Buchalter

Health Care Newsletter

July 2019

Managing Problematic Hospital-Based Physicians in Light of *Economy v. Sutter East Bay Hospitals*

By: Karen George

Until recently, hospital-based medical groups frequently complied with a hospital's request to remove a physician without any restrictions. In light of a recent California Appellate Court decision, however, hospitals and medical groups need to be cautious when terminating a physician based on clinical decision-making. Physicians are now entitled to notice and a hearing in situations where a hospital requests a medical group to remove one of its physicians from the hospital's schedule for performance reasons.

In *Economy v. Sutter East Bay Hospitals*, Dr. Kenneth Economy, an anesthesiologist, was employed by East Bay Anesthesiology Medical Group ("East Bay Group"). East Bay Group held an exclusive contract to provide anesthesia services at Sutter East Bay Hospital and Alta Bates Summit Medical Center (collectively, "the hospital"). The contract requires every anesthesiologist who provides services at the hospital to be employed by East Bay Group. The contract further requires East Bay Group to develop and maintain an independent peer review process for its physicians. The contract also allows the hospital to remove from the schedule any physician who "performs an act or omission that jeopardizes the quality of care provided to hospital's patients."

In 2011, the California Department of Public Health conducted a survey and found that Dr. Economy was putting patients at risk through the deficient use of the drug Droperidol. This finding placed the hospital in "immediate jeopardy" until a written plan was prepared and accepted.

The hospital's vice president of medical affairs asked East Bay Group's president to suspend Dr. Economy from the anesthesia schedule. The hospital's anesthesia department peer review committee recommended requiring Dr. Economy to complete a continuing education course before he was allowed to return to practice at the hospital. Dr. Economy completed the course and returned to work.
Shortly after Dr. Economy returned to his practice, the hospital noticed further unacceptable errors and violations. Pursuant to the contract, the hospital asked East Bay Group to permanently remove Dr. Economy from the anesthesia schedule. The hospital explained that it was not comfortable with the quality of care provided by Dr. Economy, and would not approve schedules containing Dr. Economy. East Bay Group asked Dr. Economy to resign. When he refused, East Bay Group terminated his employment.

Dr. Economy sued the hospital, alleging the hospital violated his right to notice and a peer review hearing under California Business and Professions Code sections 805 and 809. The hospital argued that Dr. Economy's rights were never triggered because he was terminated by East Bay Group, rather than by the hospital. The court rejected this argument, and held that the hospital's decision not to approve anesthesia schedules on which Dr. Economy was included effectively directed East Bay Group to remove Dr. Economy from all schedules. The hospital's "request" that Dr. Economy be removed from the schedules was the

functional equivalent of revoking Dr. Economy's clinical privileges. The hospital's bylaws required such a decision to be made only by the medical executive committee, after notice and a hearing before its peer review committee. Since this did not occur, the court held that the hospital indeed violated Dr. Economy's rights.

The court further held that the hospital could not delegate its duties to East Bay Group pursuant to the contractual provision requiring East Bay Group to develop and maintain an independent peer review process for its physicians. The language in the agreement did not clearly state that the East Bay Group peer review committee is responsible for complying with section 805 and 809 of the Business and Professions Code. In addition, East Bay Group did not have any policies or procedures in place for the conduct of peer review.

The appellate court affirmed the doctor's $3.8 million award of damages for lost earnings and the award of an additional sum to offset the tax consequences of lump-sum award.

Takeaways

1. Managing hospital-based physicians who are problematic

- Hospitals should not request medical groups to remove a physician based on clinical-based reasons without providing the physician with prior notice and a hearing.
- The court focused on the removal of a physician for competency reasons, but did not address a hospital requesting a medical group to remove a physician for other reasons unrelated to the physician's medical competency.
- Contractual waiver of peer review is prohibited in cases where a physician's medical competency is at issue. While the court did not address whether a physician may voluntarily waive that right and resign, this may be an acceptable alternative in certain situations.
- Groups may want to inform problematic physicians of their options, including their willingness to voluntarily resign or proceed with peer review.
- There is a potential distinction between a simple request that a physician be removed from the schedule, rather than a demand. This case might have been decided differently if the hospital did not condition the approval of the schedule on the removal of the physician.

2. Exclusive contracts

- Consider adding contractual language regarding the removal of a physician from the schedule due to non-medical disciplinary reasons. For example, administrative decisions, or conduct that is contrary to the professionalism standards of the hospital and don't require peer review.
- The court found the medical group having its own peer review committee to be relevant, but noted that the exclusive contract did not articulate that the group's peer review committee would protect all of the rights guaranteed under sections 805 and 809. Medical groups may want to

consider having their own peer review committee, and include such language in the exclusive contract. Or, they may decide to leave it to the hospital's peer review process to mitigate risks.

Karen George is an Attorney of the Firm's HealthCare Practice Group.
She can be reached at 213.891.5083 or KGeorge@buchalter.com.