC decision, which included the S.V. case, the hearing panel concluded that the findings in that decision were final because Dr. Safari did not appeal that decision. As already discussed, the hearing panel was obligated to accept the findings in this final decision.

The findings in the 2006 JRC decision supported a finding that Dr. Safari's judgment was questionable in all three cases and that the care was not appropriate. The hearing panel then detailed the evidence in support and in opposition in each of these cases and explained the basis for its conclusions.

With regard to the other cases, as already discussed, the hearing panel found the care lacking for a woman giving birth to twins in February 2004, and for a 25-year-old woman on January 25, 2005. It also found the care for a case occurring in November 2007, involving a 23-year-old woman having her first baby with the diagnosis of type 2 DM, "not up to the standard reasonably expected of a perinatologist." All three of these cases evinced poor documentation and a performance below what was expected for a specialist.

The hearing panel concluded regarding a case in January 2006 that "Dr. Safari's documentation of relevant facts and events was weak, and that his care in this case shows inadequate management of diabetes. He did not validate the accuracy of the patient's home testing blood sugar results; he did not consistently review her labs; and he did not attempt to gain more rapid control of her blood sugars by offering her admission. The

charges of proper and insufficient management of a diabetic patient, including failure to admit her or offer her admission for insulin and dietary therapy, were well substantiated.”

In the case of a 38-year-old woman in June 2007, who had a history of two previous caesarean sections, the hearing panel determined that the evidence showed that Dr. Safari “exhibited multiple instances of poor clinical judgment as a perinatologist in this case, most notably in failing to review the patient’s history and her medical records, failing to document an office sonogram, failing to perform and document a complete ultrasound on her when he saw her for a new diagnosis of oligohydramnios at 32 weeks in the hospital, and failing to consider the alternative etiologies of oligohydramnios.” The hearing panel concluded, “As a result of Dr. Safari’s deficiencies in evaluation, conclusions, and decisionmaking, this patient made an irreversible reproductive decision which she might not have made had she been counseled with different information.”

In the cases occurring in January 2006, May 2006, March 2007, and August 2007, the hearing panel found the evidence clearly supported deficient documentation, even though there was no or little support of the claim that Dr. Safari exercised poor judgment in the actual care of the patients in these cases. The hearing panel found no substantial concern about Dr. Safari’s performance in the cases occurring in August 2006, October 2006, and March 2007.

Thus, for only three of the 15 cases were there no problems with documentation or the care provided by Dr. Safari. The hearing panel supported its conclusions by making specific citations to the evidence, which included witnesses’ testimony and documents submitted. The documents included the external review of 51 of Dr. Safari’s cases from 2001 to 2007 by Dr. Phelan, a board-certified perinatologist and OB/GYN. This evidence clearly supported a finding that the lack of documentation in Dr. Safari’s cases, Dr. Safari’s attitude, and evidence of Dr. Safari’s poor judgment posed an “imminent danger to the health” of the patients.

Rather than present undisputed evidence contradicting the above findings, Dr. Safari maintains that the findings regarding the S.V. case were erroneous because he could not present his evidence contradicting the 2006 JRC decision and no individual

finding showed any serious problem. He also argues that he voluntarily took a medical-record-keeping course and therefore “it is simply not true that he made no effort to learn from his alleged documentation mistakes.”

Dr. Safari’s conclusory argument is not persuasive. As already discussed, the hearing panel properly considered the findings regarding the S.V. case. Furthermore, the fact that Dr. Safari participated in the PACE program did not show that he made an effort to learn from his mistakes, as Dr. Norcross and Boal wrote in their evaluation of Dr. Safari’s performance at the PACE program that they believed “that Dr. Safari is a bright physician who is medically competent to practice perinatology and obstetrics and gynecology, but could benefit from some type of behavioral counseling to help modify his behavior and attitude. . . .” Furthermore, “[e]ven a physician’s cooperation with corrective action imposed by a hospital does not, per se, prevent the hospital from acting to protect patients and does not undermine the medical staff’s determination that the physician was an imminent threat, as the public protection which is the subject of . . . section 809.5 ‘cannot be subordinated to the rehabilitative needs of an individual physician.’ ” (*Nesson v. Northern Inyo County Local Hospital Dist.* (2012) 204 Cal.App.4th 65, 82.)

Finally, Dr. Safari’s argument that there was no individual finding indicating a serious problem has no merit. As discussed above, the hearing panel found problems with his judgment in a number of cases, which supported a finding that his judgment and conduct could result “in an imminent danger to the health of” a patient at Kaiser. (See § 809.5, subd. (a).)

IX. The Hearing Panel’s Decision and Protected Activity

The final argument advanced by Dr. Safari is that the hearing panel unlawfully based its decision in part on protected activity. He complains that the hearing panel found that the evidence in support of Dr. Safari in the OB/GYN department was outweighed in part by “his tactic of reporting colleagues to the medical board or internal hospital authorities as a means of combating criticisms of his own performance” Dr. Safari states that he attempted to rebut this claim by presenting numerous exhibits but

these exhibits were excluded. He maintains that Kaiser was able to attack him for retaliating but he was unable to defend himself.

In his brief in this court, Dr. Safari provides one example of the evidence he was unable to submit. He was not permitted to submit an April 2009 letter that he wrote to the Kaiser board detailing serious violations of the standard of care by Doctor A. and Doctor B. that were never investigated by Kaiser. The hearing officer barred this evidence on the basis that Kaiser's argument did not focus on the merits of Dr. Safari's complaints but merely on the fact that he complained.

Dr. Safari asserts that the abovementioned evidentiary ruling violated Evidence Code section 356, as Kaiser's evidence and cross-examination of him created, according to Dr. Safari, a misleading impression and prevented the hearing panel from considering the full context of his complaints about other staff. Dr. Safari argues that the ruling was especially egregious because a health care provider's complaints about patient safety are protected activities and cannot be used as a ground for discipline against a physician under Health and Safety Code section 1278.5.

We can dispose of Dr. Safari's argument without addressing the merit of his argument that his evidence should not have been barred. Even if we were to presume that there was some error, Dr. Safari has completely failed to show prejudice.

"[T]he appellant bears the duty of spelling out . . . exactly how the error caused a miscarriage of justice." (*Paterno v. State of California* (1999) 74 Cal.App.4th 68, 106.) "No judgment shall be set aside . . . in any cause . . . for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." (Cal. Const., art. VI, § 13.) (See *Leal v. Gourley* (2002) 100 Cal.App.4th 963, 969.)

The hearing panel submitted a 24-page report that examined 15 of Dr. Safari's cases. It also reviewed the 2006 JRC decision, which analyzed three of Dr. Safari's cases. On one page of this report, the hearing panel stated: "Dr. Safari's inability to work effectively as a member of a coordinated health care team is also of considerable

concern. There is evidence that he has the support of a number of physicians and hospital staff members, but that evidence is outweighed by the evidence of his dismissive approach to input from nurses, making stressful situations even more stressful and discouraging them from interacting with him professionally . . . ; his anger and threatening demeanor . . . ; *his tactic of reporting colleagues to the Medical Board or internal hospital authorities as a means of combating criticisms of his own performance . . .* ; and his role as a main contributor to the historic dysfunctionality of his Department” (Italics added.) In a footnote, the hearing panel added: “Much of the evidence regarding these issues came from Dr. [B.] and Ms. Feigel, who were called by the [hearing panel], itself, and are considered credible witnesses. Of note, however, even one of Dr. Safari’s own witnesses, Ms. [Kim] Thurman, who had worked with him as a nurse since 1997 and was very supportive of him, saw the need to file a formal [human relations] complaint against him in 2004, when he acted in a threatening manner and she could not get away from him.”

Thus, one phrase in one sentence on one page of the 24-page report referred to the “protected activity” and the decision makes it clear that the conclusion that Dr. Safari was unable to work well with others was supported with ample evidence not related to the “protected activity.” Furthermore, the decision to terminate Dr. Safari’s privileges was not based simply on his inability to work with others, but also based on his inadequate medical performance, unsatisfactory clinical judgment, and inadequate documentation of cases. Accordingly, we conclude that any alleged error related to the consideration of Dr. Safari’s complaints about his colleagues and/his inability to present evidence to explain this behavior was harmless.

DISPOSITION

The judgment of the superior court denying the petition for writ of mandate is affirmed. Kaiser is entitled to recover costs on appeal.

Lambden, J.

We concur:

Haerle, Acting P.J.

Richman, J.