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Hospital Appeal Board

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DECISION NO. 2017-HA-001(a)

In the matter of an appeal under section 46 of the *Hospital Appeal Act*, R.S.B.C. 1996, c. 200

BETWEEN:	Margaret Guillen	**APPELLANT**
AND:	Island Health Authority	**RESPONDENT**
BEFORE:	A panel of the Hospital Appeal Board, David Perry, Chair	
DATE:	Conducted by way of written submissions concluding on November 15, 2017	
APPEARING:	For the Appellant: Jennifer Millbank, Counsel For the Respondent: Penny Washington, Counsel	

BACKGROUND

[1] Margaret Guillen has brought an appeal to the Hospital Appeal Board (the "HAB") against a decision of Island Health Authority ("Island Health") refusing to grant her hospital privileges to practice midwifery at Nanaimo Regional General Hospital.

[2] On November 30, 2016, Island Health commenced a competitive process to recruit and offer hospital privileges to two midwives. On December 07, 2016, Ms. Guillen submitted her resume and a letter expressing interest in applying for hospital privileges.

[3] Thirteen candidates applied for the two vacancies, and Ms. Guillen was among five candidates shortlisted for interviews. The selection committee eventually invited two "preferred candidates" to complete application packages which were submitted to the Island Health Board for its consideration.

[4] The selection committee did not select Ms. Guillen as one of the "preferred candidates". Her application was not submitted to the Island Health Board, and the Board never reviewed nor considered any materials from her.

[5] Ms. Guillen says that on February 21, 2017, she was informed by telephone that her application for privileges was unsuccessful. She says she has not received notification in writing.

[6] In its response to Ms. Guillen's Notice of Appeal, Island Health raises an initial issue of whether the HAB has jurisdiction to hear this Appeal. Island Health says that the HAB lacks jurisdiction because the letter and resume submitted by Ms. Guillen was not an "application" under s. 46(1)(b) of the *Hospital Act*, RSBC 1996 c. 200 (the "*Act*").

[7] Ms. Guillen concedes the issue of jurisdiction is appropriate to be determined as a preliminary matter, and the Board has so ordered. The Board finds that the issue of jurisdiction is one of mixed law and fact, but that the affidavits submitted by the parties lay out a sufficient evidentiary foundation to determine the issue on a preliminary basis without the necessity of oral submissions.

[8] The parties provided the HAB with preliminary written submissions, and the record concerning the jurisdictional issue closed November 15, 2017.

[9] With respect to remedy, in her notice of Appeal Ms. Guillen asks that the HAB "*review the substance of this decision*". The Respondent's position is that if the HAB finds it has the jurisdiction to hear this appeal, the only remedy available to Ms. Guillen is an order directing the Island Health Board to provide her with a decision on her application. In her submissions on jurisdiction Ms. Guillen maintains that even though she is appealing under s. 46(1)(b) of the *Act*, because of its *de novo* powers the HAB has the ability to "*receive the necessary evidence and to make a decision to issue a permit*".

RELEVANT LEGISLATION

[10] The Board's jurisdiction to hear this appeal is contained in ss. 46(1)-(3.2) of the *Act*:

> *Hospital Appeal Board*
>
> **46** (1) The Hospital Appeal Board, consisting of the members appointed under subsection (4), is continued for the purpose of providing practitioners appeals from
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> (a)a decision of a board of management that modifies, refuses, suspends, revokes or fails to renew a practitioner's permit to practise in a hospital, or
>
> (b)the failure or refusal of a board of management to consider and decide on an application for a permit.
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> (1.1) and (1.2)[Repealed 2004-45-102.]
>
> (2) The Hospital Appeal Board may affirm, vary, reverse or substitute its own decision for that of a board of management on the terms and conditions it considers appropriate.
>
> (2.1) A practitioner may appeal to the Hospital Appeal Board if
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> (a)the practitioner is dissatisfied with the decision of a hospital's board, or
>
> (b)a hospital's board fails to notify the practitioner of its decision within the prescribed time.

(2.2) A practitioner who wishes to appeal under subsection (2.1) is not required to first proceed by way of an application to the hospital's board.

(2.3) An appeal to the Hospital Appeal Board is a new hearing.

(3) The Hospital Appeal Board has exclusive jurisdiction to inquire into, hear and determine all those matters and questions of fact, law and discretion arising or required to be determined in an appeal under this section and to make any order permitted to be made.

(3.1) A decision or order of the Hospital Appeal Board under this Act on a matter in respect of which the Hospital Appeal Board has exclusive jurisdiction is final and conclusive and is not open to question or review in any court.

(3.2) A practitioner who wishes to appeal under subsection (2.1) must deliver the notice of appeal

(a) if the appeal concerns a board's decision under subsection (2.1) (a), not later than 90 days after the date that the board caused a notice of its decision to be sent to the practitioner, or

(b) if the appeal concerns a board's decision under subsection (2.1) (b), not later than 210 days after the date that the practitioner applied for a permit in the prescribed manner.

ISSUE

[11] The issue is quite narrow – is the letter of interest submitted by Ms. Guillen an "application" pursuant to s. 46(1)(b) of the *Act*, and has the Island Health Board failed to notify her of their decision pursuant to s. 46(2.1)(b)?

[12] Following from this – what remedy, if any, should the HAB grant if it has jurisdiction to hear the appeal?

DISCUSSION AND ANALYSIS

[13] Island Health's position is that an "application" under the *Act* and s. 8 of the *Hospital Act Regulation,* BC Reg. 121/97 (the "*Regulation*"), consists of a comprehensive package as required under s. 4.1 and 4.2 of the Medical Staff Bylaws for the Vancouver Island Health Authority (the "Bylaws"). Article four of the Bylaws outlines the procedure for application for appointment to the medical staff as follows:

Article 4 – APPOINTMENT AND REVIEW PROCEDURES

4.1 Procedure for Appointment

4.1.1 Applicants who express in writing the intention to apply for appointment to the medical staff must be provided with a copy of the *Hospital Act* and the *Regulations* and a copy of the medical staff Bylaws and Rules.

4.1.2 Applicants for appointment to the medical staff must submit to the office of the CEO one original written application on a specified form together with the documents and information detailed in section 4.1.3.

4.1.3 Each completed application must contain:

.1 a statement that the applicant has read the *Hospital Act* and the *Regulations*, and the Bylaws and Rules of the medical staff;

.2 an undertaking that, if appointed to the medical staff, the applicant will be governed in accordance with the requirements set out in the Bylaws, Rules, and policies of the medial staff, as established by the Board of Directors and the Health Authority Medical Advisory Committee from time to time;

.3 an undertaking that, if appointed to the medical staff, the applicant will participate in the discharge of medical staff obligations applicable to the membership category to which he/she is assigned;

.4 an agreement to accept committee assignments and such other reasonable duties and responsibilities as shall be assigned to the member;

.5 evidence of current membership in CMPA or in an organization with professional liability insurance in the category appropriate to the practice of the member of the medical staff, which is subject to approval by the Board of Directors;

.6 a list of privileges requested;

.7 an up-to-date curriculum vitae;

.8 the names of a minimum of three professional referees whom the Vancouver Island Health Authority can contact, one of whom shall be the Chief of Staff or Senior Medical Administrator of the organization in which the applicant has most recently worked (and/or the Post Graduate Program Director, in the case of an applicant who has recently completed post graduate training).

.9 information on any civil suit relating to the applicant's professional practice where there was a finding of negligence or battery, or where a monetary settlement was made on behalf of the applicant;

.10 information on any physical or mental impairment or health condition that affects, or may affect, the proper exercise by the applicant of the necessary skill, ability and judgment to deliver appropriate patient care;

.11 a signed consent authorizing the Board of Directors to obtain:

- a Certificate of Professional Conduct from the College of Physicians and Surgeons of B.C., the College of Dental Surgeons of B.C., or the College of Midwives of B.C.;
- in the case of an applicant from outside B.C., a Certificate of Professional Conduct from the licensing body under whose jurisdiction the applicant was practising and a letter from the appropriate B.C. College confirming eligibility for a license;
- reports on any action taken by a College disciplinary committee;
- reports on privileges that have been curtailed or cancelled by any medical, dental, or midwifery licensing authority or by any hospital or facility because of incompetence, negligence or any act of professional misconduct.

4.1.4 In cases where, under special or urgent circumstances, temporary medical staff privileges are required, the CEO may, in consultation with the Senior Medical Administrator, grant such appointments with specific conditions, and for a designated purpose and period of time. These appointments must be ratified or terminated by the Board of Directors as its next meeting.

4.2 Burden of Providing Information

4.2.1 The applicant shall have the burden of producing adequate information for a proper evaluation of his/her competence, character, ethical conduct, and other qualifications.

4.2.2 Until the applicant has provided all the information requested by the Vancouver Island Health Authority, the application for appointment will be deemed incomplete and will not be processed. If the requested information is not provided within 60 days, the application is deemed withdrawn.

4.2.3 The applicant shall notify the Vancouver Island Health Authority in writing in the event that additional information relevant to the application becomes available after the initial application form was completed.

[14] This same objection has been raised by health authorities in past appeals. However, the HAB has not ruled on this specifically, as appellants in the past have simply requested a “complete application” from the health authority and submitted it (see *Butler v Vancouver Coastal Health Authority*, Decision No. 2015-HA-003(a))

[15] However, in this case although Ms. Guillen requested and was provided a complete application, she advised through her counsel at a pre-hearing conference before the HAB that she has not yet decided to submit a more fulsome application

than the letter of interest and attached resume she provided to the selection committee.

[16] As a result, the issue comes to be decided as a matter of first instance. Does an "application" include any attempt by a medical practitioner to signal his or her interest in obtaining privileges, or is an "application" limited to the very comprehensive complete application as specified in the Bylaws?

[17] It is obvious that the letter of interest submitted by Ms. Guillen lacks most of the criteria required in a complete application. Island Health says that its Board is not required to consider any application that is not "complete", and, in fact, a selection committee does not even have to provide the complete application package to practitioners who have replied to a posting seeking to award hospital privileges unless they have been short-listed. In other words, only preferred candidates are allowed to submit a complete application, and only complete applications are referred to the Board. Island Health argues that as in this case, unsuccessful "applicants" can simply be rejected by a representative of the selection committee, and their applications need never be submitted to the Board for consideration. As a result, Island Health maintains s. 46(1)(b) of the *Act* is not engaged as Ms. Guillen has never submitted a complete application.

[18] Health authorities have statutory power under s. 56 of the *Act* and ss. 4 and 5 of the *Regulation* to enact medical bylaws. The Bylaws in the present case, which flesh out the requirements for a complete application, are a valid exercise of that authority. However, Ms. Guillen submits that the Bylaws are subordinate legislation and must be consistent with the *Act,* citing *Yu et al v British Columbia (Attorney General),* 2003 BCSC 1869, which held (at para 68[1]):

> ...In determining whether impugned subordinate legislation has been enacted in conformity with the terms of the parent statutory provision, it is essential to ascertain the scope of the mandate conferred by Parliament, having regard to the purpose(s) or objects(s) of the enactment as a whole. The test of conformity with the Act is not satisfied merely by showing that the delegate stayed within the literal (and often broad) terminology of the enabling provision when making subordinate legislation. The power-conferring language must be taken to be qualified by the overriding requirement that the subordinate legislation accord with the purposes and objects of the parent enactment read as a whole.

[19] Island Health says the detailed criteria in the complete application are essential to make a proper evaluation of candidates for privileges. They say that their statutory obligation to "*seek the best possible candidates to meet the needs of each of its local sites and the communities they serve*" means that it is a reasonable and necessary prerequisite before referring an application to the Board that a complete application be submitted.

[20] The difficulty with this argument is that the *Act* does not provide a definition of "application". I find that Ms. Guillen is correct in her submissions that subordinate legislation must be consistent with the parent legislation. It is not apparent to me that "application" is limited to "complete application", and I find

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[1] Quoting *Waddell v Schreyer* (1983), 5 DLR (4th), 254 (BCSC), at 271 and 272.

that a clear expression of interest in obtaining hospital privileges is sufficient to engage s. 46(1)(b) of the *Act*.

[21] This is not to say that the requirements of a complete application are unnecessary. In fact, they appear to be prudent and reasonable.

[22] Island Health submits a form of floodgates argument saying if any casual expression of interest in privileges is an application then the Board of Management will be overwhelmed by trivial and unqualified applications. I do not agree. If a practitioner seeks privileges it is reasonable for the Board to rely on a selection committee to interview, screen and rank candidates. However, this does not mean that unsuccessful candidates cannot be presented to the Board with a negative recommendation. This may not be necessary in all cases, but, whereas here, an applicant has specially requested that the Board consider her letter which says "*I am applying for full-time admitting privileges*", it is a simple matter to bring the application to the attention of the Board with a recommendation (presumably) not to offer her privileges.

[23] Island Health also says that every unsuccessful applicant would have a right of appeal if a simple letter of interest is an "application". I agree that is the result of this decision, but disagree that this is a realistic concern. It is already the case that even unsolicited applications that are rejected create a right of appeal (*Walker v Fraser Health Authority*, 2013-HA-003(a)). However, the problem Island Health has identified is in the wording of the *Act*. Had the Legislature intended to restrict appeal rights as submitted by Island Health, they could have easily said so in s. 46. It is not apparent that a health authority can deprive unsuccessful applicants of appeal rights for its own administrative convenience.

[24] Island Health's manager of credentialing and recruitment outlines in her affidavit dated October 23, 2017, that she provided Ms. Guillen with a complete application on September 29, 2017. In her affidavit dated November 8, 2017, Ms. Guillen acknowledges that she was provided with the application. However, Ms. Guillen has apparently never completed the requirements of the package, and is content to rely on her bare-bones letter of interest.

[25] As an alternative argument to its main position that Ms. Guillen did not submit an "application", Island Health argues that the recommendation from the selection committee to reject Ms. Guillen's application was a "decision of a hospital's Board" under s. 46(2.1)(a), and therefore her appeal is time barred. This cannot be correct. Her application was never put before the Board. Only the recommended candidates were put to the Board. If the selection committee has delegated authority to reject applications, would Island Health accept that they also have delegated authority to accept applications? Given the importance of medical staffing issues this would be an absurdity.

[26] Island Health also argues that a recommendation from a selection committee is a purely advisory decision and not subject to an appeal to the HAB, citing *Pratt v. Fraser Health Authority,* 2007 BCSC 1731 ("Pratt"). In fact, *Pratt* dealt with an application for judicial review of a committee recommendation, not a decision of the HAB. The Court held it would undermine the appeal process to the HAB if it

intervened and found that committee recommendations were a "*statutory power of decision*" pursuant to the *Judicial Review Procedure Act*, RSBC 1996, c. 241.

[27] What is being appealed in this case is not the selection committee's recommendation, it is the failure of the Board to ever consider Ms. Guillen's application.

DECISION AND ORDER

[28] For the reasons outlined above, I find that Ms. Guillen's letter of interest and resume amounted to an "application" under s. 46(1)(b) of the *Act*. I further find that because the Island Health Board never considered her application, they failed to notify her of their decision regarding her application within the prescribed time pursuant to s. 46(2.1)(b). I therefore find that the HAB has jurisdiction over this appeal.

[29] The parties disagree as to the scope of the HAB's remedial authority under s. 46(1)(b) of the *Act*, and therefore an issue is raised about how the HAB should proceed in this appeal.

[30] The Respondent maintains that the HAB's authority extends only to ordering the Island Health Board to provide Ms. Guillen with a decision on her application. Ms. Guillen maintains that the HAB's *de novo* powers permit it to consider the issue of her application for privileges afresh and make a substantive decision.

[31] Neither party provided fulsome argument on this issue. Therefore, I order that by **October 10, 2018** the parties provide the HAB, and each other, with written submissions outlining their positions on the issue of the scope of the remedial authority of the HAB under s. 46(1)(b) of the *Act*; in other words, in fashioning a remedy in the present case is the HAB limited to ordering the Respondent to consider Ms. Guillen's application and provide her with a decision? If either party wishes a right of Reply, it shall be due **October 17, 2018**.

"David Perry"

David Perry
Chair, Hospital Appeal Board

September 26, 2018