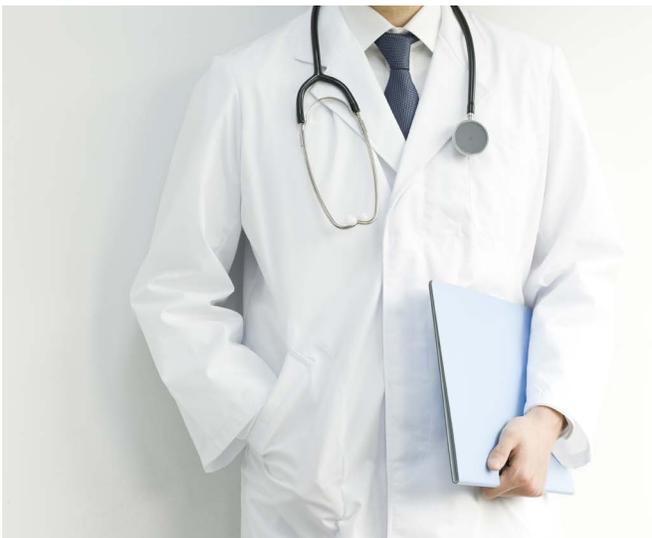


What to Expect From a Medical Staff Hearing

by Lori C. Ferguson



Hanson Bridgett Health Care Practice Group
HANSONBRIDGETT.COM

Medical staff hearings occur relatively infrequently. But when circumstances warrant a hearing, medical staff professionals should know what to expect. Medical staff bylaws and hospital policies may provide various hearing rights for physicians and other health care professionals. This article, however, discusses the general framework of the process when a hearing is required because an action mandates a report to the practitioner's licensing board pursuant to California Business and Professions Code Section 805.

Sections 809.1 through 809.6 of the Business and Professions Code set forth the minimum necessary elements of such hearings. Medical staff bylaws and other written policies and procedures may expand on or provide detail to that structure. The medical staff professional should be familiar with both the minimum statutory requirements and the bylaws provisions and hearing policies. Since any missteps in the hearing process can have undesired consequences for both the practitioner and the medical staff, medical staff counsel should be consulted as soon as it appears that an action or recommendation may trigger hearing rights.

Written Notices

Once an action has been taken or recommendation made that triggers hearing rights (referred to as the "final proposed action" in the Business and Professions Code), the practitioner must be informed in writing of the action or recommendation. By statute, the written notice must (1) identify the final proposed action, (2) advise the practitioner that the proposed action, if taken, will be reported pursuant to Section 805, (3) advise the practitioner of the right to request a hearing on the final proposed action, and (4) specify the time limit within which the practitioner may request a hearing. The notice should advise the practitioner of the logistics of making the hearing request – where and to whom to send it and any other requirements, as

set forth in the bylaws or hearing policy. It is advisable to provide the practitioner a copy of the current bylaws and policies that bear on hearing rights.

If the practitioner makes a timely request for a hearing, the practitioner is entitled to another written notice, often called the “statement of charges.” Bylaws and hearing policies often establish particular timelines for sending the statement of charges and may specify various information to include in this notice. By statute, it must at least state (1) the reasons for the final proposed action taken or recommended, including the acts or omissions with which the licentiate is charged, and (2) the place, time, and date of the hearing. Since the notice of charges is used as the framework for the issues to be proved at the hearing, it is important for the notice of charges to be accurate and complete.

Right to Counsel

The Business and Professions Code requires peer review bodies to adopt written provisions governing whether a practitioner will have the right to be represented by an attorney at the practitioner’s own expense during a peer review hearing. If the practitioner may not be represented by counsel or chooses not to be represented by counsel during the hearing, then the peer review body also may not be represented by an attorney at the hearing.

The Trier of Fact

The hearing itself must be held before a trier of fact. The trier of fact may be one or more arbitrators selected by a process mutually acceptable to the licentiate and the peer review body or a panel of unbiased individuals, often called the “judicial review committee” or “hearing panel.” The members of the hearing panel may not be in a position to gain direct financial benefit from the outcome of the proceeding and must not have acted as an accuser, investigator, factfinder, or initial decisionmaker in the same matter. The Business and Professions Code states that, where feasible, the judicial review committee should include an individual practicing the same specialty as the practitioner under review. Consult the bylaws to determine what person or peer review body may appoint the panel members (often the chief of staff or medical executive committee). The practitioner will have a right to conduct voir dire, which means to question the panel members to assess potential bias. The practitioner may object to inclusion of certain panel members if they appear to be biased or otherwise unqualified to serve.

The Hearing Officer

Although the Business and Professions Code does not require use of a hearing officer, hearing officers typically preside over the proceedings. The bylaws will guide the medical staff regarding the appointment of a hearing officer. The officer may gain no direct financial benefit from the outcome, may not act as a prosecuting officer or advocate, and is not entitled to vote. The hearing officer should not be someone who represents the hospital in other matters on a regular basis. The practitioner may question the hearing officer (conduct voir dire) and may object to the hearing officer on grounds of impartiality.

Exchange of Information

Before the hearing can proceed on the merits of the issue, there will usually be an exchange of documents and other information. The statute gives both the practitioner and the peer review body the right to inspect and copy

any documentary information relevant to the charges if that information is in the other's possession or control. Not all documents are available for disclosure, however. For example, the parties are not entitled to confidential information referring solely to individually identifiable licentiates other than the licentiate under review. If disputes about the exchange of information arise, the arbitrator or hearing officer will decide what information must be disclosed and what safeguards may be imposed to protect the peer review process. The hearing officer may postpone the hearing if the parties do not exchange requested documents at least thirty days before the hearing.

Prior to the hearing, the parties may exchange lists of witnesses expected to testify and copies of all documents expected to be introduced at the hearing. Medical staff bylaws may establish procedures and timelines in connection with the exchange of this information. By statute, failure to exchange witness lists and exhibits at least ten days before the hearing could be grounds to postpone the hearing.

The Hearing

The Business and Professions Code requires the hearing to begin within sixty days after receipt of the request for hearing, but the parties frequently agree to waive this deadline because of issues that need to be addressed before the hearing can begin.

Once the evidentiary portion of the hearing begins, the procedure is much like a trial. Usually the parties are given an opportunity to make an opening statement, and then they present their evidence. The parties have a right to see all the evidence presented to the trier of fact, to call and cross-examine witnesses, and to present and rebut relevant evidence. The parties have a right to have a record made of the proceedings, often through use of a court reporter.

Because practicing physicians or other practitioners usually comprise hearing panels, hearings often take place in the evenings for several hours at a time. Depending on the complexity of the issues, medical staff hearings can require multiple sessions to complete, and scheduling them can be difficult and time consuming. It is not uncommon for a medical staff hearing to span several months.

Once all the evidence is presented, the parties may be given an opportunity to make oral closing statements. By statute, the parties have a right to submit a written statement at the close of the hearing.

The Decision

After all the evidence is in and closing statements have been submitted, the trier of fact deliberates and reaches a decision. This process may take some time, and the bylaws may establish timeframes for the trier of fact to reach a decision. By statute, the parties are entitled to a written decision that includes findings of fact and conclusions. The decision should articulate the connection between the evidence produced at the hearing and the decision reached.

The Appeal

The Business and Professions Code does not require an appeal mechanism. But if an appeal process exists, the parties are entitled to a written explanation of the procedure for appealing the decision. Any appeal mechanism must at least allow each party to appear and respond, be represented by an attorney or any other representative designated by the party, and receive a written decision of the appellate body.

Medical staff hearings are not common occurrences for most medical staffs, and no two medical staff hearings are alike. But medical staff professionals can be prepared by understanding the basic framework of medical staff hearings.

For more info, please contact:



Lori C. Ferguson

Partner

Direct Phone: (916) 551-2813

lferguson@hansonbridgett.com

SAN FRANCISCO

425 Market Street, 26th floor

San Francisco, CA 94105

TEL 415-777-3200

FAX 415-541-9366

NORTH BAY

Wood Island

80 E. Sir Francis Drake Blvd., Ste. 3E

Larkspur, CA 94939

TEL 415-925-8400

TEL 707-546-9000

FAX 415-925-8409

SACRAMENTO

500 Capitol Mall, Ste. 1500

Sacramento, CA 95814

TEL 916-442-3333

FAX 916-442-2348

SILICON VALLEY

950 Tower Lane, Ste. 925

Foster City, CA 94404

TEL 650-349-4440

FAX 650-349-4443

EAST BAY

1676 N. California Blvd., Ste. 620

Walnut Creek, CA 94596

TEL 925-746-8460

FAX 925-746-8490