Tips for Successful Medical Staff Hearings

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Steven Mansfield Shaber

Few events are more distasteful to both hospitals and medical staff leaders than hotly contested medical staff hearings. They often challenge medical staff's goal of fostering collegiality and hospitals' cultivation of trust and good relations with their physicians. Let's begin with three observations.

- Everyone hates medical staff fair hearings.
- When it comes to fair hearings, actions the medical executive committee (MEC) takes that adversely affect the hearing almost always happen before the hearing begins.
- Physicians often come out better at a hearing than the MEC had recommended; hearing panels often disagree, at least in part, with the MEC's desired corrective action.

If the third observation is true, then many hearings should have been avoided. If the second observation is true, then many hearings where the physician wins could have been avoided. Finally, if the first observation is true – and it surely is – whenever a hearing can be avoided, everyone will be happier.

We hope that this article will facilitate the happiness of all parties by helping them to avoid unnecessary hearings.

What is the first thing to remember? Staff fair hearings are rare. Even the state's largest hospitals go years between one hearing and another. Small hospitals may go a couple of decades without a hearing. This means that typically no one at a hospital is particularly expert when it comes to preparing for and running a hearing, and many people are novices. Of all the parties to the hearing, the medical staff's rotating physician leadership is most likely to be inexperienced.

There is an easy remedy for inexperience: think ahead and prepare accordingly. Assume the matter will go to a fair hearing, and plan from the start for that eventuality.

Gather the whole story. Most staff hearings take the form of an appeal from the medical executive committee's decision to take adverse action against a physician. Most staff bylaws say the MEC decision is presumptively correct, and the burden is on the physician to prove the MEC had no reasonable basis for its decision.

Hearing panels dislike this presumption against the physician, and they will find a way around it unless they are convinced the MEC actually heard all the evidence about the case. On at least one level, this attitude makes sense. Why would a hearing panel of physicians defer to the MEC, when the panel believes it knows more about the case

than the MEC did?

The solution is to be sure the MEC has gathered the whole story before it takes corrective action. Gathering the whole story means talking to everyone who is involved – not only those who do not support the physician, but those who support him or her. It means knowing whether potential witnesses are willing to testify under oath at a hearing. It means documenting what everyone says in enough detail so the MEC gets the story in the words of the witnesses, not just in the words of the investigators.

Beware of bias. The people complaining about the physician may have a bias that needs to be recognized and considered in evaluating their credibility, well before the MEC takes corrective action and the case heads toward a hearing. Complaints come from many sources, and every complainant may have several motives: partners fall out; specialists and primary care physicians quarrel; nurses and physicians clash; competing specialists vie for business; and administrators and departments look out for their staffs and their own. The MEC should identify these problems and take them into account from the beginning, because the hearing panel certainly will learn about them if the case ever comes to a hearing.

Talk to the doctor. It is impossible to gather the whole story without hearing from the physician who is the subject of the investigation, in person and in detail. Yet the MEC often does not make this contact, and, instead, either relies on the physician's written statement or on what it perceives as the "incontrovertible facts of the case." The problem with only receiving the physician's account in writing is that it leaves unanswered questions the MEC may have – and there are always questions. The problem with relying on the so-called "incontrovertible" facts is they often do not tell the MEC what it needs to know about the physician's attitude. Two physicians may make the same serious error, but each may deserve different corrective action if each has a different attitude toward the events. One physician may have learned from the situation and may be trusted to avoid such problems in the future. The other may have learned nothing and cannot be trusted. The best way to judge the physician's attitude is to talk face-to-face.

Be sure there is a connection to good medicine. The federal Health Care Quality Improvement Act protects everyone involved in a staff fair hearing from personal liability if they act in the good-faith belief that their actions promote quality health care. Consequently, it is important to ask from the beginning to the end of this process, have the physician's actions impinged on good health care, and does the proposed corrective action promote it? Do not start on a course that may lead to a hearing unless you can say the physician's actions either have, or most likely would, seriously interfere with good health care at the hospital. The hearing panel will certainly ask this question.

Step back and be sure of your case. The MEC probably should not take action that will lead to a hearing unless it is confident it will win. A good way to test that confidence is to ask whether the medical staff would win the hearing (and the physician lose), even if the burden were on the staff to prove that all the events occurred, there were no extenuating circumstances, and the proposed corrective action is precisely warranted by the errors committed. This is not to say that from a legal perspective, the burden is on the medical staff. Rather, the MEC's acting as if the burden

were always on the staff builds in an extra layer of assurance that the hearing panel will see things the same way.

Conclusion. These suggestions come to a single point. If the MEC puts itself in the shoes of the hearing panel and is doubly careful before it starts any sort of corrective action that could lead to a hearing, it will be less likely to start such serious corrective action. Moreover, if and when the MEC starts such corrective action, it will be better able to prove to a hearing panel that the corrective action was needed. As a way to avoid unnecessary hearings, we believe that this is the road to happiness.

301 Fayetteville St., Suite 1900, Raleigh, NC 27601/P.O. Box 1801, Raleigh, NC 27602-1801 P: 919.783.6400 F: 919.783.1075