Hospital Appeal Board

Citation:	*Dr. Theresa Szezepaniak v. Interior Health Authority*, 2023 BCHAB 5
Decision No.:	HAB-HA-22-A009(a)
Decision Date:	2023-11-20
Method of Hearing:	Conducted by way of an oral hearing and written submissions concluding on September 15, 2023
Decision Type:	Final Decision
Panel:	Sharleen Dumont, Panel Chair Stacy Robertson, Panel Member Dr. R. Alan Meakes, Panel Member
Appealed Under:	Section 46 of the *Hospital Act*, RSBC 1996, c 200

Between:

Dr. Theresa Szezepaniak

Appellant

And:

Interior Health Authority

Respondent

Appearing on Behalf of the Parties:

For the Appellant:	Lee C. Turner, Counsel
For the Respondent:	Alexis Kerr, Counsel Melissa Perry, Counsel

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FINAL DECISION

INTRODUCTION

[1] The Appellant, Dr. Theresa Szezepaniak (the “Appellant”), joined Royal Inland Hospital ("RIH") in March 2020 as a member of the medical staff in the Department of Hospitalist Medicine (the “Department”). RIH is a tertiary care hospital in Kamloops, operated by the Interior Health Authority ("IH").

[2] In March 2020, the Provincial Health Officer of British Columbia (the "PHO") declared COVID-19 to be a public health emergency. In October 2021, the PHO issued an Order which provided that all staff members of a regional health authority were required to either be vaccinated against COVID-19 or have obtained a medical exemption in order to work in a hospital after October 25, 2021.

[3] The Appellant was not vaccinated against COVID-19 and did not obtain a medical exemption. She consequently was not able to work at RIH effective October 26, 2021.

[4] On November 16, 2021, IH advised the Appellant that her inability to work and discharge her obligations as a member of the medical staff was grounds for cancellation of her hospital privileges, and that a recommendation to that effect would be made to the IH Board of Directors. On August 23, 2022, the IH Board of Directors canceled the Appellant's IH medical staff appointment and hospital privileges, effective August 19, 2022.

[5] On October 18, 2022, the Appellant filed a Notice of Appeal pursuant to section 46 of the *Hospital Act*, appealing the Board of Directors' decision.

BACKGROUND

[6] The essential facts on which this appeal is based are not in dispute and are, for the most part, set out in the documents submitted by the parties. Dr. A, IH Interim VP of Medicine, gave evidence on behalf of the Respondent and the Appellant gave evidence on her own behalf.

[7] The Appellant obtained her medical degree from Leicester University in 1997. She has worked as a physician in hospitals in British Columbia for approximately 21 years in various disciplines, namely Emergency Room, Hospitalist, Surgical Assistant, Obstetrics and Palliative Care. She is registered with the College of Physicians and Surgeons of British Columbia and has no restrictions on her practice. Throughout her career she has held various administrative positions and has taught as a clinical associate/preceptor through the UBC Faculty of Medicine.

[8] IH is responsible for the delivery of health care services in the Southern Interior of British Columbia. RIH is within the IH area of responsibility. The IH Board of Directors is the governing body of IH.

[9] In 2019, IH offered the Appellant a full-time position as a non-employee member of the medical staff as a hospitalist in the Department at RIH, subject to certain conditions. One of the conditions of the offer was that the Appellant successfully complete the credentialing process to both obtain and maintain hospital privileges at RIH, with issuance of hospital privileges at the discretion of the IH Board of Directors. A further condition was that the Appellant agree to "participate on an ongoing basis in the call rotation at the Royal Inland Hospital in the Hospitalists department, on a frequency equitable with the other medical staff in that department".

[10] The Appellant accepted the offer on August 2, 2019. She was subsequently granted hospital privileges and commenced work as a hospitalist at RIH in March 2020. The IH Medical Staff Bylaws (the “Bylaws") provide that appointments to medical staff and hospital privileges are reviewed for renewal on an annual basis.

[11] The Appellant also entered into a Clinical Services Contract, which is a contract between IH and each of the physicians in the Department. The Clinical Services Contract sets out matters such as the level of staffing to be provided by the physicians and the payment schedule, and is renewed annually.

[12] The hospitalist program is the largest inpatient program at RIH and plays a key role in the provision of comprehensive medical care including the movement of patients across the continuum of care, that is, from the emergency department to an inpatient unit, and from the hospital back into the community.

[13] In March 2020, the World Health Organization declared COVID-19 to be a global pandemic and the PHO declared COVID-19 to be a public health emergency in British Columbia.

[14] Vaccines for COVID-19 became available in British Columbia in December 2020, with general availability rolled out through the first half of 2021.

[15] On October 14, 2021, the PHO issued an order entitled *Hospital and Community (Health Care and Other Services) Covid-19 Vaccination Status Information and Preventative Measures*. This order was revised or repealed and replaced, on October 21, 2021, November 9, 2021, November 18, 2021, September 12, 2022, and April 6, 2023 (collectively, the “Order”).

[16] The Order provided that staff members were not permitted to work in a care location, which included hospitals, after October 25, 2021, unless they had received a COVID-19 vaccine or had been granted an exemption from the PHO. The Order expressly stated that it did not have an expiration date.

[17] At the time of the issuance of the Order the Appellant had not received a COVID-19 vaccination.

[18] On October 15, 2021, IH issued a memo to all employees and medical staff regarding the Order. The memo summarized the Order, noting that all health care staff must have received at least one dose of COVID-19 vaccine before October 26 in order to continue working. The memo stated that those who had not received a first dose by October 26 would be placed on unpaid leave and/or see a pause in their contract, and that "Employees who have not received a first dose of COVID-19 vaccine by Nov. 15, should anticipate that their employment and/or other contractual arrangements with IH may be terminated."

[19] On October 22, 2021, Dr. B, then Vice President Medicine and Quality for IH, sent a letter to all members of the IH medical staff, including the Appellant, advising that if they had not received a first dose by October 25, they would not be able to provide services from October 26. The letter also stated that if medical staff did not receive a first vaccine dose by November 14 there would be additional consequences related to their employment, contract, and/or privileges, as appropriate.

[20] On October 25, 2021, the Appellant delivered an exemption request to the PHO, in which she stated that she was requesting an exemption on the basis of an unjustified violation of her rights and freedoms under the *Canadian Charter of Rights and Freedoms* (the "*Charter*"), and that the nature of the exemption she was seeking may fall outside the scope for which the PHO had said exemptions would be considered. The Appellant's letter to the PHO also included numerous requests for information related to disclosure of scientific evidence regarding the vaccines and how *Charter* requirements were being met.

[21] The PHO denied the Appellant's application for an exemption on the basis that only medical exemptions were being considered. The PHO did not respond to any of the questions set out in the Appellant's letter.

[22] On October 26, 2021, Dr. B wrote a letter to the Appellant advising that unless IH could confirm her vaccination status as "vaccinated" or "partially vaccinated", she would not be able to provide services from October 26 onward. The letter further stated that if she did not receive Dose 1 by November 15 or obtain an exemption there would be additional consequences related to her employment, contract, and/or privileges.

[23] In compliance with the terms of the Order, the Appellant ceased participating in shifts at RIH on October 26, 2021.

[24] On November 9, 2021, Dr. C, Chief of Staff at RIH, sent the Appellant an email indicating that he had been asked to contact all medical staff not yet vaccinated to determine plans moving forward regarding her hospital privileges. The email outlined three options for unvaccinated members of staff. The first option was to resign/withdraw hospital privileges and the second was to obtain an exemption from the PHO. The third option was summarized as follows:

> They can choose none of the above and their privileges will be recommended to the IH Board of Directors for cancellation or non-renewal as per Bylaws. For those that are cancelled, we will be required to notify the College. Subsequently, they will have to declare that their privileges were cancelled on any future application for privileges in BC and other provinces.

[25] The Appellant testified that she was upset by the email from Dr. C, and felt that she was being threatened by the RIH Chief of Staff, which she found both shocking and unnecessary.

[26] The Appellant responded to Dr. C by email the same day, on November 10, 2021. She stated that she was ready, fit and able to work in her position as a hospitalist, in keeping with her contract, that she would not be resigning, and that she would not be "blackmailed or coerced into receiving an experimental injection". She further indicated that Dr. C and IH rendered themselves liable to legal proceedings on a variety of grounds, including abuse of human rights. She asked for the name of the party who would be making the recommendation to the Board of Directors in order that she or her legal team could direct any further correspondence to them.

[27] By email of November 10, 2021, Dr. C advised that the recommendation concerning privileges would come from the Health Authority Medical Advisory Committee ("HAMAC") to the IH Board of Directors, which grants hospital privileges.

[28] Also on November 10, 2021, IH sent a letter to the Appellant regarding the availability of the Janssen vaccine. The letter included the statement "We understand that you may not have yet received a COVID-19 vaccine and therefore do not qualify to continue providing services in Interior Health. We value our medical staff and want to take this opportunity to inform you of a one-dose Janssen COVID-19 vaccine that will be available in the coming weeks." The letter requested that the Appellant confirm if she intended to get the Janssen vaccine. It also provided links to Health Canada and other websites for information regarding the vaccine.

[29] The Appellant testified that she reviewed the information on the links set out in the November 10 letter but was not reassured about the safety of the vaccine. She did not sign and return the letter.

[30] On November 12, 2021, the Appellant sent Dr. C an email in which she stated that "now is the time to advocate as persistently and loudly as possible, on behalf of ALL your healthcare co-workers who are currently subject to this disgraceful abuse of their Charter and Human Rights." She posed questions such as asking for an explanation as to how her termination would improve the quality of care at RIH. She stated that Dr. C would be personally liable for not speaking out and asked that he "thoroughly examine your conscience and act with great moral courage at this unprecedented time in our history. NOW is the time to distinguish yourself as Chief of the Staff who [medical staff members] are looking to you for powerful and morally righteous advocacy".

[31] Dr. C responded to the Appellant by email of November 15, stating that he had noted her concerns, that discussions at HAMAC regarding privileging were confidential, and that he would not be providing further communication around these discussions.

[32] On November 12, 2021, the Appellant also sent an email to IH's Manager Medical Administration - Credentialing and Privileging, attaching an 18-page letter addressed to the HAMAC members, with the request that it be provided to every member of the committee. The letter indicated it was a "NOTICE OF LIABILITY regarding the BC Government's Mandatory Testing/Vaccination Policy". The Appellant stated in the letter that it was her position that the government's mandatory vaccination policy and health orders were illegal, and set out various concerns with the vaccines and various legal principles. The letter included a few questions similar to those included in the exemption request to the PHO and the statement that anyone who participated in the "mandatory vaccination policies" would be personally liable for all of the harms caused by the policies, and asked that they refuse to participate in any way in supporting the policies.

[33] The Appellant testified on cross examination that she felt that it was her civic and moral duty to inform HAMAC that, by being party to enforcing the vaccination mandate, they were coercing her and could be personally liable.

[34] Ms. D, President and Chief Executive Officer of IH, wrote a letter to the Appellant dated November 16, 2021, in which she noted that the Appellant had been advised on October 26 that she was no longer able to provide services in an IH facility as a member of medical staff as she had not been confirmed as vaccinated as required by the Order. Ms. D stated that the Appellant's inability to work, and therefore discharge her responsibilities as a member of the IH medical staff in accordance with the Bylaws, was grounds for cancellation of her hospital privileges. Ms. D advised the Appellant that her contract with IH as a hospitalist had been frustrated and was terminated immediately. Ms. D further stated that she would be making a recommendation to the IH Board of Directors to cancel the Appellant's privileges, which would first be considered by HAMAC on November 19, 2021. She advised that the Appellant would be given written notice of the Board of Directors' meeting, and that she would have the right to be heard, either in person or through counsel, at that meeting.

[35] A briefing note to HAMAC, dated November 19, 2021, recommended that hospital privileges be cancelled for those medical staff who were "in violation of the Public Health Officer Order". At its meeting the same day HAMAC approved the recommendation.

[36] On March 25, 2022, IH advised the Appellant that the Board of Directors would be convening on April 13 to consider the recommendation to cancel her privileges. She was advised that she had the right to be heard at the meeting, either personally or through counsel. The Appellant was provided with a copy of the briefing note to the Board of Directors, which indicated that the recommendation to be considered was to cancel the IH medical staff appointment and hospital privileges of the Appellant on the basis that she was not permitted to work at IH as a result of being unvaccinated against COVID-19

without valid exemption. The November 19, 2021 briefing note to HAMAC was attached as an appendix to the briefing note to the Board of Directors.

[37] Counsel for the Appellant raised a concern that the recommendation to HAMAC had been made on the erroneous basis that the Appellant was in violation of the Order, and requested that the matter be returned to HAMAC for reconsideration. A revised briefing note prepared for HAMAC, dated April 8, 2022, confirmed that the Appellant was not in violation of the Order and that the recommendation to cancel her hospital privileges was being made on the basis set out in the letter from Ms. D to the Appellant dated November 16, 2021, namely that the inability to work, and therefore discharge obligations and responsibilities as a member of the IH medical staff in accordance with IH Medical Staff Bylaws, was grounds for cancellation of hospital privileges.

[38] On April 8, 2022, HAMAC reconsidered its original November 19, 2021 decision and, on the basis of the revised briefing note from the CEO, it confirmed its approval and adoption of the recommendation to cancel the Appellant's hospital privileges. A supplemental briefing note was then prepared for the Board of Directors, noting the initial incorrect basis for the CEO recommendation, the clarified basis for the recommendation, and the April 8 HAMAC decision.

[39] The Board of Directors' meeting to consider the CEO and HAMAC recommendations was subsequently rescheduled to June 15, 2022. The Appellant was notified of the meeting and attended the meeting and made submissions through counsel.

[40] By letter of August 23, 2022, the Appellant was advised of the Board of Directors' decision to cancel her IH medical staff appointment and hospital privileges effective August 19, 2022. The letter stated that the Board had passed a motion that the cancellation was a result of her "being unvaccinated for COVID-19 without valid exemption, and therefore not permitted to work" pursuant to the Order.

[41] The reasons for the Board of Directors' decision were provided to the Appellant by letter of September 2, 2022. In its reasons the Board noted that the IH President and CEO and HAMAC had recommended that the Appellant's privileges be cancelled because she was unable to work. The Board also summarized the argument put forward by the Appellant as to why her privileges should not be cancelled as: i) it was not appropriate to cancel her privileges under the discipline process because she was in compliance with the Order, ii) section 6 of the *Hospital Regulations*, required that a member "refuse or neglect" to comply with requirements in the *Regulations* before privileges could be cancelled and compliance with the Order did not meet that test, and iii) IH has a legal obligation to respect her decision to remain unvaccinated.

[42] In support of its decision the Board noted that it could not avoid the obligations imposed by the Order. The Board stated that not meeting service obligations is a violation of the Bylaws and the Medical Staff Rules (the "Rules"). The Board noted that the Appellant had chosen to remain unvaccinated and as a result was consciously refusing and

neglecting to meet the requirements in the Order which would enable her to provide services to IH. The Board further noted that cancellation of the Appellant's privileges would open up her position for recruitment to fill the position, as hospitalists were desperately needed.

[43] The Appellant testified that she was unemployed for two months following October 26, 2021. She subsequently obtained a position as a family doctor with a private clinic in 100 Mile House and relocated her family to that area.

[44] The Appellant acknowledges that her inability to work at RIH, and the consequent financial impact and need to relocate to find work, are a result of the Order, and not the IH Board of Directors' decision. She says, however, that no longer being able to describe herself as a hospitalist and having to explain that her medical staff position and hospital privileges were cancelled through a disciplinary process has caused her humiliation. She says that each year when she renews her licence with the College of Physicians and Surgeons of British Columbia, or if she applies for a licence in a different jurisdiction, she will have to declare that her privileges were revoked.

[45] The Appellant also testified that the cancellation of her medical staff appointment and hospital privileges will make it more difficult for her to return to work once the Order is no longer in effect because she will have to reapply for appointment to the medical staff and for hospital privileges. She said that she would like to return to RIH as a hospitalist, although perhaps not on a full-time basis given her relocation to 100 Mile House.

[46] The parties agree that RIH, and in particular the Department, were chronically understaffed and overworked prior to the COVID-19 pandemic. The pandemic, and other stressors such as wildfires and floods which caused patient relocation to the IH region, exacerbated those challenges. The Order, and the consequent inability of unvaccinated hospital staff to work, caused further staffing challenges.

[47] The Department has had some success filling vacancies on a temporary basis with locum physicians, but filing permanent positions has been difficult. At the time of the hearing of this appeal there were 14 physicians on the Department medical staff, representing 9.98 full time positions. An additional 5.0 full time positions, to be filled by six physicians, currently remain vacant. IH is actively recruiting to fill two of the vacant positions.

[48] In order for IH to recruit on a permanent, and not locum, basis it is necessary for a position to be vacant. Therefore, while the Appellant remained a member of medical staff it was not possible for IH to recruit a permanent replacement for her position.

[49] The Appellant has appealed the decision of the Board of Directors and seeks an order reinstating her medical staff appointment and hospital privileges.

[50] As of the hearing of this appeal the Order remains in effect and the Appellant remains unvaccinated against COVID-19.

ISSUES

[51] The issue before the Panel is whether the IH Board of Directors was correct in cancelling the Appellant's medical staff appointment and hospital privileges. Pursuant to section 46(2) of the *Hospital Act*, the Panel may affirm, vary, reverse or substitute its own decision for that of the Board of Directors, on terms and conditions the Panel considers appropriate.

[52] The parties have framed the first issue to be determined by the Panel as: Was the Appellant in violation of the IH Medical Staff Bylaws?

[53] If the answer to that question is yes, the second issue before the Panel is: Was cancellation of the Appellant's medical staff appointment and hospital privileges the appropriate response?

[54] The Respondent says that the Appellant's decision to remain unvaccinated against COVID-19 amounts to consciously refusing or neglecting to meet the terms of the Order in a manner which would enable her to fulfil her service obligations under the Bylaws, thereby resulting in a violation of the Bylaws. The Respondent further says that cancellation was the appropriate response because RIH has significant staff shortages, particularly in the Department, and that was the only course of action which enabled IH to recruit physicians to her position on a permanent basis.

[55] The Appellant says both issues put before the Panel should be answered in the negative. The arguments advanced on her behalf in support of this position, as understood by the Panel, can be summarized as follows:

1. The Appellant has not "refused or neglected" to meet her service obligations, and remains ready and available to work at RIH as a hospitalist. Rather, she chose to decline the COVID-19 vaccination in accordance with her rights under the *Charter* and the *BC Health Care (Consent) and Care Facility (Admission) Act,* and is being prohibited from fulfilling her duties because of the Order.
2. If declining to receive the COVID-19 vaccine does amount to refusing or neglecting to meet her service obligations under the Bylaws, the cancellation of her medical staff appointment and hospital privileges was not the appropriate response. The Department was chronically understaffed, with many ongoing vacancies. IH could therefore exempt the Appellant from her service obligations, presumably until such time as the Order is no longer in effect, with no impact on the ongoing recruitment efforts for the other vacant positions.

3. IH is required to respect her decision to not receive the COVID-19 vaccine, that the decision to discipline her does not do so, and is in fact the antithesis of respect.
4. The process leading to the Board of Director's decision was procedurally unfair, and IH violated its own Bylaws and Rules by:
    a. failing to allow the Appellant to appear before HAMAC (Bylaw Article 11.2.1);
    b. failing to represent the interests of the Appellant (Bylaw Article 10.2 and Medical Staff Rules, section 15.3.5) by failing to represent her or look out for her interests and failing to answer her questions; and
    c. changing its position regarding the reasons for its decision.
5. Finally, the Board of Directors failed to consider and apply the *Charter* in making its decision.

DISCUSSION AND ANALYSIS

[56] The Panel agrees with the issues as framed by the parties and will address the issues and the arguments raised by the Appellant as follows:

1. Was the process leading to the Board of Director's decision procedurally unfair or did IH violate its own Bylaws and Rules?
2. Does the *Charter* apply, such that the Board of Directors was required to consider *Charter* principles in its decision to cancel the Appellant's privileges?
3. Was the Appellant in violation of the IH Medical Staff Bylaws?
4. If the answer to #3 is yes, was cancellation of the Appellant's medical staff appointment and hospital privileges the appropriate response?

[57] The Panel has thoroughly considered all evidence, submissions, and case law and will refer only to that which is necessary to this decision.

Was the process procedurally unfair?

[58] As noted, the Appellant argues that the process leading to the Board of Director's decision was procedurally unfair, and that IH violated its own Bylaws and Rules by:

a. failing to allow the Appellant to appear before HAMAC;
b. failing to represent the interests of the Appellant; and
c. changing its position regarding the reasons for its decision to cancel the Appellant's privileges.

[59] The Respondent asserts that whether or not the proceedings which led to the cancelation of privileges was procedurally fair is not the focus of a hearing before the

Hospital Appeal Board (the "HAB") because it is a hearing *de novo* which cures any procedural defects (*Paulus v. Surrey Memorial Hospital* (BC Medical Appeal Board, 1996); *Ng v. Richmond Health Services*, 2003 BCHAB 1).

[60] That this is a hearing *de novo* does not, however, lead to the conclusion that procedural concerns are not relevant and should not be considered. In *Hoonjan v. Interior Health Authority*, 2022 BCHAB 4, the HAB considered a case involving an ophthalmologist who was not given medical staff privileges after the specialized program in which he had been working for a number of years was relocated from one hospital to another. In that case, procedural concerns included a failure of any senior medical staff to advise the physician of his rights under the Medical Staff Bylaws or his right of appeal to the HAB. The panel stated that it is appropriate for the HAB to consider where there are serious breaches of procedural fairness that affect the substantive rights of a member of the medical staff, and to address those procedural fairness issues in exercising its discretion (at paragraph 85).

[61] The Panel will therefore consider the procedural concerns raised by the Appellant to assess whether there were any serious breaches of procedural fairness that affected the Appellant's substantive rights.

Failure to allow the Appellant to appear before HAMAC

[62] The Appellant asserts that IH violated the Bylaws by not allowing her to appear before HAMAC in November 2021 when the recommendation that her privileges be cancelled was considered. This argument is based on the assertion that IH proceeded under the wrong Bylaw.

[63] The principles and process for disciplinary proceedings are set out in Bylaw Article 11, with process set out in Article 11.2. IH followed the process set out in Article 11.2.2, General Disciplinary Action, which provides for the Board of Directors' consideration of a recommendation from HAMAC and the CEO regarding cancellation, suspension, restriction or non-renewal of privileges, with the affected medical staff member having the right to be heard at the Board of Director's meeting.

[64] The Appellant asserts that, instead, the process set out in Article 11.2.1 should have been followed. Article 11.2.1 allows for the summary restriction or suspension of privileges by the CEO or a senior medical administrator in cases of serious problems which may adversely affect patient care, or the safety and security of patients and staff. Such restrictions are to be considered by HAMAC at a special meeting, at which the affected medical staff member has the right to be heard.

[65] The process set out in Article 11.2.1 is intended to address situations involving the risk of imminent harm which must be addressed quickly and may result in a summary restriction or suspension of privileges before any hearing can be held by the Board of Directors. The immediacy of the restriction or suspension of privileges in this process before HAMAC is why the medical staff member has a right to be heard at the meeting of

HAMAC. That was not the case in this matter and the Appellant's privileges were not restricted or suspended by the CEO or senior administrator prior to the Board of Directors' meeting.

[66] The Panel is of the view that IH followed the appropriate process. Even if the wrong process had been followed, the substantive right at issue is the right to be heard, and the Appellant had that opportunity before the Board of Directors before any decision regarding her privileges was decided.

Failure to represent the Appellant's interests

[67] The Appellant asserts that IH failed to represent the Appellant's interests throughout the disciplinary process, and relies upon Bylaw Article 10.2 (obligation of medical staff association to inform members of their rights under the Bylaws) and the principles set out in *Hoonjan* regarding the obligation of department heads to look out for the interests of their medical staff members. The Appellant also states that IH, particularly Dr. C and HAMAC, failed to answer any of her questions.

[68] The Panel is of the view that the Appellant was provided with complete and accurate information throughout the process and notes that she was treated the same as other unvaccinated staff. She was advised on multiple occasions that a failure to become vaccinated, and therefore to work at RIH, could affect her contract and hospital privileges. She was advised of the disciplinary process and her rights within that process. She was represented by counsel at the Board of Directors meeting. The circumstances are not similar to that in *Hoonjan*, where the physician was unrepresented and misled about his rights, while being treated unfavourably in relation to the other applicants for a medical staff position. The Panel therefore does not agree that IH failed to represent the Appellant's interests.

[69] The Panel also does not agree that not answering the questions posed by the Appellant constitutes a failure on the part of IH. The questions posed by the Appellant to HAMAC in the Notice of Liability, and to Dr. C in the email exchange with him, were made in the context of a challenge of the Order and assertions of liability for those individuals who followed PHO directives. As a member of the medical community the Appellant should have been well aware of the status and background of vaccines and of the risks of receiving the vaccine in comparison with contracting COVID-19. No information was being withheld from the Appellant. The Panel is of the view that the Appellant was not genuinely seeking information and that her questions reflected her disagreement with the PHO and her challenge of the Order. In the circumstances we find no fault on part of HAMAC or Dr. C to decline to engage with her by responding to her questions.

IH changed its position

[70] The Appellant asserts that IH changed its position regarding the reasons for cancelling the Appellant's privileges. The Panel understands that this is based primarily on

two arguments. The first is that the initial briefing memo to HAMAC erroneously stated that the Appellant was in violation of the Order. The second argument is that the November 16, 2021 letter from the CEO to the Appellant advised that her contract with IH had been frustrated and was terminated immediately; that "frustration" of contract results when an intervening event that is not the fault of either party renders performance of a contract radically different from that which was contemplated; and that the acknowledgment of "no fault" on the part of the Appellant is inconsistent with the disciplinary process and allegation that she violated the Bylaws by refusing or neglecting to fulfill her service obligations.

[71] The initial November 19, 2021 briefing note to HAMAC recommended that hospital privileges be cancelled for those medical staff who were "in violation of the Public Health Officer Order". The Appellant is correct that this was an error as the Appellant did not work in RIH after October 26, 2021, and was therefore in compliance with the Order. This error was acknowledged and addressed as soon as it was raised. In the Panels' view this does not constitute a procedural error and it did not affect the Appellant's substantive rights.

[72] With respect to the suggested inconsistency between frustration of contract and the disciplinary process, we note that in her November 16, 2021 letter the CEO separately addressed the recommendation regarding cancellation of privileges and the termination of the Appellant's contract with IH. The recommendation regarding termination of privileges was clearly stated to be based on the Appellant's inability to work and therefore discharge her responsibilities as a member of medical staff in accordance with the Bylaws, which would be addressed pursuant to Bylaw Article 11.1.1, namely the disciplinary process. On the other hand, the contract that was terminated immediately on the basis of frustration was the Clinical Services Contract, which, as noted above, largely dealt with the hours that hospitalists committed to work and the payment schedule. Termination of that contract is not before this Panel as this hearing is about the cancellation of the Appellant's hospital privileges. IH has been consistent in its position that the cancellation of privileges was pursuant to the discipline process.

[73] The Panel therefore finds that the IH did not commit any serious breaches of procedural fairness that affected the Appellant's substantive rights which warrant being addressed by the Panel in the exercise of its discretion.

Does the Charter apply?

[74] The Appellant asserts that the Board of Directors should have considered her *Charter* rights when making its decision to cancel her hospital privileges.

[75] The *Charter* applies to the executive and legislative actions of the federal and provincial governments. Not all actions by entities associated with government, such as hospitals, are within government control such that the application of the *Charter* is

warranted. Stated very simply, a distinction is drawn between those actions or matters which are "ultimate or extraordinary" and within government control, versus daily operational matters which are considered "routine or regular" and within the control of another entity (*Stoffman v. Vancouver General Hospital*, [1990] 3 SCR 483). Where an entity is found to be implementing a specific government policy or program the *Charter* will apply (*Eldridge v. British Columbia (Attorney General)*, [1997] 3 SCR 624).

[76] In *Stoffman* the Court considered the adoption of a mandatory retirement policy for physicians and consequent non-renewal of hospital privileges, and held that responsibility for such matters rested with the hospital board. As such the board's actions in adopting the policy did not fall within the ambit of the *Charter*. In *Eldridge* the Court considered the failure of the provincial government to fund sign language interpreters for deaf persons accessing health care services. A distinction was drawn with *Stoffman,* in that provision of the services was not simply a matter of internal hospital management, but the expression of a specific government policy regarding health care services. In that case the *Charter* did apply, and the government could not evade its obligation to provide services without discrimination.

[77] The Panel understands that the Appellant's position is that the decision of the IH Board of Directors in this matter amounts to implementation of government policy, such that the *Charter* applies, based on two arguments. The first is that the Order constituted government policy and, in making the decision to cancel hospital privileges further to the inability to work in a hospital due to the Order, IH was applying or implementing the Order.

[78] The requirement in the Order that unvaccinated staff were not permitted to work in hospitals clearly had an impact on hospital staffing. This was an operational matter which IH was required to address. The Order itself did not include any provisions or create any requirements regarding the employment or contractual relationship between hospital staff and health authorities, or provide any direction regarding implementation of the Order.

[79] The Panel is of the view that the Board of Director's decision regarding hospital privileges was a "routine or regular" operational decision. While made in response to the effects of the Order it did not constitute application or implementation of government policy.

[80] The second argument on which the Appellant relies in support of the assertion that the IH Board of Director decision amounts to implementation of government policy is based on the wording of the Bylaws. In particular, the Appellant notes that Bylaw Article 11.1.1 provides that cancellation, suspension, restriction or non-renewal of privileges must be done in accordance with the established medical staff disciplinary procedures, as set out in section 6 of the *Hospital Act Regulations*. The Appellant takes the position that, while IH may be autonomous in its day-today operations, Article 11.1.1 means that IH acts as agent for the government when initiating and carrying out disciplinary actions.

[81] Section 6 of the *Hospital Act Regulations* creates the authority for a hospital board to make decisions regarding hospital privileges. Despite the language in Bylaw Article 11.1.1 regarding procedures set out in section 6, that section does not delineate a specific process or procedure. In the Panel's view section 6 does not constitute government policy. Disciplinary processes undertaken by a health authority are therefore not implementation of such policy.

[82] The Panel is of the view that this matter is analogous to the scenario in *Stoffman*, and not *Eldridge*, and that the decision regarding the Appellant's hospital privileges was a routine, operational matter within the control of the IH Board of Directors. As such it did not fall within the ambit of the *Charter* and the Board of Directors was not required to consider the Appellant's *Charter* rights when making its decision to cancel her hospital privileges.

Was the Appellant in violation of the IH Medical Staff Bylaws?

[83] This is one of the two central issues to be addressed.

[84] Section 6 of the *Hospital Act Regulations* provides that a hospital's board may exclude a person from rendering health care services in a hospital if the person "refuses or neglects" to comply with the Bylaws. The relevant Bylaw is Article 6.2.4, which requires medical staff to meet service responsibilities. For a hospitalist this means showing up for designated shifts at the hospital location. Article 11.1.1 of the Bylaws provides that violation of the Bylaws may result in "cancellation, suspension, restriction or non-renewal of privileges".

[85] The question is therefore whether the Appellant's decision to not receive a COVID-19 vaccination, knowing that it would result in her inability to fulfill her service obligations to IH, constituted a refusal or neglect to meet her service obligations, such that she was in violation of the Bylaws.

[86] The Respondent says that the answer to the question is yes, that the Appellant's decision to remain unvaccinated against COVID-19 amounts to consciously refusing or neglecting to meet the terms of the Order in a manner which would enable her to fulfil her service obligations under the Bylaws, thereby resulting in a violation of the Bylaws, such that IH was entitled to take the disciplinary actions set out in Article 11.1.1.

[87] The Appellant says that she chose to exercise her legal right to decline the vaccination and that her ability to work at RIH was taken from her by the Order, but this does not constitute a refusal or neglect to meet her service obligations. The Appellant says that the decision to not receive the vaccination and a decision to not work are separate decisions, and that being prohibited from working is different than neglecting or refusing to work. Consequently, there has been no Bylaw violation and IH cannot rely on Article 11.1.1 to discipline her.

[88] The Appellant further says that the law requires that IH respect her exercise of her *Charter* rights and that the decision to take disciplinary action does not do so. The Appellant says that IH should have exempted her from her service obligations, presumably until such time as the Order is no longer in effect.

[89] Section 7 of the *Charter* protects the right to "life, liberty and the security of the person". This right protects the right to bodily autonomy, including the right to refuse medical treatment. That the Appellant was fully within her rights to decline to receive the COVID-19 vaccine is uncontroverted and not at issue.

[90] The parties provided numerous case authorities which considered impacts to employment resulting from the COVID-19 pandemic or a failure to vaccinate. These cases arose in differing factual contexts and applied differing rationales to reach different conclusions. Some of the cases arose in a health care setting but none considered hospital privileges.

[91] Grievance arbitrations in a unionized work environment included: termination of an employee unable to work because of the Order was warranted, as the employer had provided compelling evidence of the operational impact of leaving unvaccinated employees on unpaid leaves of absence (*Fraser Health Authority v. BCGEU (Capozzi Grievance),* 2022 CanLII 25560 (BC LA)); termination of an employee who could not work because of the Order was warranted as the employment relationship had been frustrated (*Fraser Health Authority and HEU (London Grievance)* (2022, Doyle (BC LA)); a unilaterally imposed vaccination policy was contrary to a collective agreement provision that the employer must discuss any significant policy changes with the union prior to implementation (*Chartwell Housing REIT v. Healthcare, Office and Professional Employees Union, Local 2220*, 2022 CanLII 6832 (ON LA)); termination for failure to comply with a vaccination policy was appropriate as keeping employees on a leave of absence of unknown length would materially hamper the employer's ability to recruit and retain employees (*Lakeridge Health v. CUPE, Local 6364*, 2023 CanLII 33942 (ON LA)); and a failure to comply with an employer policy requiring that employees be vaccinated warrants dismissal for noncompliance (*BCGEU V. BC Safety Authority dba Technical Safety BC*, 2023 CanLII 76193 (BC LA)).

[92] Employment (non-union) cases included: the employment contract of an employee of a travel agency had not been frustrated by the pandemic (*Verigen v. Ensemble Travel*, 2021 BCSC 1934); the implementation of a vaccination policy by the client which rendered an unvaccinated employee unable to work did result in frustration of the employment contract (*Croke v. VuPoint Systems Ltd*, 2023 ONSC 1234); and an employee put on unpaid leave for a failure to comply with a vaccination policy had not been constructively dismissed (*Parmar v. Tribe Management Inc*, 2022 BCSC 1675).

[93] Other referenced cases included tribunal determinations that a failure to comply with a vaccination policy is a personal and deliberate choice which constitutes "misconduct" and disqualifies a terminated employee from EI benefits (*ML v. Canada*

Employment Insurance Commission, 2023 SST 739; *SJ v. Canada Employment Insurance Commission*, 2023 SST 682; and *GM v. Canada Employment Insurance Commission*, 2023 SST 675) and that a vaccination policy applicable to all military personnel was overbroad because it did not consider a member's occupation, duties or place of work (*Military Grievances External Review Committee*, File No. 2022-109 (May 30, 2023)).

[94] The Panel is of the view that the facts and reasoning in the *Capozzi* labour arbitration decision are most applicable to this matter.

[95] In *Capozzi* the employee was a substance abuse counsellor employed by the Fraser Health Authority. She was unvaccinated and therefore unable to work due to the Order. Her employment was terminated and her union asserted she should have been placed on unpaid leave. The arbitrator noted at paragraph 23:

> For her own personal reasons, the Grievor chose not to get vaccinated. Clearly, the Grievor has the right to make her personal choices, and I accept she strongly believes in her views. However, the result of those choices was that she rendered herself, by virtue of the terms of the Order, ineligible to work for FHA, in any capacity. Further, she advised FHA that she had no intention of ever becoming vaccinated. Accordingly, there was no reasonable prospect of her becoming eligible to work under the Order in the foreseeable future. An employee who, by her choice, renders herself statutorily ineligible to work indefinitely gives FHA cause for some action, whether it be considered culpable or non-culpable.

[96] There has been no allegation of misconduct on the part of the Appellant. IH does not allege that the Appellant has committed unprofessional or unethical conduct, breached any professional ethics or codes, nor is she guilty of professional negligence. It should be made clear that this matter does not involve any patient care issues whatsoever. In this sense the cancellation of her hospital privileges was “non-culpable”. Nevertheless, the Appellant did decide to not receive a COVID-19 vaccination, knowing that it would render her unable to meet her service obligations.

[97] As in *Capozzi*, this Panel acknowledges that the Appellant has the right to make decisions impacting her bodily integrity and accepts that she strongly and sincerely believes in her views. That does not mean, however, that she is immune from the consequences of her decision. It is a recognized principle of law that a reasonable person desires or foresees the natural and probable consequences of their conduct. (See, for instance, *The “Common Sense” / “Natural Consequences” Inference*, 2015 CanLIIDocs 5062). While generally applicable in the criminal law context when assessing intent, it has analogous application here. In deciding to not receive the COVID-19 vaccine the Appellant is presumed to have also intended the foreseeable consequences of that decision. She knew she was rendering herself ineligible to work at RIH and, in doing so was refusing to fulfill her service obligations under the Bylaws.

[98] The Appellant says that IH is required to respect her exercise of her *Charter* rights and cites definitions of "respect" as meaning being held in high or special regard. The implication is that in order to respect her decision IH must not take any steps that hold the Appellant accountable for the consequences of that decision. Having the right to make a decision, and your right to do so acknowledged, or respected, is not the same as being held responsible for the consequences. IH has not challenged the Appellant's right to decline the COVID-19 vaccination or the beliefs that led her to that decision. IH has, however, held the Appellant accountable for the foreseeable consequences of her decision which adversely impacted IH. In doing so IH has not disrespected the Appellant's right to make a health care decision or exercise her *Charter* rights.

[99] The Panel is therefore of the view that the Appellant violated her service obligations set out in Bylaw Article 6.2.4. The Panel is also of the view that the violation warranted a disciplinary response under Bylaw Article 11.1.1.

Was cancellation of the Appellant's medical staff appointment and hospital privileges the appropriate response?

[100] This brings us to the second central question to be addressed; that is, was cancellation of the Appellant's medical staff appointment and hospital privileges the appropriate disciplinary response?

[101] In *Capozzi* the arbitrator also considered whether termination of the grievor's employment or a lesser response was appropriate. The union advocated for a leave of absence. In determining that termination was appropriate the arbitrator noted that compelling evidence had been provided of the operational impact of leaving unvaccinated employees on unpaid leaves of absence and held that the health authority had presented "compelling operational reasons" for its approach and that no lesser alternative was reasonably available.

[102] This approach was adopted by the HAB in *Dr. Christopher McCollister v. Vancouver Island Health Authority*, 2023 BCHAB 1. In that matter the HAB panel considered whether to issue an interim stay of a cancellation of hospital privileges pending a full hearing. The subject physician was a pediatrician in a community which required three pediatricians. One position had been vacant since 2017. The physician was unvaccinated and unable to work in the local hospital due to the Order, leaving only one working pediatrician. Termination of the physician's privileges, leaving two vacancies, meant the health authority was eligible for additional funding for locum coverage. The panel noted that the health authority had provided evidence similar to that led in *Capozzi* regarding recruitment challenges and held that the health authority had established "administrative and operational difficulties" if the stay was granted.

[103] A similar approach was taken in the *Lakeridge* matter. As noted above, that case involved terminations of employees for failing to comply with a vaccination policy. In

finding that the terminations were appropriate the arbitrator noted that the evidence established that it would have been materially more difficult to attract replacement staff for vacancies of employees on indefinite temporary leaves, rather than filling vacancies for permanent positions. This was noted as being in contrast to the situation in the *Chartwell* matter, where the evidence fell "far short" of establishing potential problems with recruitment or retention should employees be left on indefinite leaves of absence.

[104] The evidence in this matter is that RIH, and in particular the Department, were chronically understaffed and overworked prior to the COVID-19 pandemic, and that these challenges were exacerbated by various events, including the Order and the consequent inability of unvaccinated hospital staff to work. The Department has had some success filling vacancies on a temporary basis with locum physicians, but filing permanent positions has been difficult. In order for IH to recruit on a permanent, and not locum, basis it is necessary for a position to be vacant. Therefore, while the Appellant remained a member of medical staff, it was not possible for IH to recruit a permanent replacement for her position.

[105] The evidence also established that, at the time of the hearing of this appeal, there were 5.0 vacant full-time positions in the Department, and that IH is currently actively recruiting to fill two of those positions.

[106] There was no evidence led to suggest that there is any difference between the Appellant's position and the other vacant positions, or that her position, in particular, needed to be vacant to assist with recruitment. IH is having considerable difficulty recruiting new hospitalists, despite ongoing permanent, full-time vacancies in the Department. Cancelling the Appellant's medical staff appointment and hospital privileges did not assist with recruitment for those ongoing vacancies. IH led evidence that a physician had recently been hired into the Appellant's former position, but there was no explanation as to why the new physician could not have been hired into any of the other vacant positions. In other words, it was not necessary for the Appellant's specific position to be vacant for the new physician to be hired.

[107] The Panel is of the view that, absent evidence of compelling administrative or operational reasons establishing that termination of hospital privileges is the appropriate approach, a lesser response is warranted. Those lesser options, as set out in Bylaw Article 11.1.1, are suspension, restriction, or non-renewal of privileges.

[108] The Panel is of the view that the appropriate disciplinary response in October 2021 would have been to suspend the Appellant's appointment and privileges until such time as she was eligible to work, by reason of revocation of the Order or her vaccination, or the other vacant positions in the Department were filled and there was a compelling administrative or operational need to recruit for the specific position which she held.

[109] That would not, however, be the end of the matter. Pursuant to Bylaw 4.4.1 medical staff appointments and hospital privileges are reviewed on an annual basis. Bylaw 4.5 sets out the process for review, and Bylaw 4.5.2 provides that the appropriate committee and

department head shall consider "information on the manner in which the member has fulfilled the duties and obligations as a member of the medical staff" and report its recommendation to HAMAC which, in turn, shall notify the Board of Directors of its recommendations. The Board of Directors then makes its decision.

[110] The Appellant has not worked at RIH since October 25, 2021. If her medical staff appointment and privileges had been suspended they would have come up for review twice since that time. The information upon those reviews would be that the Appellant was not fulfilling her duties and obligations as a member of the medical staff. The logical recommendation in response would have been to not renew her medical staff appointment or privileges, and the Board of Directors would have been warranted in making that decision.

DECISION

[111] In conclusion, and for the reasons set out above, the Panel finds as follows:

1. IH did not commit any serious breaches of procedural fairness that affected the Appellant's substantive rights which warrant being addressed by the Panel in the exercise of its discretion.
2. The Board of Directors was not required to consider the Appellant's *Charter* rights when making its decision to cancel her hospital privileges.
3. The Appellant's decision to not receive a COVID-19 vaccination, knowing that it would result in her inability to fulfill her service obligations to IH, constituted a refusal or neglect to meet her service obligations, such that she was in violation of the Bylaws.
4. The appropriate response to the violation was:
    a. a suspension of the Appellant’s privileges until such time as she was eligible to work, by reason of revocation of the Order or her vaccination, or there was a compelling administrative or operational need to recruit for her position; and
    b. if the Appellant remained ineligible to work at the time of annual review, for her medical staff appointment and privileges to not be renewed on the grounds that she was not fulfilling the duties and obligations as a member of the medical staff.

[112] The Panel therefore orders that the August 23, 2022 decision of the IH Board of Directors is substituted with the Panel's decision as follows:

1. The Appellant's hospital privileges be suspended, effective August 19, 2022, to be in effect until such time as the Appellant is eligible to fulfill her service obligations to IH or there is an administrative or operational need to recruit for her position; and
2. If the Appellant remains ineligible to work at the time of the annual review of her hospital privileges, that those privileges be cancelled.

"Sharleen Dumont"

Sharleen Dumont, Panel Chair
Hospital Appeal Board

"Stacy Robertson"

Stacy Robertson, Panel Member
Hospital Appeal Board

"Dr. R. Alan Meakes"

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