

2017 WL 5195507 (Cal.Super.) (Trial Order)  
Superior Court of California.  
Unlimited Jurisdiction  
San Francisco County

Lester JACOBSON, M.D., Plaintiff-Petitioner,

v.

CALIFORNIA PACIFIC MEDICAL CENTER, Defendant-Respondent.

No. CGC-15-546478.

April 20, 2017.

**Order Granting Petitioner Lester Jacobson, M.D.'s Motion for Peremptory Writ of Mandate**

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Harold Kahn, Judge.

\*1 Date Filed: June 22, 2015

Trial Date: April 17, 2017

This matter initially came before the Court for hearing on December 8, 2016. James M. Cooper of Kessenick, Gamma & Free, LLP appeared for Plaintiff-Petitioner, Lester B. Jacobson, M.D. ("Petitioner" or "Dr. Jacobson"). Glenda M. Zarbock of Hanson Bridgett LLP appeared for Defendant-Respondent Sutter West Boy Hospitals dba California Pacific Medical Center ("Respondent" or "CPMC"). The Honorable Harold E. Kahn presided. Evidence was presented by way of declaration, and argument made. At the hearing, both parties agreed that the Court could and should decide issues of fact in ruling on this matter. The matter was deemed submitted to the Court on December 8, 2016. While the petition was still under submission, Dr. Jacobson appeared before the Court with an ex parte application, the sum of which was that the Court allowed the introduction of supplemental evidence on the petition and the opportunity for both parties to file briefs on that evidence. On January 12, 2017, the Court vacated the submission to allow that to occur and placed it under submission again on January 31, 2017.

Having considered the pleadings, the file in this matter, including all briefs and submissions from the parties on Petitioner's Motion for Peremptory Writ of Mandate, and argument of counsel, the Court hereby **GRANTS** Dr. Jacobson's Petition for Writ of Mandate and **ORDERS** the issuance of a peremptory writ of mandate under Code of Civil Procedure § 1085 reinstating Dr. Jacobson to the faculty of CPMC's inpatient medicine teaching service.

**I. BACKGROUND**

Dr. Jacobson is a licensed physician who is board certified in internal medicine and cardiology. CPMC is a general acute care teaching hospital and the sponsoring institution for an internal medical residency program ("IMRP"). From 1975 to June 24, 2015, Dr. Jacobson served as a faculty member on both CPMC's internal medicine and cardiology teaching services, both of which are part of CPMC's IMRP. Dr. Jacobson would admit his patients with general medical problems

to the inpatient medicine teaching service and care for them as the attending physician of record with the assistance of CPMC's residents and interns.

In January 2015, CPMC notified Dr. Jacobson that he was being removed from the faculty of the inpatient medicine teaching service as of June 24, 2015. CPMC did not inform Dr. Jacobson that he was entitled to any type of hearing before removing him from the faculty of the inpatient medicine teaching service. On June 24, 2015, Dr. Jacobson was removed from the faculty of the inpatient medicine teaching service, having not received a hearing of any kind.

Dr. Jacobson challenges CPMC's removal of him from the faculty, asserting that he had a privilege or property right to serve on the faculty of the inpatient medicine teaching service, and that CPMC was therefore required to provide him with fair procedure before removing him from the teaching service. Dr. Jacobson contends that CPMC failed to provide him with fair procedure because (1) CPMC did not afford him a hearing before removing him; and (2) CPMC's decision to remove him was arbitrary and not substantively rational.

## II. DISCUSSION OF THE MERITS

### A. Dr. Jacobson's Privileges or Property Rights Under CPMC's Medical Staff Bylaws

\*2 The first issue this Court addresses is whether CPMC's medical staff bylaws give Dr. Jacobson a privilege or property right to be on the teaching faculty for the inpatient medicine teaching service. The Court has determined, in its role as trial judge entitled to resolve disputed facts, that the bylaws do not give Dr. Jacobson such a right or privilege. The Court concludes that the bylaws are ambiguous on this point, particularly with reference to their language about delineation on forms, but all the evidence shows that hospital personnel have treated the ability to be on the faculty of the residency program as separate from a privilege in the staff bylaws.

### B. Dr. Jacobson's Privileges or Property Rights Under the Business and Professions Code

The next issue this Court addresses is whether Dr. Jacobson has a privilege or property right to be on the teaching faculty for the inpatient medicine teaching service under Business and Professions Code Section 805 *et seq.* Section 805(a)(4) defines "staff privileges" as follows:

"Staff privileges" means any arrangement under which a licentiate is allowed to practice in or provide care for patients in a health facility. Those arrangements shall include, but are not limited to, full staff privileges, active staff privileges, limited staff privileges, auxiliary staff privileges, provisional staff privileges, temporary staff privileges, courtesy staff privileges, locum tenens arrangements, and contractual arrangements to provide professional services, including, but not limited to, arrangements to provide outpatient services.

The Court concludes that Section 805 *et seq.*, when interpreted as a whole, cannot be fairly interpreted as providing a staff or clinical privilege to be on the teaching faculty of the inpatient medicine teaching service. If that were true, Section 809.2 would provide a panoply of procedural protections where there has been only a diminishment of a physician's ability to admit and attend to the physician's patients, which the Court finds was not the intent of the legislature. The Court finds it was not the intent of the legislature to do anything other than state that what has been determined by the hospital, through bylaws or through just the normal course of conduct that's subject to peer review, as the extent of staff and clinical privileges as defined in Section 805.

### C. Dr. Jacobson's Privilege or Property Rights Under The Common Law

The Court next considers whether Dr. Jacobson had a property interest in his service as a member of the teaching faculty for the inpatient teaching service under the common law.

The Court concludes that the principal case addressing this issue is *Bergeron v. Desert Hospital Corporation*, 221 Cal. App. 3d 146 (Cal. Ct. App. 1990). In *Bergeron*, the hospital's action, removal of a physician from the hospital's emergency room call roster, resulted in less than a full curtailment of the physician's ability to admit and attend to patients. It was only certain patients that could not be attended to, namely emergency on-call patients. The *Bergeron* court held that the physician's participation on the hospital's emergency room call roster was a property right that could not be revoked without notice and a hearing, because his participation was a "substantial benefit to him" and "directly related to the pursuit of his livelihood." *Id.* at 150-152.

The Court concludes that *Bergeron* is analogous here, and that the effort by CPMC to distinguish that case is not successful. Under the facts as the Court finds them, Dr. Jacobson has a property interest under *Bergeron*. Dr. Jacobson derived substantial benefit from his membership on the teaching faculty of the inpatient teaching service and his membership is directly related to the pursuit of his livelihood. Dr. Jacobson has practiced as a member of the faculty of the inpatient teaching service, using the resources of the residents, to the benefit of the residents, his patients, and himself. The substantial benefit to Dr. Jacobson was primarily monetary. The costs credits the evidence that Dr. Jacobson has lost opportunity \$100,000. Prior to his removal, Dr. Jacobson had the ability to fashion his practice such that he was able to see, visit, treat, and bill for treatment of patients admitted to the inpatient medicine teaching service. As a result of no longer being on the faculty, while he technically had the ability to see, visit, treat, and bill for treatment of inpatients, that ability was seriously hampered in a way that made it infeasible for Dr. Jacobson to continue to do so. In short, it was infeasible for Dr. Jacobson to continue to care for inpatients outside of the teaching service, and this inability to care for inpatients caused a substantial loss of income.

\*3 Under these circumstances, Dr. Jacobson (but not necessarily everybody) has a property right in his membership on the faculty of the inpatient medicine teaching service under the *Bergeron* case.

#### **D. Dr. Jacobson Was Not Removed From the Faculty As Part of a Quasi-Legislative Decision**

The Court next addresses the applicability of the line of cases addressing the need for fair procedure where quasi-legislative conduct or actions are taken. *See Major v. Memorial Hospitals Assn.*, 71 Cal. App. 4th 1390 (Cal. Ct. App. 1999). The specific question is whether, despite the fact that Dr. Jacobson has a right under the *Bergeron* case for fair procedure, that right was nevertheless validly taken away without fair procedure because it was part of a quasi-legislative action.

The Court finds that there is no factual basis to conclude that Dr. Jacobson's right was taken away as part of a quasi-legislative action. The Court finds that CPMC's January 2015 decision that Dr. Jacobson would no longer be a part of the teaching faculty for the inpatient medicine teaching service as of June 24, 2015 was a single decision as to a single physician. CPMC's removal of other non-hospitalist physicians before January 2015 does not turn the decision to exclude Dr. Jacobson into a quasi-legislative action. The great majority of non-hospitalist physicians had ceased to be on the teaching faculty well before January 2015, and most before Dr. Edson assumed the role of program director. To the extent there was a restructuring, that restructuring had taken place de facto, if not by actual written policy, well before the decision was made to exclude Dr. Jacobson. By the time CPMC decided to remove Dr. Jacobson, there was no longer a restructuring; there was an individual decision that was made. There were only two non-hospitalists left and the question was, essentially, "What do we do with Dr. Jacobson?" The Court, having read the case law on quasi-legislative decisions and reviewing the record in this case, finds that CPMC's decision to remove Dr. Jacobson from the teaching service was not a quasi-legislative decision; rather, the decision was an adjudicative decision as to only Dr. Jacobson.

**E. Requiring Fair Procedure Is Not Inconsistent with the ACGME  
Accreditation Guidelines (Copper Declaration Exhibit X)**

The next question that the Court addresses is what effect, if any, the accreditation rules have on Dr. Jacobson's fair procedure common law right to process before he would be no longer a part of the inpatient teaching service of the IMRP. The Court interprets the ACGME guidelines as not inconsistent with imposing a fair procedure right. The guidelines give Dr. Edson, or whoever is the current program director of the IMRP, the right to determine continued participation of faculty, but nothing in them is inconsistent with the common law of California imposing procedural requirements before someone who has been a long-standing member of the teaching faculty can be removed from that teaching faculty. Furthermore, there is nothing in the guidelines that suggests the decision was to be an unfettered decision, *i.e.*, that it was entirely for Dr. Edson or whoever is the current incumbent program director at CPMC, to make that decision without any input from anybody else. The Court finds that, in this case, there was input here from others before the decision to remove Dr. Jacobson from the faculty was made, as well as after the fact. The decision was at least partially reviewed by Dr. Browner, Dr. Wiviott, and Dr. Giang.

\*4 The bottom line is that many decisions are subject to procedural rights, but the decisions are still accorded to one person or one entity to make that decision. Making such a determination, which CPMC must respect because it needs accreditation of its residency program, does not in any way preclude the imposition of fair procedure rights. Nor does it in any way reduce the ability of a decision maker, such as Dr. Edson, from carrying out what he believes in his judgment to be in the best interest of the residency program. Nor does it unfairly curtail the sponsoring institution here, CPMC.

**F. Nature of Hearing Required Before Removal from the Teaching Service**

Neither Dr. Jacobson's petition, nor his second cause of action for fair procedure, seeks a determination of what the hearing before removal from the faculty from the teaching service must look like. However, this is a very important issue. The Court will not go too far in addressing an issue that was neither briefed nor argued in depth by the parties. However, in the Court's view, the hearing that is required does not necessarily have to be coextensive with the hearing and other rights set forth in Business and Professions Code Sections 805, 809.2, and related statutes. The hearing may be something short of that, as long as it affords fairness.

The Court notes that it did a nationwide search and could not find a single case as to the rights, if any, procedural or substantive, of faculty members on a residency program. There were, of course, many cases about the rights of residents and cases are split. But the majority appears to say that there are substantial property and liberty interests at stake for residents. That's even noted in the accreditation rules, where it says that the program has to respect all of the due process-like rights of residents. If a program has to respect the due process-like rights of residents, there is no reason why it should not respect the due process-like rights of more senior physicians, such as Dr. Jacobson, who have developed reliance and derived substantial benefit from being on the faculty of the inpatient teaching service.

**G. CPMC Did Not Afford Dr. Jacobson A Fair Hearing Before Removing Him From the Teaching Service**

In addition to finding that Dr. Jacobson had a property right to be on the teaching faculty of the inpatient medicine teaching service under the common law and was entitled to a fair hearing before he could be removed from the faculty, the Court finds that Dr. Jacobson was not afforded a fair hearing by CPMC before he was removed from the faculty and is therefore entitled to reinstatement.

Because the Court has already concluded that Dr. Jacobson's petition should be granted based on CPMC's failure to afford Dr. Jacobson a fair hearing, the Court need not reach and explicitly does not rule on the second ground in the

petition, which argues that the decision by Dr. Edson to terminate Dr. Jacobson from the inpatient teaching faculty was irrational or substantively outside the scope of fair procedure.

#### H. Effect of Court's Ruling On Petition

Dr. Jacobson's action is a combined action for both a petition for writ of mandate and a complaint bringing three causes of action: (1) the First Cause of Action is for retaliation in violation of Health and Safety Code § 1278.5; (2) the Second Cause of Action is for violation of fair procedure; and (3) the Third Cause of Action is for violation of the unfair competition law (Business and Profession Code § 17200 et seq).

The Court's ruling on the petition resolves the issue of liability with respect to Dr. Jacobson's Second Cause of Action for violation of fair procedure, but issues related to the relief available to Dr. Jacobson beyond reinstatement, such as the measure of damages, remain for trial.

### III. CONCLUSIONS

\*5 Based upon the foregoing, it is hereby **ORDERED, ADJUDGED, and DECREED** that:

1. Dr. Jacobson's Petition for Writ of Mandate is **GRANTED**. Let a peremptory writ of mandate under Code Civ. Proc. § 1085 issue commanding Respondent to:

- a. Set aside its decision to remove Dr. Jacobson from the faculty of the inpatient medicine teaching service.
  - b. Immediately reinstate Dr. Jacobson as a member of the faculty of the inpatient medicine teaching service, with all rights and privileges that he enjoyed prior to June 2015.
2. Respondent shall file a return on the writ within 45 days of its issuance.
3. Petitioner is ordered to prepare a Writ of Mandate consistent with the Court's ruling in this case.

Date: 4/20/17

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JUDGE OF THE SUPERIOR COURT

HAROLD KAHN