Due Process and Fair Hearing Rights

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Why is there due process?

Due process protects practitioners from being unfairly denied the right to practice in a certain facility.

• A practitioner, even though not a hospital employee, is entitled to practice in a hospital provided the practitioner meets objectively reasonable criteria (R.C. 3701.351)

• So long as a hospital relies upon objectively reasonable criteria and provides the practitioner with procedural due process, a court will not interfere with a hospital’s decision that a practitioner should (or should not) practice at the hospital.
Corrective Action Process

INFORMAL
- Identify Concerns
- PRC Review

FORMAL
- MEC Review
- Fair Hearing Process
- Board Action
Corrective Action Process: Formal Process

- MEC Reviews Concern
- MEC Conducts Investigation
- MEC Recommends Action and Alerts Practitioner
- Fair Hearing Process (if applicable)
- Appeal Process (if applicable)
- Board Action

FORMAL
MEC Investigation Process

• Investigation can be done by entire MEC or an ad hoc committee appointed by the MEC
  • Members should be in good standing and not have conflicts.
  • Ad hoc committee should include a practitioner in the same specialty (if possible).
  • Can choose a practitioner from another hospital, if he/she is willing to participate.

• Practitioner is provided notice of the investigation and has an opportunity to provide information.
MEC Investigation Considerations

- If the issue is quality of care, have you taken steps to assure your internal review is reliable? Do you need an external review?
- If the issue is disruption or behavior, have you sufficiently documented the concerns? Has the practitioner behavioral intervention process at the facility been followed?
MEC Recommendation

- MEC has any and all available remediation options
- One of those options is summary suspension, when appropriate
  - Goes into effect prior to exercise or waiver of fair hearing rights
  - Can only be imposed by designated individuals/committees (e.g., Medical Staff President, CEO, MEC, chair of Board of Directors, or Board of Directors)
- MEC’s decision may trigger fair hearing rights.
- MEC reports its decision to the practitioner.
Corrective Action Process: Formal Process

MEC Reviews Concern

MEC Conducts Investigation

MEC Recommends Action and Alerts Practitioner

Fair Hearing Process (if applicable)

Appeal Process (if applicable)

Board Action

FORMAL
<table>
<thead>
<tr>
<th>No right to fair hearing</th>
<th>Right to Fair Hearing</th>
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<tbody>
<tr>
<td>• Oral or written reprimand/warning</td>
<td>• Denial/termination of appointments with privileges</td>
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<td>• Denial/modification/suspension/termination of emergency privileges or appointments without privileges (except active category)</td>
<td>• Denial/termination of reappointment with privileges</td>
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<td>• FPPE (as long as no limitation on previously exercised privileges)</td>
<td>• Denial/termination of active medical staff appointment/reappointment without privileges</td>
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<td>• Automatic suspensions/terminations</td>
<td>• Certain restrictions on privileges imposed by MEC for more than X days (e.g., involuntary proctoring)</td>
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<td>• Voluntary agreements not to exercise/relinquish privileges (unrelated to professional competence)</td>
<td>• Suspensions of X or more days (varies by facility)</td>
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<td>• Suspensions of less than X days (varies by facility)</td>
<td>• Involuntary reduction of existing privileges (for X days or longer)</td>
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<td>• Ineligibility for appointment/reappointment because of an exclusive contract, closure of a service, or employment termination</td>
<td>• Denial of reinstatement of appointment and privileges after a leave of absence, or imposition of modifications of privileges or conditions of reinstatement (if a report to the NPDB is required)</td>
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**The above are based on the Medical Staff governing documents. Some rights may vary by facility**
Health Care Quality Improvement Act of 1986 (HCQIA)

1. Reasonable belief that the action was in furtherance of quality care

2. After a reasonable effort to obtain the facts of the matter

3. After adequate notice and hearing procedures or such other procedures as are fair to the practitioner under the circumstances

4. In the reasonable belief that the action was warranted by the facts known after such reasonable effort to obtain facts and after meeting the requirements of paragraph (3).
Fair Hearings: Resemble a court proceeding

- Hearing officer or a panel of individuals presides over the case.
- Physician and a representative of the Medical Staff attend.
- Physician brings his/her attorney.
- An attorney from the Office of the General Counsel and often an outside counsel represent the medical staff.
- A court reporter is present and records the proceedings.
- Evidence is presented.
- Objections are made.
- The hearing officer or hearing panel provides a written decision at the conclusion of the proceedings, outlining the reasoning.
Fair Hearing Process: What governs this process?

- Process is governed by the medical staff governing documents.
- Generally, the Medical Staff’s fair hearing manual sets forth the specific procedures that must be followed in preparing for and conducting a fair hearing.

**FOLLOWING THESE PROCEDURES IS ESSENTIAL!**

- Why are procedures so important? Because courts will generally not substitute their judgment for the judgment of practitioners who followed the procedures and were unbiased in their decisions.
What is the role of a peer reviewer in a fair hearing?

- Peer review administrative staff assist with collecting background documents.
- Hospital attorneys and external counsel assist with preparing for the hearing and answering questions about what to expect.
- Physician:
  - answers questions related to his/her clinical review.
  - discusses what his/her findings were.
  - provides the rationale for his/her determination.
- There is generally no dialogue between the physician under review and the peer reviewer.
- Questions are posed by the hospital’s attorney, the involved physician’s attorney, and the hearing panel/officer.
Corrective Action Process: Formal Process

1. MEC Reviews Concern
2. MEC Conducts Investigation
3. MEC Recommends Action and Alerts Practitioner
4. Fair Hearing Process (if applicable)
5. Appeal Process (if applicable)
6. Board Action
Appeal Process

• Practitioner has right to appeal the fair hearing decision.
• Process and timing of appeal process is set forth in the Medical Staff governing documents.
• Appellate Review Committee (in many cases the OhioHealth Quality of Care Committee) hears the appeal.
• Appeal Statements are provided by both sides.
• Committee may allow oral statements by each side.
• Committee enters a final decision.
Corrective Action Process: Formal Process

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Board of Directors Action

- Within X days after receipt of a recommendation, the Board (Quality of Care Committee) issues a decision.
- The Board’s decision, when final, is immediately effective and a notice is sent to the practitioner.
- Following issuance of a final decision, reports may need to be made to the NPDB and/or the State Medical Board.
After the final decision...

- A practitioner may decide to litigate the matter if he/she is not happy with the final decision made by the Board.
- Physician entitled to a reasonable investigation, not a perfect investigation.
- Courts will not substitute judgment of the medical staff or governing body or reweigh evidence.
- The key is to follow the procedure delineated in the Medical Staff bylaws and ensure that the process is free from bias and conflicts of interest.
- Further, proper record keeping is essential because it is the basis for demonstrating that the processes were followed and the decisions were reasonable.
So if there is litigation, what is my liability?

• HCQIA provides good faith immunity from state and federal liability for persons participating in the peer review process. Federal courts have applied this many times.

• Peer review decisions are considered part of internal quality improvement processes, which further affirms the protections afforded under HCQIA.

• Medical staff bylaws provide indemnification for participation in peer review (including the fair hearing process).

• OhioHealth provides insurance for participants and handles the litigation process for peer review participants.

• These protections exist as long as confidentiality is maintained and Practitioners participate in good faith and without malice.
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GRADY MEMORIAL HOSPITAL + DUBLIN METHODIST HOSPITAL + DOCTORS HOSPITAL–NELSONVILLE
HARDIN MEMORIAL HOSPITAL + MARION GENERAL HOSPITAL + REHABILITATION HOSPITAL + O’BLENESS HOSPITAL
MEDCENTRAL MANSFIELD HOSPITAL + MEDCENTRAL SHELBY HOSPITAL + WESTERVILLE MEDICAL CAMPUS
HEALTH AND SURGERY CENTERS + PRIMARY AND SPECIALTY CARE + URGENT CARE + WELLNESS
HOSPICE + HOME CARE + 28,000 PHYSICIANS, ASSOCIATES & VOLUNTEERS