COMMUNITY CARE AND ASSISTED LIVING APPEAL BOARD

Community Care and Assisted Living Act,
SBC 2002, c. 75

APPELLANT: TJ (the Appellant)

RESPONDENT: Chief Medical Health Officer, Vancouver Island Health Authority

PANEL: Alison H. Narod, Panel Chair
Nathan Bauder, Member

DECISION

INTRODUCTION

[1] The Appellant appeals a decision by the Chief Medical Health Officer (the "MHO") of the Vancouver Island Health Authority ("VIHA"), dismissing her application to reconsider his earlier decision to deny her application for a licence under the *Community Care and Assisted Living Act* (the "*Act")* to operate a group child care facility.

[2] The Panel finds that the Appellant has failed to meet the burden placed on her by section 29(11) of the *Act* to prove that the decision under appeal was not justified. We dismiss the appeal and confirm the MHO's decision to deny the requested licence. Our reasons are set out below.

[3] This case is unusual insofar as the Appellant does not dispute the material facts. As the Appellant's history as a child care operator is detailed and extensive, we will not canvass the whole of that history below, but will refer to key facts. This should not be taken as an indication that the whole of the facts was not considered.

[4] The decision under appeal is a decision dated October 20, 2008 by the MHO in which he declined, under section 17(3) of the *Act*, to rescind, vary or substitute his earlier decision dated September 9, 2008 to deny the Appellant's application for a licence for a group child care (school age) facility (known as "Kidstyme Kids Zone/Group Centre"), pursuant to his authority under section 11(2) of the *Act*.

[5] The decision under appeal reveals that, on September 9, 2008, the MHO made a decision to deny the Appellant's application for the aforementioned Licence. The MHO based the September 9, 2008 decision on information contained in an Application Review Report prepared by the VIHA staff (the "Report"). Among other things, that Report referenced BC Supreme

Court proceedings in which VIHA obtained a January 22, 2008 injunction Order declaring that the Appellant had contravened the *Act* by operating a community care facility by providing care to three or more children unrelated by blood or marriage without holding a valid and subsisting community care facility licence and prohibiting her from continuing to do so. It also referenced a March 25, 2008 B.C. Supreme Court Order finding the Appellant in contempt of the Court's January 22, 2008 Order by operating a community care facility on February 25, 2008 without holding a valid, subsisting licence under the *Act*. Both Orders were issued with the consent of the parties.

[6] Additionally, the MHO based his September 9, 2008 decision on an August 18, 2008 Order of the B.C. Supreme Court finding the Appellant in contempt of its March 25, 2008 Order by operating a community care facility without holding a valid, subsisting licence under the *Act*. Based on the materials before him, the MHO formed the opinion that the Appellant did not meet the requirements of section 11(2)(a) of the *Act*.

[7] The Appellant was given, and availed herself of, the opportunity to request reconsideration of the September 9, 2008 decision and her written reasons in support were taken into account in the MHO's October 20, 2008 decision.

[8] In the decision under appeal, the MHO observed that the Report indicated that the Appellant had been a licensee of a community care facility for 10 years prior to 2007. During that time, she demonstrated on-going patterns of non-compliance with minimal health and safety requirements. Despite her written submissions, which included assertions that she had never harmed or neglected a child in any way, she did not appear to the MHO to understand that she had compromised the health and safety of children by failing to follow the minimum requirements set out in the legislation. Items of "chronic, repetitive non-compliance" included, but were not limited to, exceeding maximum capacity and providing care to too many preschool age children. The Appellant admitted making mistakes and maintained that she tried her best to comply with legislation. However, she was routinely unsuccessful in meeting minimal requirements.

[9] The MHO noted that the Appellant voluntarily surrendered her Licence in July, 2007. However, the Community Care Facilities Licensing Program ("CCFLP") substantiated, during inspections from October, 2007 to April, 2008, that the Appellant operated an illegal, unlicensed community care facility on at least six occasions by exceeding maximum capacity without the requisite licence. After the Appellant received various verbal warnings and written notices to cease and desist, and after she was discovered on four occasions to be operating an unlicensed facility between October and December, 2007, on January 22, 2008, the VIHA obtained the first aforementioned B.C. Supreme Court Order enjoining the Appellant from operating a community care facility by providing care to three or more unrelated children without a valid and subsisting licence under the *Act*. Despite the Order, the CCFLP substantiated on two additional occasions that the Appellant continued to operate an illegal,

unlicensed facility. As mentioned, the Appellant was found in contempt of court on two subsequent occasions (see the above-noted March 25, 2008 and August 18, 2008 contempt orders). (As noted, she consented to the original injunction Order and the first contempt Order.)

[10] The MHO found that the Appellant had not only demonstrated that she would not comply with the *Act*, but she had also demonstrated that she would not comply with an injunction order of the B.C. Supreme Court. She demonstrated disregard for the *Act* and the Supreme Court of B.C., as well as blatant disrespect for the law.

[11] Moreover, the MHO observed that the Report indicated that the Appellant had not passed Licensing's written manager assessment. Moreover, a signature on a May 2008 "Opinion of Medical Practitioner" form had been "forged" according to the physician. (We note that this form was designed to provide a medical practitioner's opinion indicating whether or not the mental and physical health of a person working at a licensed daycare is adequate for the job.) As a result, the CCFLP had not received a complete application package from the Appellant. The Report noted that, despite having been apprised that her application was incomplete, the Appellant maintained she had supplied all information requested and pressed for an early decision.

[12] The Report also indicated that during the last inspection of the Appellant's facility, significant health and safety concerns had been identified. After the inspection, the Appellant continued to request that a decision on her licence application be made "soon". The Appellant, in her written response to the September 9, 2008 decision, contended that she had not been given a chance to prove that she had remedied the concerns that had been raised by having the benefit of a follow-up inspection, during which she could have demonstrated that she had corrected deficiencies and complied with requirements.

[13] The MHO indicated he was prepared to accept the Appellant's assurances that she had corrected deficiencies identified in the last inspection and completed all documentation required in the application process. However, she had not passed the written manager assessment and therefore had not secured an approval to be the manager of the proposed facility. Additionally, he had concerns about the forged signature on the "Opinion of Medical Practitioner" form that had been submitted by the Appellant.

[14] In the result, the MHO concluded:

> Based on the information provided, I am of the opinion that the Applicant does not meet the requirements of Section 11(2)(a) of the *Community Care and Assisted Living Act* including that the Applicant:
>
> - Is of good character;
>
> - Has the training, experience, and other qualifications required under the Regulations; and

- Has the personality, ability and temperament to operate a community care facility in a manner that will maintain the spirit, dignity and individuality of children in care.

Accordingly, I decline to act under Section 17(3) of the *Act* to rescind, vary or substitute my decision to deny the issuance of the Licence to the Applicant for the purposes of operating Kidstyme Kids Zone/Group Centre and, pursuant to my authority under Section 11(2) of the *Act*, I hereby deny the issuance of the Licence for the reasons given above.

THE APPELLANT'S POSITION

[15] In her written reasons for appeal, the Appellant made a number of allegations and submissions concerning the issue of her compliance with health and safety requirements. However, since the MHO accepted that such matters had been corrected, those allegations do not affect the outcome of this appeal and, therefore, they will not be referred to further, below.

[16] However, in her written submissions, the Appellant also suggested that she had been harassed by VIHA staff who she said constantly alleged complaints that she was caring for too many children. She said that she had been embarrassed and slandered by VIHA staff and felt that she had been stripped of her dignity and happiness. Although she does not deny the allegation that she exceeded maximum capacity, she said it was out of her control. She maintained that on the last occasion, she was only one child over the limit, because a parent was late.

[17] Additionally, the Appellant maintained that she had learned from her mistakes and had corrected them.

Appellant's Evidence

[18] In the hearing before this panel, the Appellant testified that she was a person of good character. The Appellant admitted that she had made mistakes. She agreed that she had too many children in her care a couple of times, but suggested it was not a very significant matter and, in any event, it was out of her control, because it was due to the fault of the parents and the fact that she was too accommodating of them.

[19] With respect to the Supreme Court contempt awards, she contended that she was treated unfairly by Licensing when she was taken to Court over it. She felt mistreated by VIHA staff, generally. In particular, Licensing had miscalculated the number of children under her care, because there were other persons in the home that were either the children's parents or caretakers. She maintained that on the last occasion she was only one child over the limit and there was nothing she could do about it, because the parent was late.

[20] The Appellant acknowledged affixing a doctor's name to the Opinion of Medical Practitioner form required by VIHA to establish her mental and physical fitness to work at her facility, but she did not consider it forgery. She

did not think it was wrong. In her view, VIHA was requesting a second letter from her doctor. Since she had previously provided it with a letter from this doctor, she questioned why another one was required again, and she was upset by this.

[21] The Appellant canvassed her pre-2007 experiences with the Nanaimo office of the Licensing Authority. However, since that evidence is not relevant to our decision, it need not be referenced here. She also canvassed the health and safety deficiencies she thought were alleged against her, but since the MHO accepted they had been corrected, there is no need to review them here.

[22] With respect to the issue of the written manager assessment, the Appellant maintained that she historically did not do well on written tests and alleged that she had not been given the whole of the test. She maintained that when she was asked questions orally, she was able to do everything with no problem.

[23] On cross-examination, the Appellant agreed that she had previously possessed a Licence to operate a child care facility from 1996 to 2007 and that she surrendered it in July 2007. She understood she had to apply for and obtain a licence to care for more than two unrelated children. She understood she had to be a person of good character and agreed that one indication of this is whether the person obeys the law and does not break it.

[24] The Appellant admitted that she had broken the law in 2008, but maintained that she had only done so once. Despite this, she agreed that she had been issued the above-referenced B.C. Supreme Court orders and had consented to one of the Orders made against her. She had been represented by legal counsel at that time. She acknowledged that she admitted in Court that she had exceeded the limit of children that she could care for without a licence, and that she not only contravened the *Act,* but also Court orders. She acknowledged that she had been punished in contempt and, among other things, the Court had imposed a punishment of a fine and a suspended 30 day jail sentence.

[25] The Appellant agreed that another indication of good character was that a person with it does not mislead and will be honest and open with government officials. One example of this is not to forge and print someone else's name. She acknowledged that she affixed the doctor's name to the above noted document without the doctor's permission and did not apprise VIHA that she had done so.

[26] The Appellant agreed that the MHO was correct in finding that the signature on the May, 2008 "Opinion of Medical Practitioner" form was "forged" according to the physician. She maintained that since she printed the doctor's name, and did not "sign" it, it was not a forgery. However, if it amounted to a forgery, she did not mean it that way.

[27] The Appellant also agreed that the MHO was correct in finding that she had not passed the written manager assessment and therefore had not

obtained VIHA's approval to be the manager of the proposed facility. She maintained that she had not completed one page of the assessment form, but acknowledged she had been told it did not relate to the type of licence she sought.

[28] The Appellant acknowledged that part of her submission was that she was unhappy and dissatisfied with the Nanaimo office of VIHA and that, as a result of her concerns, her application for a licence was reviewed and decided by persons in VIHA's Victoria office who had not previously had anything to do with her.

[29] The Appellant acknowledged that she had made mistakes in the past and that the MHO and others had considered her past history. They considered that it showed on-going non-compliance with minimum standards of health and safety.

[30] The Appellant acknowledged that she was not alleging that the MHO erred, but that she was asking for a second chance to prove herself. She admitted that she broke "some rules" and was wrong in doing so, but she maintained she was under stress and no one was hurt. She did not believe all of the complaints against her, did not know where they came from, and thought they were vindictive. She apologized for her mistakes and reiterated that she was a person of good character.

[31] The Appellant acknowledged that the rules and regulations were in place for a reason and were important, but she said she thought that it would be acceptable to bend them for a few minutes. She acknowledged that she should have stayed within the rules. She said she never made a decision for the wrong reasons intentionally.

[32] The Appellant maintained that these problems would not recur, because she has now learned her lesson from this and from her experiences in Court. She knows she was wrong.

[33] The Appellant asked if she could have her licence back with conditions, such as being subject to inspections and no recurrent contraventions.

RESPONDENT'S POSITION

[34] As the Respondent's position has been accepted by the Panel, we will incorporate its arguments into our Reasons and not repeat them here.

Respondent's Evidence

[35] The Respondent called TW, a Licensing Officer (the "LO") with the South Island Victoria office of VIHA as a witness. She was the author of the Report that was considered by the MHO. She explained how and why she came to her conclusion that the Appellant was not a person of good character.

[36] The LO said she considered the Appellant's history as a licensee and her current application. The LO noted that she had not received the complete documentation required for an application, as the application was incomplete. Among other things, the LO had not received a written manager assessment that the Appellant had passed. She and the Appellant had discussed the Appellant's difficulties with providing written answers and the Appellant was advised that she could have someone assist her in editing her response. The Appellant said she had someone who could help her do so. When the LO discussed the fact that the Appellant's application was incomplete in this regard, the Appellant indicated that she wanted her application to be processed anyway.

[37] Accordingly, the LO reviewed the material she had before her. This material included the Appellant's history of exceeding the number of children permitted to be in her care and her history of contempt of court. The LO considered section 11 of the *Act* and concluded that the Appellant was disobeying the law, knowingly. The LO was not satisfied that the Appellant would comply with the law in the future.

REASONS

[38] Section 11 of the *Act* provides, in part:

> **Powers of Medical Health Officer**
>
> 11(1) Subject to this Act and the regulations, a medical health officer may issue to an applicant a licence to operate a community care facility and specify in the licence the types of care that may be provided in the community care facility.
>
> (2) A medical health officer must not issue a licence under subsection (1) unless the medical health officer is of the opinion that the applicant,
>
> (a) if a person, other than a corporation,
>
> (i) is of good character,
>
> (ii) has the training, experience and other qualifications required under the regulations,
>
> (iii) has the personality, ability and temperament necessary to operate a community care facility in a manner that will maintain the spirit, dignity and individuality of the persons being cared for …

[39] As noted, this is an unusual case. The Appellant has not disputed the material facts. Indeed, she has agreed that the MHO was correct and made no error in his decision respecting each factor that he relied on in making his decision.

[40] In our view, there is a substantial body of evidence that justifies the MHO's conclusions.

[41] Section 11(2)(a) of the *Act* prohibits a medical health officer, such as the MHO, from issuing a licence, such as that sought by the Appellant, unless he is of the opinion that the person is of good character, has the personality, ability and temperament necessary to operate the facility to be licensed in the requisite manner.

[42] There is no doubt that the process in which the MHO made his decision was fair. The evidence did not substantiate the Appellant's allegations that she had been harassed, mistreated or unfairly treated by VIHA staff in connection with allegations that the Appellant had failed to comply with the legislative limits on permissible capacity. The MHO and the VIHA staff involved in preparing the Report that he considered were persons who had no prior dealings with the Appellant. The Appellant was provided with the September 9, 2008 decision. She was provided with and took advantage of the opportunity to seek reconsideration and provide written submissions in support. Her submissions were taken into account in the MHO's October 20, 2008 decision. The Appellant was provided with an opportunity to appeal the October 20, 2008 decision, at which time she was able to make written and oral submissions and to ask questions of the Respondent's witnesses.

[43] There was ample evidence to support the MHO's opinion that the Appellant was not a person of good character and therefore failed to meet the requirement of section 11(2)(a)(i). The Appellant agreed that a person of good character obeys the law and does not breach it. Yet she repeatedly contravened the statutory and regulatory requirement that she refrain from providing care to three or more children not related to her by blood or marriage without holding a valid and subsisting Community Care Facility Licence. Despite repeated warnings, she continued to transgress these requirements. The Respondents had to go to the extent of commencing a Supreme Court action to obtain an injunction order and two contempt orders to bring this home to the Appellant and curtail her repeated contraventions. The first two of these orders were by consent and the Appellant's last contempt order is therefore more objectionable because of her own agreements to comply with the law.

[44] Despite this, the Appellant minimized the seriousness of her conduct, claiming it was not intentional, it was not avoidable, the contraventions themselves were minor or insignificant, and she merely bent the rules for a matter of minutes.

[45] Additionally, despite acknowledging that a person of good character does not forge the signature of another and mislead government officials about the signature, the Appellant affixed the name of a physician to a document required as part of her application for a licence, without the knowledge of the physician. The Appellant did not apprise the Respondent of that fact. Notably, the document was an important element of her application; it reflected on the very criteria that the MHO had to consider in deciding whether he was

prohibited from issuing the licence; it attested to her fitness to work in the facility to be licensed. Again, the Appellant minimized the significance of this conduct, saying that it was not intentional and suggesting that it was minor and unimportant.

[46] This evidence, in and of itself, would be a sufficient basis on which to uphold the MHO's decision to refuse to issue a licence to the Appellant.

[47] However, the Respondents also submit that there was evidence that the Appellant was not a person who had the training, experience and other qualifications required by section 11(2)(a)(ii), nor the personality, ability and temperament necessary to operate a community care facility in a manner that will maintain the spirit, dignity and individuality of the persons being cared for as required by section 11(2)(a)(iii).

[48] We find that the MHO did not err in concluding that the Appellant lacked the personality, ability and temperament required by section 11(2)(a)(iii). This is amply demonstrated by the Appellant's repetitive contraventions of the *Act* and regulation, particularly as they relate to the requirement to refrain from caring for three or more children unrelated by blood or marriage without holding the requisite licence. Moreover, it is evidenced by the Appellant's inability to comply with Supreme Court orders to the point that she was found in contempt twice and punished by a fine and suspended jail sentence. It is also revealed in the Appellant's action in affixing her doctor's name to a document intended to attest to her physical and mental fitness to work in the facility at issue and then misrepresenting that document and its contents by submitting that document to VHA in support of her application.

[49] The Appellant's attitude towards these misrepresentations, contraventions and Court Orders demonstrates a lack of appropriate personality, ability and temperament, insofar as it reveals that she does not take her legal responsibilities seriously, minimizes their importance, and fails to appreciate their significance to the health and safety of those for whom she purports to care, as well as their spirit, dignity and individuality.

[50] Moreover, and perhaps most significantly, her repetitive contraventions and her minimization and lack of appreciation of the seriousness of those matters gives us no confidence that the Appellant will comply with the *Act* and regulation in the future. We are reinforced in this view by the fact that the Appellant did not comply with two Supreme Court Orders to which she herself consented; this indicates she cannot be relied on to comply with her own assurances that she will comply with her obligations under the *Act* and Regulation.

[51] Under section 29(12) of the *Act*, the Board may confirm, reverse or vary a decision under appeal or send the matter back for reconsideration, with or without directions. Under section 50(2) of the *Administrative Tribunals Act*, the Board may attach terms or conditions to whatever decision we issue. The Appellant has asked us to issue her a licence with conditions attached.

However, our decision, for the reasons we have explained, is to dismiss her appeal and confirm the decision of the MHO that denied her licence application. The circumstances of this appeal do not call for any terms or conditions to be attached to our decision.

[52] Accordingly, the appeal is dismissed.

May 5, 2009

Alison H. Narod, Panel Chair

Nathan Bauder, Member