BRITISH COLUMBIA

Hospital Appeal Board

Fourth Floor, 747 Fort Street
Victoria BC V8W 3E9
Telephone: (250) 387-3464
Facsimile: (250) 356-9923

Mailing Address:
PO Box 9425 Stn Prov Govt
Victoria BC V8W 9V1

Website: www.hab.gov.bc.ca
Email: hab@gov.bc.ca

DECISION NO. 2017-HA-002(a)

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

BETWEEN:	Dr. Paul Sanghera	**APPELLANT**
AND:	Vancouver Coastal Health Authority	**RESPONDENT**
AND:	Dr. N	**THIRD PARTY**
BEFORE:	A Panel of the Hospital Appeal Board, David Perry, Chair	
DATE:	Conducted by way of written submissions concluding on November 10, 2017	
APPEARING:	For the Appellant:	Brent Windwick, Q.C., Counsel
	For the Respondent:	Penny Washington, Counsel
	For the Third Party:	Kimberly J. Jakeman, Counsel

BACKGROUND

[1] Dr. Sanghera ("Dr. S." or the "Appellant") appeals the decision of the Vancouver Coastal Health Authority ("VCHA") Board of Directors to appoint Dr. N. as a member of the provisional medical staff in the Vancouver Acute Department of Ophthalmology at Vancouver General Hospital. His notice of appeal alleges that the selection was unfair and biased, and he seeks an order from the Hospital Appeal Board ("HAB" or "Board") appointing him to the medical staff of VCHA with hospital privileges.

[2] The appointment was made following a lengthy selection process which resulted in a selection committee ranking three candidates. Dr. N. was ranked first, another practitioner was ranked second and Dr. S. was ranked third.

PRELIMINARY ISSUE

[3] VCHA has raised a preliminary question of jurisdiction regarding whether the HAB has the authority under the *Hospital Act*[1] to appoint Dr. S. in place of Dr. N., which would effectively remove Dr. N's privileges. Dr. S. has sought this remedy, or, in the alternative, that he be granted privileges in addition to Dr. N.

[4] Dr. N. was given notice of the appeal by VCHA at the request of the Board. Dr. N. applied for third-party privileges and was granted standing by the HAB on October 13, 2017.

[5] VCHA and Dr. N. say that appointing Dr. Sanghera in place of Dr. N. is outside the jurisdiction of the HAB. Dr. Sanghera disagrees. However, all three parties agree that this preliminary issue of jurisdiction is a pure question of law, and must be determined prior to the main hearing on the merits. I agree that the matter can be determined without an evidentiary foundation. I also agree that when the issue is a question of jurisdiction, it must be determined prior to the main hearing. [2]

LEGAL JURISDICTION

[6] The parties all rely on section 46 of the *Hospital Act*, which states, in part:

> 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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> (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.
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> (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

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[1] *Hospital Act*, RSBC 1996, c. 200.
[2] *Sorokan v. Fraser Health Authority*, 2014-HA-002(b).

> 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.

PARTIES' POSITIONS

[7] The issue of the scope of the Board's authority to displace a practitioner holding privileges appears to be one of first instance, both in British Columbia and Canada.

[8] VCHA and Dr. N. cite *Parton v. Greater Victoria Hospital Society*[3], a 1992 decision of the Medical Appeal Board. In particular, VCHA and Dr. N draw attention to the following language: "*We are not capable of judging whether Dr. S. should or should not have been appointed, nor will we attempt a task which is not in our mandate. We have no power to remove his privileges and would not wish to do so in any case.*"[4]

Appellant

[9] The Appellant correctly notes this statement is obiter dicta as the finding was not necessary to the disposition of that appeal. Nevertheless, it appears to be the only time a privileges appeal body has even commented on the issue, and warrants some consideration.

[10] The Appellant says the HAB has *de novo* powers, and can substitute its decision for any decision of VCHA. VCHA made the decision to appoint Dr. N. instead of Dr. S., and if the HAB has authority to substitute its own decision, it follows that the HAB could make an alternative appointment; namely Dr. S. instead of Dr. N. It is the Appellant's position that the power to displace an incumbent practitioner exists by "necessary implication" from the wording of the *Hospital Act*[5].

[11] The Appellant further says that the HAB should consider the appointment as of the date it was made, in April 2017. He submits that he will lead evidence that the selection process was biased and the HAB should, as a result, substitute its own decision and grant him privileges. Dr. Sanghera submits that if he is unsuccessful on the argument that there is need for an additional Ophthalmologist at VGH, then it would unduly restrict the scope of his remedies to deny him the right to claim

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[3] *Parton v. Greater Victoria Hospital Society*, Medical Appeal Board Decision (July 21, 1992) [*Parton*].
[4] *Parton* at p. 16.
[5] Appellant submissions at para. 16, citing: *ATCO Gas and Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, [2006] SCJ No 4, [2006] 1 SCR 140 at paras 36-37.

privileges even if the result would be to remove those privileges from the incumbent Dr. N.

[12] The Appellant relies on the "selection grievance" cases arising from arbitration of collective agreements in a unionized setting. In those cases it is permissible, in restricted circumstances, for an arbitrator to appoint a grievor to a position even if the result is to remove an incumbent. [6]

Respondent and Third Party

[13] VCHA argues that the Appellant has no right to appeal at all in this case, as only practitioners with existing privileges can appeal under section 46(1)(a). VCHA says the appeal of rights of practitioners without existing privileges that have unsuccessfully applied for privileges are restricted to s. 46(1)(b), where a hospital authority has failed or refused to consider an application.

[14] VCHA says that as VCHA did dispose of Dr. S's application, the *Hospital Act* does not provide him with a ground for appeal. It submits that considered correctly, the appeal remedy sought, namely replacing Dr. N. with Dr. S., is not a proper appeal of Dr. S's rejection, but rather an impermissible appeal of the appointment of Dr. N., which Dr. S. lacks legislative authority to bring.

[15] VCHA takes the position that the HAB does not have unfettered jurisdiction to grant or remove privileges. It says the HAB, like VCHA, is governed by the *Hospital Act*, the Regulation and the Medical Staff Bylaws and Rules. VCHA says the only authority to remove privileges under these instruments is for discipline, loss of licence or upon twelve months' notice. [7]

[16] Dr. N. says it is beyond the HAB's jurisdiction to remove his privileges in the absence of explicit authority in the *Hospital Act*, and there is no basis for inferring such jurisdiction in these circumstances. Dr. N. also relies upon *Parton*, and says, in contrast to the Appellant's position that *Parton* should be distinguished because the third-party physician did not have standing, it is immaterial in that case that the incumbent practitioner had not been granted third-party standing.

[17] Dr. N. points out that he is not an appellant in the present case, and argues that he should therefore be "insulated by the remedial powers of the HAB given its own mandate under s. 46 of the *Hospital Act*." [8]

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[6] Appellant Submissions at para 35, citing: David M. Beatty et al, Canadian Labour Arbitration, 4th ed, (Toronto: Thomson Reuters Canada, 2006, loose-leaf) [Canadian Labour Arbitration], ch 6:3100, online: WestlawNext Canada (date accessed September 29, 2017), citing: *Great Atlantic and Pacific Co. of Canada Ltd*. (1976), 11 LAC (2d) 291 (Brendt), quashed 76 CLLC 14,056 at pp.334-5 sub nom. *Canadian Food & Allied Workers Union, Local 175 v Great Atlantic &Pacific Co. of Canada Ltd*. (Ont Dv Ct), leave to appeal to CA refused 13 LAC (2d) 211n.

[7] Respondent Submissions at para 27.

[8] Dr. N. Submissions at para. 27.

ANALYSIS

[18] I agree the appropriate section of the *Hospital Act* to consider in the present case is s.46, which outlines the limits of appeals and grants the HAB de novo powers.

[19] In contrast to the Appellant's position, I do not find the selection grievance authorities helpful in my determination of the present matter. These cases deal with grievances in a collective agreement where the criteria are very explicit and the discretion of management to appoint unqualified or less senior union members is curtailed. VCHA correctly argues that in this case practitioners are independent contractors and the hospital authority has broad jurisdiction to appoint the candidate of its choice subject to the legislation, Rules and Bylaws. Members of a collective bargaining unit accept their union as an exclusive bargaining agent and also accept that seniority rights may cause them to be rejected for promotions. There is no question that neither the Appellant nor Dr. N. has accepted these restrictions on their right to apply for privileges.

[20] However, VCHA has advanced what in my view is an unduly restrictive interpretation of s. 46(1). It is apparent that there is a right to appeal a "refusal" of privileges. Nowhere in the *Hospital Act* is a refusal made to apply only to holders of existing privileges. The referral in s. 46(1)(b) to "application for a permit" does not narrow the right to appeal in s. 46(1)(a). Rather, it creates another ground of appeal which allows an applicant to have his application heard in a timely manner, not just wither on the vine.

[21] I also find unpersuasive that this appeal should be characterized as appealing Dr. N's privileges. The Appellant appeals the refusal of his privileges. He asserts that should there be insufficient resources to permit additional privileges for him, it would be unjust to deny him his primary remedy sought and allow what he characterizes as an improper selection procedure to restrict his alternative remedy of being appointed in addition to Dr. N.

[22] I do, however, find that VCHA and Dr. N. are correct in arguing that circumstances have fundamentally changed since the grant of privileges to Dr. N. in April 2017. He is now an incumbent with procedural and substantive protections for his privileges. There has been no assertion that VCHA or HAB could lawfully terminate his privileges on the grounds of incompetence, lack of licence, lack of demand for his services or any other substantive ground.

[23] It is not permissible for the HAB to simply review the selection procedure and substitute its decision for that of the VCHA. The appointment of Dr. N. has changed the circumstances such that removing his privileges has not been shown to be lawful taking into account the legal and regulatory structure.

[24] While the Appellant is correct that section 46 of the *Hospital Act* gives the HAB broad *de novo* powers to step into the shoes of the Health Authority and make its own decision on an appealable matter, it also true that the "shoes" that the HAB steps into are constricted by the legislative framework under which the Health Authority must operate.

[25] Section 46(3) of the *Hospital Act* is clear that one limitation on the exclusive jurisdiction of the HAB is that the HAB can only make an order which is "permitted to be made". The Respondent is correct in asserting that the HAB is not "permitted" to make an order which undermines the legislation, Bylaws and/or Rules.

[26] An incumbent physician with hospital privileges is protected from removal of those privileges by extensive procedural and substantial criteria as set out in the *Hospital Act*, Rules and Bylaws. What Dr. Sanghera submits is that the HAB should ignore the granting of privileges to Dr. N. and address the issue as if the decision was being made for the first time; however that position ignores the reality that Dr. N. has been practicing in the hospital with privileges for some time now.

[27] If the error alleged is that of the VCHA, it is difficult to see why VCHA's error should negatively affect Dr. N. There is no suggestion that he is incompetent or that there is no demand for his services. Moreover, removal of his privileges in the absence of substantive grounds would inevitably give rise to a right of further appeal. Allowing removal of existing privileges as a remedy in an appeal would create a potential domino effect wherein a successful displacement of a practitioner could create further appeal rights.

[28] Further, if the HAB were to revoke Dr. N.'s privileges, what remedy, if any, would he have? Is participation as a third party an adequate substitution for his own substantive appeal rights? Would all unsuccessful applicants following a selection process also have their own rights of appeal?

[29] The remedy urged by the Appellant would, of necessity, require the HAB to order a course of action falling outside of the scope of the relevant Rules and Bylaws. By removing privileges from an incumbent, the HAB would be impermissibly exercising authority which it has not been granted either explicitly or by necessary implication.

[30] Appointing Dr. Sanghera as an additional member of the department is a permissible exercise of HAB authority.[9] I find removing an incumbent is not.

[31] This does not prevent Dr. Sanghera from advancing his alternative remedy namely that he be appointed in addition to Dr. N. Nothing in this ruling prevents Dr. Sanghera from advancing all the grounds of his appeal, namely, there is need in the community for further ophthalmological services, the selection procedure was biased and Dr. Sanghera was the superior candidate.

CONCLUSION

[32] Accordingly, the HAB finds as a preliminary question of jurisdiction that it does not have the authority to grant the primary remedy sought, namely the removal of privileges from Dr. N. and the grant of those same privileges to the Appellant.

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[9] See for example: *Walker v. Fraser Health Authority,* Decision No. 2013-HA-003(a).

[33] As this is a preliminary ruling made in the absence of evidence, I should not be taken to have made any findings of fact which bind the panel hearing the appeal on the merits.

"David Perry"

David Perry, Chair
Hospital Appeal Board

July 10, 2018