Hospital Appeal Board

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DECISION NO. 2017-HA-001(b)

In the matter of an appeal under section 46 of the *Hospital Appeal Act*, RSBC 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 October 17, 2018	
APPEARING:	For the Appellant: Jennifer Millbank, Counsel For the Respondent: Penny Washington, Counsel	

BACKGROUND

[1] This is the second preliminary decision made in the appeal brought by Margaret Guillen against the Vancouver Island health Authority ("Island Health"). The appeal was commenced following a competitive selection process to retain two midwives for the Nanaimo General Hospital. Ms. Guillen was an unsuccessful candidate.

[2] Ms. Guillen brought this appeal to the Hospital Appeal Board (the "HAB") by way of notice of appeal dated June 14, 2017.

[3] In its response to Ms. Guillen's Notice of Appeal, Island Health raised a preliminary question of jurisdiction. Island Health submitted that the letter of application with enclosed resume that Ms. Guillen submitted to a competitive process to offer hospital privileges to midwives was not an "application" as defined in section 46 of the *Hospital Act* (the "Act").

[4] In Decision No. 2017-HA-001(a), the HAB determined that the letter of interest submitted by Ms. Guillen was an application as defined under the Act, and accordingly the HAB had authority to hear the appeal.

[5] Following its decision to accept jurisdiction, the HAB requested that the parties provide further submissions on the scope of the remedy that can be granted by the HAB.

[6] Island Health says that as the appeal was brought pursuant to section 46(1)(b), the remedy available to Ms. Guillen is restricted to an order that the board of management of Island Health issue reasons in writing for its decision with respect to Ms. Guillen's application for hospital privileges.

[7] Ms. Guillen submits that as the HAB has jurisdiction de novo and can make any decision that Island Health could make, the matter should proceed to a full hearing on the merits to determine whether or not she should be granted hospital privileges.

[8] In her original Notice of Appeal Ms. Guillen relied upon section 46(2.1)(b), saying that the health authority had failed to notify her of its decision. Further, in her submissions on jurisdiction, Ms. Guillen said explicitly that she was not appealing pursuant to section 46(1)(a) of the Act.

[9] In her submissions on the appropriate remedy following the HAB's acceptance of jurisdiction, Ms. Guillen now says that the "phone call of February 21, 2017 constituted notice of the board's decision [...] with respect to the application for privileges made by Ms. Guillen on December 7, 2016".

[10] In the reasons accepting jurisdiction I found that the Island Health Board of Directors had not made a decision, and that Ms. Guillen had restricted the grounds of her appeal to section 46(2.1)(b), i.e. that Island Health had failed to notify her of its decision.

[11] The Act provides two different paths for an appeal as follows:

> 46 (1) The Hospital Appeal Board, consisting of the members appointed under subsection (4), is continued for the purpose of providing practitioners appeals from
>
> > (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.

[12] Section 46(1)(a) refers to a decision of a board of management that affects a practitioner's privileges, whereas section 46(1)(b) refers to a failure or refusal of a board of management to consider and "decide" on an application.

[13] The two different subsections distinguish appeals of a "decision" from appeals where there has been a failure to make a decision.

[14] The two types of appeal are mirrored in section 46(2.1)(a) and (b) as follows:

> (2.1) A practitioner may appeal to the Hospital Appeal Board if
>
> > (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.

[15] Subparagraph (a) addresses the situation where the board of management has made a "decision". Subparagraph (b) addresses the situation where the board of management has failed to notify a practitioner of its decision.

[16] This parallel structure between the basis for the HAB's authority in section 46(1) and the grounds of appeal in section 46(2.1) suggests that the remedy the HAB can grant is limited by the type of appeal. In appeals where there has been a decision of the board of management the HAB can substitute its own decision. Where there has not been a decision, or there has been a failure to communicate a decision, the remedy is to remit the matter to the board of management and require it to make a decision and communicate it to the practitioner.

[17] Although Ms. Guillen initially submitted that there has been no decision by the board of management and that her appeal was restricted to an appeal against a failure to make a decision, she now says that the telephone call from a member of the selection committee appointed to evaluate and recommend successful candidates to the board of management was in fact a "decision" of the board of management.

[18] I will treat this as an alternative submission.

[19] First, dealing with this alternative submission, I do not accept that a delegated selection committee can make a "decision" of the board of management, particularly in such important circumstances as the granting of hospital privileges to practitioners. The selection Committee must make many operational decisions in the course of designing the recruitment process: setting out criteria for evaluating candidates, contacting references, interviewing and assessing candidates and finally making recommendations to the board of management.

[20] It is clear from the structure of the Act, the *Hospital Act Regulation* (the "Regulation"), the medical staff bylaws and the rules, that a decision of the board is one that is made following proper consideration at a meeting of the board of management. It is noteworthy that s. 46(1)(b) allows appeals when the board of management has failed to "consider" and "decide".

[21] It is unclear whether the board of management even has the jurisdiction to delegate its power of decision to an employee. In section 3 of the Regulation, the board of management has authority to delegate "power to exercise the functions of the board" to an administrator. For purposes of granting hospital privileges, section 8 of the Regulation sets out a detailed timeline for duties of the administrator and the board of management. Nowhere in that process is there provision for the power to make a "decision" to be delegated to anyone other than the administrator.

[22] A modern health authority consists of hundreds, if not thousands, of staff making administrative and managerial decisions every day. All of these decisions are made in some sense by the board of management, as they must recruit, instruct and oversee very large bureaucracies. The board of management is ultimately responsible for the myriad of decisions made by their staff. That does not mean that every one of these decisions, whether or not the effect is to affect hospital privileges, is a "decision" of the board of management.

[23] In addition, section 8 of the regulations requires that a decision of the board of management be in writing. All parties concede that the notification to Ms. Guillen in this case was made by telephone from a member of the selection committee.

[24] I am satisfied that there has not been a decision of the board of management in this case as defined in section 46 of the Act.

[25] Incidentally, I note that section 46(3.2)(a) of the Act imposes a limitation of 90 days following communication of a decision to a practitioner to bring an appeal. If the February 21, 2017 telephone call was a "decision", the appeal should have been brought by May 22, 2017. In fact it was brought June 14, 2017. If I am wrong in finding the telephone call was not a decision, this appeal is statute barred in any event.

[26] This leaves consideration of the potential remedy available to Ms. Guillen.

[27] She argues that because the HAB has de novo powers and because she has already been found to have made an application, the HAB can now step into the shoes of the board of management and make a decision, as of first instance, whether or not she should be granted privileges.

[28] The structure of section 46 suggests that there are two types of appeals. There are appeals where practitioner's privileges have been modified or refused, and there are appeals where the board of management has neglected or refused to either make a decision or communicate their decision to the applicant. It is clear that what has occurred in the present appeal is that an application was received by the selection committee and was never submitted to the board of management.

[29] Although Island Health was formerly of the view that it did not need to consider Ms. Guillen's expression of interest because it was not a complete application, the HAB has found that Ms. Guillen's expression of interest which said in effect "I am applying for hospital privileges", amounted to an application for privileges. Therefore, the board of management must now consider Ms. Guillen's application and make a decision.

[30] Ms. Guillen says that the HAB can "affirm, vary, reverse, or substitute its own decision for that of a board of management", quoting from section 46(2) of the Act. She then says that although the board either failed to make a decision and/or failed to make this decision in writing, the finding that she has made an application is enough to transfer jurisdiction over granting her privileges from the board of management to the HAB.

[31] The difficulty with this position is that section 46(2) assumes that the board of management has in fact made a decision. In this case I find that the Island Health has not made a decision at the board level, and that the appeal must rest on a failure or refusal to consider the application. The practitioner in this case can only appeal based on a failure to provide her with decision within the prescribed time.

[32] The prescribed time has been defined in section 8 of the Regulation to be within 120 days after the administrator's receipt of the application.

[33] There was no evidence led in this case whether the telephone notification to Ms. Guillen was ever brought to the attention of the administrator outside of the present appeal.

[34] I find that the only remedy available to Ms. Guillen in the circumstances is for the HAB to order that Island Health provide her with a decision in writing within 120 days of the date of these reasons.

[35] I have made this ruling based on my interpretation of the Act and the Regulation. However, there are also strong practical reasons for requiring that the board of management make the decision at first instance.

[36] Both parties have raised the issue of whether there is a need for further midwifery services within the Island Health Authority. It would be of great assistance for the HAB hearing a potential appeal based on need to have the analysis of Island Health already prepared. It would also be of assistance to Ms. Guillen in deciding whether or not to appeal, and if she does proceed, what evidence she would need to call.

[37] There is also the question of whether, should the HAB find that there is a need, Ms. Guillen is the appropriate candidate. Island Health has raised issues of competence. As was set out in the first preliminary decision, Ms. Guillen has provided very little information in support of her application. Notably, she has elected to not satisfy the extensive requirements for documentation of references and competence set out in the in Article 4 of the Medical Staff Bylaws. These requirements are, as I found before, prudent and reasonable. If Ms. Guillen did proceed with a further appeal, would references, representatives from the College, prior employers and co-workers all be required to testify? This would be a burdensome and impractical procedure for a candidate search.

[38] Should the HAB entertain this application for privileges as a decision-maker of first instance, it would of necessity have to hear from witnesses as to Ms. Guillen's competence, her qualifications, and if there is consideration of other candidates, her relative abilities compared to those of the other candidates. Contrary to the submission of Ms. Guillen that it would be most efficient for the matter to proceed to a hearing on the merits without being considered by the board of management, in fact, this would require perhaps dozens of witnesses to appear under oath in order to determine such matters as whether or not Ms. Guillen is qualified to practice, whether there have been any complaints against her from patients, or what coworkers and supervisors have to say about her from prior employment.

[39] I note in passing that Ms. Guillen argues that the bylaws should not apply to a prospective candidate, but only to someone who already has privileges. I reject this submission. Island Health is required by statute to draft bylaws to address, among other topics, the recruitment and retention of medical practitioners. If Island Health is operating within their statutory duty, clearly any applicant can be compelled to satisfy the screening criteria before being granted privileges.

[40] Having already found that Ms. Guillen has made an application, I now hold that her only remedy is that the board of management be compelled to provide her with written reasons regarding whether or not they accept or reject her application.

[41] In her submissions on remedy, Ms. Guillen said that should the matter be returned to the board of management, she could simply bring a new appeal. I agree that she may well have a right of appeal after issuance of that decision, but given the passage of time since the original selection process, the board of management is the body best suited to evaluate whether or not there is a need in the community for a further provision of midwife services at their hospital, whether or not Ms. Guillen is the appropriate candidate or even whether she ought to have been selected in the competitive recruitment process. Following that rigorous evaluation and selection process, should Ms. Guillen choose to exercise her rights (if any) of appeal, a sufficient record will have been created to allow any future panel hearing the matter to evaluate her appeal with sufficient evidentiary basis.

[42] I order Island Health to provide its written decision on Ms. Guillen's application for hospital privileges within 120 days of the date of these reasons.

"David Perry"

David Perry
Chair, Hospital Appeal Board

November 16, 2018