Hospital Appeal Board

Citation:	*Dr. Malvinder Hoonjan v. Interior Health Authority*, 2023 BCHAB 4
Decision No.:	HAB-HA-20-A003(d)
Decision Date:	2023-10-30
Method of Hearing:	Conducted by way of written submissions and an oral hearing concluding on March 3, 2023
Decision Type:	Decision on Costs of Application
Panel:	Stacy F. Robertson, Panel Chair Dr. R. Alan Meakes, Panel Member Dr. Ailve McNestry, Panel Member
Appealed Under:	Section 46 of the *Hospital Act,* RSBC 1996, c 200

Between:

Dr. Malvinder Hoonjan

Appellant

And:

Interior Health Authority

Respondent

Appearing on Behalf of the Parties:

For the Appellant:	Susan Precious, Counsel
For the Respondent:	Alexis Kerr, Counsel

Decision on Costs of Application

[1] This is a decision on an award of costs for an application heard by the Hospital Appeal Board (the "HAB") in writing and by an oral hearing on March 3, 2023, which resulted in a letter ruling of the same date (the "March 3, 2023 Order"). This costs decision only covers the period following the release of the HAB's December 7, 2022 decision on the merits of the appeal (the "Merits Decision") (*Dr. Malvinder Hoonjan v. Interior Health Authority*, 2022 BCHAB 4) up to the March 3, 2023 Order, and it does not deal with any subsequent applications.

[2] For the reasons given below, the Respondent, the Interior Health Authority ("IH"), is ordered to pay the actual costs of the Appellant, Dr. Malvinder Hoonjan, from December 8, 2022 to March 3, 2023 up to a cap of $10,000 payable forthwith. This panel also orders that this Decision be placed on the agenda of the next Board meeting for IH, and that the Decision be circulated to the members of the Ophthalmology Division and the Senior Medical leadership.

BACKGROUND

[3] On December 7, 2022, the HAB released its decision on the merits of Dr. Malvinder Hoonjan's appeal, referred to as the Merits Decision.

[4] The panel granted the appeal and ordered that the Appellant be granted active medical staff privileges as a vitreo-retinal surgeon at Kelowna General Hospital ("KGH") with equal access to operating room ("OR") time as the other two vitreo-retinal surgeons at KGH.

[5] However, because of the amount of time that the appeal process had taken, prior to that part of the order taking effect, the panel ordered that IH work with the Appellant and accommodate any necessary steps to facilitate his reintroduction to performing retinal surgical services at KGH.

[6] The panel made specific findings that IH's breach of its obligations to the Appellant caused issues with the currency of the Appellant's surgical skillset, and therefore, it was also the responsibility of IH to work with the Appellant to remedy those currency issues. At paragraphs 154 and 155 of the Merits Decision, the panel stated:

> As previously detailed in this decision, this panel has found that any currency issues regarding Dr. Hoonjan are largely due to IH's failure to follow its obligations under the privileging dictionary and Dr. Hoonjan's repeated issues with OR scheduling. In addition, the improper termination of Dr. Hoonjan's privileges at RIH and failure to properly grant privileges to Dr. Hoonjan as part of the relocation of the retinal surgical services from RIH to KGH have exacerbated Dr. Hoonjan's current currency issues as he was forced to seek a remedy before the HAB.

> The HAB noted in *Campbell v. PHSA* (Decision No. 2018-HA-002(f)) that when currency issues are the result of the hospital's conduct in breach of its Bylaws, then it has to take responsibility for the decline in any skills and currency issues, and therefore, must work with an appellant to accommodate return to a full surgical slate with the appropriate skills.

[7] Based on IH's responsibility for the currency issues, the panel used very particular language that "it ***will require*** IH to work with Dr. Hoonjan and ***accommodate*** any necessary steps to facilitate Dr. Hoonjan's reintroduction to performing retinal surgical services at KGH." [emphasis added] (see paragraph 157 of the Merits Decision).

[8] The panel made several statements and recommendations about the reintroduction plan at paragraph 157 of the Merits Decision but left IH to work with the Appellant to determine the specifics of the reintroduction plan. Paragraph 157 set some minimum expectations for the parties:

> This panel is not going to order a specific reintroduction plan for Dr. Hoonjan, but it will require IH to work with Dr. Hoonjan and accommodate any necessary steps to facilitate Dr. Hoonjan's reintroduction to performing retinal surgical services at KGH. Access to OR time for any training on equipment or scrubbing in with other vitreo-retinal or ophthalmology surgeons would be the minimum accommodation expected to be provided by IH. The other two vitreo-retinal surgeons at KGH can offer any assistance to Dr. Hoonjan but there has been evidence that KGH is not a teaching hospital and this panel is not going to force any requirement on the other two vitreo-retinal surgeons in that regard. The parties are encouraged to find the assistance of an outside expert to create a reintroduction plan that is suitable and appropriate for Dr. Hoonjan's circumstances and satisfies any requirements for Dr. Hoonjan's reintroduction.

[9] In the December 7, 2022 Merits Decision, the panel gave the parties 60 days to reach a mutually agreeable reintroduction plan. The 60 day deadline was set to expire on February 5, 2023, unless it was extended by agreement of the parties. The panel remained seized of the matter if the parties could not come to an agreement on the reintroduction plan.

EXPIRY OF 60 DAY DEADLINE AND APPELLANT'S APPLICATION

[10] Counsel for IH has conceded that IH did not deliver any reintroduction plan to the Appellant within the 60 day deadline.

[11] Counsel for IH also conceded that after the December 7, 2022 Merits Decision, no one from IH contacted the Appellant at all. Counsel noted that there were some limited discussions between IH counsel and the Appellant's counsel on January 17, 2023 to get some information on what steps the Appellant had taken regarding his reintroduction.

[12] In contrast to IH's failure to deliver any reintroduction plan, the Appellant submitted a proposed reintroduction plan to IH on January 31, 2023. The reintroduction plan included steps taken by the Appellant to familiarize himself with the Constellation surgical equipment, plans to observe retinal and other ophthalmological surgeries at KGH, plans to set up observerships at other medical facilities, and plans to perform retinal and cataract surgeries with another surgeon in Ontario (pending the appropriate Ontario licensure approvals).

[13] The Appellant received no contact from IH before the expiry of the deadline, apart from a request through legal counsel on January 17, 2023. The Appellant then offered to extend the 60 day deadline by consent to February 13, 2023. On February 9th, four days after the expiry of the 60 day deadline, IH agreed to the extension. The Appellant received no further contact from IH up to the expiry of the agreed upon February 13, 2023 extended deadline. Counsel for the Appellant wrote to IH to emphasize that the extension was to reach an agreement by February 13, 2023, not to submit their first proposal. The panel is in full agreement with this position taken by counsel for the Appellant. Paragraph 159 of the Merits Decision was clear that the 60 day deadline was to come to an agreement, not simply to deliver IH's version of the reintroduction plan.

[14] Having received no response from IH by the February 13, 2023 deadline, the Appellant commenced this application on February 14, 2023 and asked the HAB to rule on the parties' inability to agree on a reintroduction plan.

[15] Only after the Appellant's application was commenced on February 14, 2023, did IH deliver its first reintroduction plan proposal to the Appellant through legal counsel on the same date. This delivery was well past the February 5, 2023 deadline established by this panel, and also past the revised deadline of February 13, 2023 agreed to by the parties.

[16] The parties exchanged written submissions on the Appellant's application and an oral hearing was held on March 3, 2023 by video conference.

[17] At the conclusion of the hearing on March 3, 2023, the panel noted that the matter was urgent and issued a letter ruling on the reintroduction plan, referred to as the March 3, 2023 Order. The panel reserved its ruling on the issue of costs of the application leading to the March 3, 2023 Order.

[18] This panel had significant concerns about IH's reintroduction plan and therefore the March 3, 2023 Order did not include many of the items contained in IH's proposal. Instead, the panel essentially deferred to a third party, something which had been recommended to the parties in paragraph 157 of the Merits Decision.

[19] In deciding on an award of costs for the application leading to the March 3, 2023 Order, these reasons will deal with the process taken by IH to try to come to an agreed upon reintroduction plan. For greater clarity, these reasons only cover the time period from the release of the Merits Decision up to the March 3, 2023 Order and do not deal with any subsequent applications.

THE PARTIES' POSITIONS ON COSTS

[20] In advance of the hearing on March 3, 2023, the HAB issued a letter specifically notifying the parties that they may want to address possible cost consequences resulting from the failure to agree on the reintroduction plan within the 60 day deadline set out in the Merits Decision in their written submissions.

[21] IH did not address the issue of costs in its written submissions to the panel. The Appellant stated in its written submissions that it was content to leave the issue of costs in the hands of the panel but noted that any award of costs should be on a lump sum basis.

[22] During the oral hearing on the application, the panel again asked the parties for submissions on costs. IH stated that they were focused on the reintroduction plan, not costs, and that they were content to leave the issue of costs in the panel's hands. The Appellant also did not make any detailed submissions on costs other than to submit that any costs award should be ordered as a lump sum. No other submissions on costs were received from the parties, despite the panel's specific request that the parties address the issue.

LAW ON COSTS

[23] The HAB dealt with its jurisdiction to award costs in *Behn v. Vancouver Island Health Authority*, 2010 BCHAB 2, at paragraphs 6 to 9:

> In 2004, the Legislature amended the powers given to the Hospital Appeal Board (the Board) under the *Hospital Act*, R.S.B.C. 1996, c. 200, to incorporate by reference a number of statutory powers and procedures from the *Administrative Tribunals Act*, S.B.C. 2004, c. 45 (ATA):
>
> > 46(4.2) Sections 1 to 20, 25 to 35, 37 to 39, 42, 44, 46.2, 47 to 56, 57, 58, 60 (a), (b) and (d) to (f) and 61 of the Administrative Tribunals Act apply to the Hospital Appeal Board.
>
> Among the incorporated provisions is s. 47 of the ATA. Section 47 conferred upon the Board, for the first time, the authority to order one party to pay the costs of another party, an intervener or the Board itself:
>
> > 47 (1) Subject to the regulations, the tribunal may make orders for payment as follows:
> >
> > > (a) requiring a party to pay part of the costs of another party or an intervener in connection with the application;
> > >
> > > (b) requiring an intervener to pay part of the costs of a party or another intervener in connection with the application;
> > >
> > > (c) if the tribunal considers the conduct of a party has been improper, vexatious, frivolous or abusive, requiring the party to pay

> part of the actual costs and expenses of the tribunal in connection with the application.
>
> (2) An order under subsection (1), after filing in the court registry, has the same effect as an order of the court for the recovery of a debt in the amount stated in the order against the person named in it, and all proceedings may be taken on it as if it were an order of the court.
>
> The "regulations" referred to in the opening words of s. 47(1) describe regulations that may be made by the Lieutenant Governor in Council under s. 60 of the ATA. No such regulations have been made.
>
> In the absence of regulations, the result is that an order for payment of costs is left to the discretion of the particular administrative tribunal to which s. 47 applies.

[24] This panel accepts the above statements regarding the jurisdiction of the HAB to award costs. Since the decision in *Behn* in 2010, a regulation under section 60 of the *ATA* regarding security for costs was made and it does not apply to the reasoning in this application.[1]

[25] The panel in *Behn* rejected the general civil litigation rule that costs follow the event, and this panel agrees with that rejection. However, once it is determined that parties are generally not entitled to costs if they are successful, then the HAB is left to exercise its discretion and look at specific circumstances where costs could be ordered. Every factual circumstance is different, and it is not helpful to list all circumstances where costs may be ordered in these reasons. This decision will rest on the specific facts before the panel and will not rule out other special circumstances or considerations where an award of costs would further the aims and purposes of the legislative framework that created and governs the HAB.

[26] In *Behn* the panel noted at paragraph 22 that "Special circumstances should be found only where a party's conduct falls clearly below the standards to be expected in the underlying process or on the appeal itself."

[27] This panel also agrees with the comments in *Behn* at paragraph 20 that the approach regarding an award of costs should be sufficiently flexible to allow the HAB to find special circumstances where either party's conduct warrants it.

[28] Noting the principles above, the HAB may exercise its discretion to award costs against one of the parties to the appeal in special circumstances where a party's conduct markedly falls below the standards to be expected in the underlying process, or the appeal itself, and where an award of costs would further the aims and purposes of the

---

[1] The *Security for Costs (Administrative Tribunals) Regulation*, SOR 238/2015, came into force on December 18, 2015, pursuant to sections 60(1)(e), (e.1), and (f) of the *Administrative Tribunals Act*, SBC 2004, c 45. This regulation does not apply to the reasoning in this application.

legislative framework that created and governs the HAB. This is the test that this panel applied to the facts in this matter.

THE PARTIES' CONDUCT AFTER THE DECEMBER 7, 2022 MERITS DECISION

[29] The December 7, 2022 Merits Decision created a duty on both parties to work together, and a duty specifically on IH to accommodate any necessary steps to facilitate the Appellant's reintroduction plan. In addition, the panel found at paragraph 129 of the Merits Decision that IH medical leadership has obligations to the Appellant relating to currency issues. The panel also noted that any currency issues of the Appellant are largely the fault of IH and IH must not ignore that fact as it complies with the Merits Decision. It should be noted that the Appellant already had consulting medical staff privileges at KGH with a surgical restriction which is not disputed by IH, and therefore he was a current member of the medical staff at KGH.

[30] At the March 3, 2023 hearing, Dr. A, the Interim Vice President, Medicine and Quality for IH, provided evidence on behalf of IH. He stated that he took note of the specific direction from the HAB to IH to work with the Appellant to accommodate a return to a full surgical slate with the appropriate skills, and to accommodate any necessary steps to facilitate the Appellant's reintroduction to performing retinal surgical services at KGH.

[31] Dr. A further stated that he was working together with the KGH Department of Surgery Head, the Interim Executive Medical Director for IH South, and the Head of the KGH Division of Ophthalmology, to develop a reintroduction plan for the Appellant. The problem is that the Merits Decision specifically required IH to work together with the Appellant, and yet Dr. A, on behalf of IH, excluded him from any discussions regarding the reintroduction plan. This is a significant and marked departure from the conduct required in the circumstances and required pursuant to the terms of the Merits Decision.

[32] Dr. A provided a list of eight further steps taken by him to develop a reintroduction plan, including requesting through legal counsel information from the Appellant about what measures he had taken himself since he ceased to have OR time at KGH. The evidence indicated that this request through IH legal counsel was made on January 17, 2023, more than half-way through the 60 day period, and was the only communication of any kind with the Appellant about developing a reintroduction plan.

[33] The Appellant already had consulting medical staff privileges at KGH, and the Merits Decision made the Appellant a member of the active medical staff subsequent to the parties agreeing upon a reintroduction plan. It was improper for all correspondence from IH's senior medical leadership to go through legal counsel, essentially continuing to treat the Appellant like an adverse party in litigation. This approach was against the duties this panel found that IH owes to members of the medical staff, particularly as it related to currency issues which were caused by IH itself. Legal counsel are entitled to review plans

and give feedback and the panel does not take issue with IH's right in that regard, but the Division Head and other senior medical staff were required to take specific steps to reintegrate the Appellant back into his practice. The Merits Decision clearly required consultation with the Appellant, and therefore reaching out directly to the Appellant was an obvious minimum step that IH failed to do. The panel would have expected there to be meetings between the Appellant and other IH senior medical leadership, including the Division Head, to see where there was agreement on reintroduction issues and where further work needed to be done to resolve any areas of disagreement. Instead, IH pursued a black box approach which excluded the Appellant from the process to develop the reintroduction plan.

[34] IH's failure to contact the Appellant directly at any time before the 60 day deadline to come to an agreement on the reintroduction plan is a marked departure from the conduct required in the circumstances and required pursuant to the terms of the Merits Decision.

[35] At the March 3, 2023 hearing, Dr. A accounted for IH's approach by stating that during the 60 day period after the Merits Decision he conducted a further investigation into the currency of the Appellant's surgical skillset and concluded that the Appellant did not meet the currency requirements of the Privileging Dictionary and that he only marginally met the requirements when he filed the underlying appeal. This conclusion seeks to relitigate the issue of currency, which was dealt with extensively at paragraphs 124 to 129 of the Merits Decision, where the panel found that the position taken by IH was in error given the evidence submitted at the hearing. In any event, and as stated in the Merits Decision, IH bears the responsibility of fixing what it broke. Coming to any other conclusion regarding currency at this stage, without any consultation or participation of the Appellant, is of no assistance to complying with the terms of the Merits Decision and only served to delay what IH was required to do.

[36] IH's approach to the reintroduction plan was based on an erroneous conclusion that the Appellant did not meet currency requirements, should no longer be licensed to practice, and therefore needed significant retraining and recertification. First, this is not what the panel ordered. Second, there was evidence that during this period the Appellant was approved for licensure in Ontario not only to observe, but to perform vitreoretinal surgeries with another surgeon. This undermines IH's position and interpretation regarding the need for recertification or significant retraining. Dr. A's focus on technical currency issues is a marked departure from the conduct required in the circumstances and required pursuant to the terms of the Merits Decision. This disregard further serves to illustrate how IH's treatment of the Appellant throughout the circumstances that led to the underlying appeal, and to the March 3, 2023 Order, has been misguided and careless. IH continued to put the blame and responsibility on the Appellant without offering any meaningful accommodation as required by this panel's order.

[37] The Merits Decision did not require the requalification or recertification of the Appellant. By IH's own submissions that is not what any of the guidance requires. IH

submitted that the Privileging Dictionary, one of the sources relied upon by IH for its reintroduction plan, did not address in any specific detail how competence should be measured or assessed. IH also submitted that the College of Physicians and Surgeons of B.C.'s guidance did not address in any specific detail how competence should be measured or assessed. The process to evaluate competence is fluid and fact specific and simply cannot be done in any reasonable basis without consultation of all parties. The Merits Decision ordered the parties to come together to discuss and determine what steps were necessary to reintroduce the Appellant into a full vitreoretinal surgical practice and to seek the assistance of a third party to provide guidance.

[38] Dr. A stated that he and others in medical staff leadership consulted experts regarding the extent of retraining in the circumstances. He also stated that there were very limited suitable retraining opportunities and that he and Dr. B decided what the most appropriate steps would be. First, as stated above, the process required by the Merits Decision was to be in collaboration with the Appellant, rather than the unilateral process Dr. A described. Second, any concerns about unavailability of suitable retraining opportunities was never discussed with the Appellant. In fact, the Appellant proposed several retraining opportunities to IH, and instead of evaluating those opportunities together with the Appellant, IH unilaterally made its own decisions regarding their suitability. IH's approach ignored the Appellant's resourcefulness in finding retraining opportunities, and it further underlined the lack of process by IH and their failure to include and accommodate the Appellant. The actions of Dr. A and Dr. B noted in this paragraph represent a marked departure from the conduct required in the circumstances and required pursuant to the terms of the Merits Decision.

[39] Dr. A also stated that he was considering a physician supervisor or mentor who would be able to attest to the Appellant's surgical competence. Again, the terms of the Merits Decision required cooperation and consultation and it seems unfathomable that IH would consider any person for a mentorship without the involvement of the Appellant. The refusal of IH to include the Appellant in those discussions represents a marked departure from the conduct required in the circumstances and required pursuant to the terms of the Merits Decision.

[40] As stated above, the Appellant provided a proposed reintroduction plan to IH on January 31, 2023, to which he received no response from anyone at all before the 60 day deadline. As the panel noted in paragraph 156 of the Merits Decision, the Appellant was agreeable to additional training and he recognized that he needed to refamiliarize himself with the retinal surgical procedures and equipment.

[41] As part of the Appellant's proposed reintroduction plan he recognized the need for refamiliarization training with the representative for the Constellation surgical equipment, and noted that he needed assistance from IH to do this. IH was in receipt of this basic request since January 31, 2023 and failed to act on it in any meaningful way. Paragraph 157 of the Merits Decision noted that access to OR time for equipment training would be

the most basic type of accommodation expected to be provided by IH, and yet they failed to fulfill or even respond to the Appellant's request within the 60 day deadline.

[42] Despite the Appellant's own ongoing efforts to coordinate with the Constellation representative and IH up to the date of the oral hearing on March 3, 2023, he had not received the training, or any assistance from IH in scheduling the training. IH could have intervened to assist the Appellant in scheduling the Constellation equipment training and failed to do anything to assist him in that regard. This conduct on the part of IH is a marked departure from the conduct required in the circumstances and required pursuant to the terms of the Merits Decision.

[43] The Appellant also sent several emails to the two vitreoretinal surgeons at KGH to observe their surgeries as part of his reintroduction. Neither allowed him to observe their surgeries, even though one of the surgeons acknowledged that there were other medical students and learners in the OR. In the hearing on the Merits Decision, there was evidence that KGH was not a teaching hospital, but this admission that there were indeed medical students and learners observing in the OR while the Appellant was excluded from the same is confounding and further illustrates the ongoing marginalization of the Appellant.

[44] In response to the Appellant's request to observe the surgeries of the other vitreoretinal surgeons, the Division Head said that nothing could be done about observing vitreoretinal surgeries until the reintroduction plan had been agreed upon. There is nothing in the Merits Decision that supports this comment. The fact that IH did not communicate the basic terms of paragraph 157 of the Merits Decision to its medical staff, or that they were not aware of it, is remarkable. In addition, it is clear that some things that could be part of the reintroduction plan could be achieved with minimal disruption before the full reintroduction plan was finalized.

[45] The Merits Decision required IH to prioritize and accommodate any request by the Appellant to observe surgeries. Again, paragraph 157 of the Merits Decision stated that facilitating the Appellant scrubbing in with other vitreoretinal or ophthalmological surgeons was a bare minimum accommodation IH should provide. The complete failure of IH to allow that, or direct its other medical staff to allow that, is a marked departure from the conduct required in the circumstances and required pursuant to the terms of the Merits Decision. Despite IH's refusal to let the Appellant observe retinal surgeries and its position that he needed significant retraining to be able to perform surgeries, the Appellant applied for and was approved for licensure in Ontario to perform the same types of surgeries that IH was preventing him from observing or performing at KGH.

[46] IH submitted that it accepted the Merits Decision but it also says that the reasons for the Appellant's currency issues were irrelevant to how it approached a reintroduction plan. The Merits Decision specifically created a duty on IH to accommodate the Appellant with the reintroduction plan beyond what would be normal because IH was at fault for his currency issues. While the reintroduction plan must be reasonable, for IH to ignore the

actual reasons for the Appellant's currency issues essentially renders the findings of fault in the Merits Decision meaningless. The reasons are relevant – very relevant.

[47] On February 28, 2023, IH ultimately submitted that it was prepared to accept the Appellant's proposed reintroduction plan of January 31, 2023, provided that the refresher training it contemplated was supplemented by a robust but tailored and time-limited period of supervised surgical practice. The problem with IH's submission however was that it was respectfully submitted by counsel within the written submissions in response to the Appellant's application arising from IH's failure to communicate with him regarding the reintroduction plan pursuant to the Merits Decision.

[48] At no point prior to February 28, 2023 did IH did communicate to the Appellant their position on his proposed reintroduction plan, even though they received it on January 31, 2023. To be clear, the Appellant bringing an application before the HAB does not act as a stay of the implementation process IH was ordered to engage with, or bar IH from responding to the Appellant's reintroduction plan. IH's failure to respond to the Appellant's January 31, 2023 reintroduction plan in a timely manner until the parties' submissions in this application were exchanged is a marked departure from the conduct required in the circumstances and required pursuant to the terms of the Merits Decision.

[49] At the March 3, 2023 hearing, IH conceded that, although they had not done so prior to this hearing, they were not opposed to granting OR time for specific surgical procedures. Granting OR time for specific surgical procedures is exactly the type of reasonable accommodation that the panel would have expected IH to provide earlier within the 60 day deadline. The failure to communicate this type of accommodation to the Appellant, who they knew was desperately trying to perform some surgical procedures, is a marked departure from the conduct required in the circumstances and required pursuant to the terms of the Merits Decision.

ANALYSIS AND CONCLUSION

[50] The Merits Decision required the parties to work collaboratively to come up with a reintroduction plan for the Appellant to return to a full vitreoretinal surgical practice at KGH.

[51] This panel finds that the Appellant worked diligently pursuant to the order of the panel to contact IH and submit a reasonable reintroduction plan within the 60 day deadline.

[52] Unfortunately, the same cannot be said for the Respondent. IH did not consult with the Appellant and failed to even come up with a preliminary plan before the 60 day deadline. This panel has noted several times that this matter is time sensitive and IH appears to have ignored this fact in failing to consult with the Appellant or present any reintroduction plan by the deadline.

[53] It is problematic that the Appellant had an easier time securing training in Ontario, including licensure and assistance from an experienced vitreoretinal surgeon, than from his own hospital which has an obligation to work with him as a medical staff member pursuant to the IH Medical Staff Bylaws and Rules. IH also had a specific duty pursuant to the Merits Decision to accommodate any steps necessary for the reintroduction plan.

[54] It is troubling that IH believes the reason for the Appellant's currency issues is irrelevant. The panel directed that IH specifically must accommodate the Appellant in his reintroduction plan because IH is the reason for the Appellant's currency issues. To accomplish this, IH was required to take steps beyond what is normal. The findings in the Merits Decision against IH cannot be ignored in the implementation process.

[55] While IH says it accepts the Merits Decision, their actions during the 60 days afterwards show no evidence of responsibility towards the Appellant's situation or compassion for its wrongful treatment of the Appellant which led to the underlying appeal. In addition, IH's handling of the reintroduction shows a lack of respect for this panel's orders and reasons in the Merits Decision.

[56] Paragraph 86 of the Merits Decision refers to the Medical Staff Bylaws and its subordinate Medical Staff Rules as a social contract between the medical practitioner and the Health Authority. The use of the term social contract is purposeful and recognizes that both parties owe duties to the other. The framework of the HAB and the appeal process must be taken into account including that the parties may have an ongoing relationship after a successful appeal which requires them to work together and move beyond whatever dispute led to proceedings before the HAB. This does not mean the parties may ignore specific findings, but that the parties must remove any biases, or other improper motivations, and work towards fulfilling the orders and directions of the HAB.

[57] The HAB has jurisdiction to make any decision that the Board of Directors of IH can make regarding the privileging regime. Therefore, the orders and directions in the Merits Decision must be treated the same as if the direction came from the Chair of the Board of Directors and implemented by the President and CEO of the IH. The failure of IH to respond appropriately to the terms and conditions in the Merits Decision is largely the failure of the IH Board to whom the senior medical leadership are responsible.

[58] Parties must have some faith that when an administrative appeal comes before the HAB, and the HAB makes an order or direction, that the parties will work with diligence and reason to comply and to implement the order in a reasonably fair manner. While the HAB is available to deal with disputes along the way towards implementation, both parties must make a reasonable attempt at implementation before the assistance of the HAB is sought. As detailed above there were many steps the IH could have taken within the 60 day deadline, or the agreed upon extension, and they failed to take any of those steps.

[59] IH failed to accommodate the reintroduction process and completely failed to abide by the deadline in the Merits Decision. While the imposition of a deadline did not guarantee agreement, at a bare minimum, multiple meetings and the involvement of the

Appellant in the process should have occurred. IH continued to keep the Appellant in the dark and controlled the process throughout. This is exactly what the requirement to come to a mutually agreeable reintroduction plan was designed to avoid.

[60] While it is obvious that the Appellant has an interest in a speedy reintroduction plan, his actual efforts to comply with the reintroduction plan in the Merits Decision are commendable. In contrast, the efforts of IH to comply with the Merits Decision were misguided and are deserving of rebuke by this panel.

[61] This panel ordered IH to work with the Appellant and accommodate his reintroduction to a full surgical practice. It is a clear breach of that direction to ignore the Appellant while the deadline expires and then to simply present a reintroduction plan to him without any recognition of the plan that he provided or consultation or consideration of what he was proposing.

[62] Given that IH failed to contact or work with the Appellant at any time within the deadline, or respond in any way to his reintroduction plan, or work with him to accommodate his training on the Constellation surgical equipment, or provide any opportunities within KGH to observe retinal surgeries, or any of the other findings of a marked departure from the conduct required in the circumstances and required pursuant to the terms of the Merits Decision, this panel finds that this conduct is deserving of a costs award against IH. It is IH's conduct in failing to fulfill the panel's directions regarding the reintroduction plan that directly led to the need for this application.

ORDER

[63] This panel orders that IH pay the actual costs of the Appellant from December 8, 2022 to March 3, 2023 up to a cap of $10,000 payable forthwith. If there are issues with the actual determination of costs this panel will remain seized to resolve those matters. This panel also orders that this Decision be placed on the agenda of the next Board meeting for IH, and that the Decision be circulated to the members of the Ophthalmology Division and the Senior Medical leadership.

"Stacy F. Robertson"

Stacy F. Robertson, Panel Chair
Hospital Appeal Board

"Dr. Ailve McNestry"

Dr. Ailve McNestry, Panel Member
Hospital Appeal Board

“Dr. R. Alan Meakes”

Dr. R. Alan Meakes, Panel Member
Hospital Appeal Board