COMMUNITY CARE AND ASSISTED LIVING APPEAL BOARD

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

APPELLANT: MT (Operator of Happy Hearts Licensed Family Daycare)

RESPONDENT: Fraser Health Authority

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

DECISION

Introduction

[1] The Appellant, MT, who formerly operated "Happy Hearts Licensed Family Daycare" appeals decisions to cancel her Community Care Facilities (CCF) License due to her inability to provide safe care to children, based on her mental health status and substance dependence. The original decision, dated July 3, 2009, found the Appellant contravened Sections 7(1)(a) and 11(2)(a)(i), (ii) and (iii) of the *Community Care and Assisted Living Act* (the "*Act*") and Section 21(2) of the Child Care Licensing Regulation (the "Regulation"). The Appellant's license was cancelled on July 3, 2009.

[2] On August 20, 2009, the Appellant's application for reconsideration of the original decision to cancel her license was rejected. Notably, the reconsideration decision-maker observed that the original decision to cancel the license was based on the Appellant's current high risk substance misuse and mental health issues. The reconsideration decision-maker took into account the Appellant's argument that her operational history should weigh in her favour, but found that history could not override a grave concern with the Appellant's current high-risk substance misuse and mental health issues.

[3] A hearing of the appeal has not yet been set. In the interim, counsel for the Respondent, Fraser Health Authority, has applied for summary dismissal of the Appellant's appeal.

The Parties' Submissions

[4] In making the application for summary dismissal, the Respondent submits new information that it says shows that the Appellant operated an illegal family childcare facility from September 1 to December 31, 2009, during the period when this appeal was outstanding. The Respondent seeks an order pursuant to Appeal Board Rule 15(1)(c) and (d) that the appeal be summarily dismissed on the grounds that it is frivolous, vexatious or trivial or gives rise to an abuse of process, and that it has no reasonable prospect of success.

[5] The evidence on which the Respondent relies includes evidence that an MCFD Social Worker attended at the daycare on November 25, 2009, at which time she observed two foster children in the Appellant's care and one other child being dropped off into her care. Additionally, the Respondent relies on evidence that the Appellant claimed childcare subsidies for three or more children from MCFD during those months.

[6] The Respondent submits that the Appellant knowingly operated a family childcare requiring a CCF license from September 2009 to December 2009 and demonstrated a lack of willingness to operate within legal requirements. It asserts that the Appellant demonstrated, by operating an illegal family childcare, that she will not abide by any terms and conditions should her CCF license be reinstated.

[7] Additionally, the Respondent submits that the new information substantiates that the appeal is frivolous and vexatious and/or has no reasonable prospect of success as the Appellant has clearly demonstrated an inability or unwillingness to act lawfully in compliance with the *Act*, the Regulation or any possible terms and conditions which the Board might grant on a successful appeal. In this regard, it relies on *TJ v. VIHA*, 2009 BCCCALAB 3.

[8] The Appellant resists the application for summary dismissal. She claims that during the September 1 to December 31, 2009 period, she was providing care for two children under the "license not required" status, which is available to any person caring for children. She says that she has not provided care for more than two children at any time after August 31, 2009. Additionally, she specifically says that, during the Social Worker's visit, she was caring for only two children.

[9] The Appellant supplies the Affidavit of a friend who was present at the time of the Social Worker's visit. The friend says that she brought a third child, her granddaughter, for a visit, and was present with the child at all times during that visit. Additionally, the friend corroborates that there were only two other children in the Appellant's care during that time.

[10] The Appellant also says that the facts on which her appeal depends are those surrounding the determination made by the Respondent at the time the license was "cancelled" by them and not any subsequent facts. She says the subsequent facts are hotly disputed. She denies she has demonstrated any unwillingness or inability to act lawfully and in compliance with the *Act*.

[11] Moreover, the Appellant says that she erroneously made multiple claims for subsidies from MCFD and has now made arrangements to repay overpaid subsidies to MCFD.

[12] In reply, the Respondent says the Appellant attempts to avoid dealing with the seriousness of the new information by offering evidence regarding a selected few dates in the relevant period. It says the Appellant has failed to address the Respondent's serious and fundamental concern that she knew she was not licensed and could only care for no more than two children, yet she proceeded to claim subsidies funded by public tax revenues for three or more children during this four month period while her appeal was outstanding.

[13] The Respondent supplies documents evidencing the Appellant's claims for subsidies for multiple children and says the Appellant's argument is simply not credible in light of this documentation.

[14] The Respondent says that the Appellant either:

(a) did unlawfully care for three or more children and applied for and received public funds from two different programs to operate the unlawful daycare; or

(b) if she was only caring for two children, that she repeatedly made false claims to receive public funds from two different funding programs for three or more children.

[15] The Respondent contends that the inescapable conclusion is that the Appellant has proven herself by her own signature and documentation to be unsuitable and not of good character as required by Section 11 of the *Act*. It says she has demonstrated a lack of willingness to operate within legal requirements and will not abide by any terms or conditions which she seeks the Appeal Board to grant on her appeal. It reiterates its submission that the appeal is frivolous and vexatious and/or has no reasonable prospect of success, and ought to be dismissed at this stage.

Reasons

[16] The relevant portions of Appeal Rules 15(1)(c) and (f) state:

> 15(1) To apply to the Board for an order summarily dismissing an appeal, the respondent must deliver a written request to the Board that demonstrates any one of the following apply:
>
> (c) the appeal is frivolous, vexatious or trivial or gives rise to an abuse of process,
>
> (f) there is no reasonable prospect the appeal will succeed. ...

[17] With respect to Section 15(f) of the Rules, we find the following comments by the Supreme Court of Canada relevant and useful in our analysis:

> Whether an appeal has any reasonable prospect for success is a highly discretionary issue and a question of fact, militating in favour of deference: Baker v. Canada (Ministry of Citizenship and Immigration), [1999] 2 S.C.R. 817 at 61.

It is therefore quite clear that in considering the application before us, we must ensure that proper discretion is exercised and ensure that the principles of natural justice and procedural fairness are followed.

[18] As noted, the Respondent relies on the *TJ v. VIHA* case. There, the appellant had demonstrated ongoing patterns of non-compliance which included exceeding maximum capacity and providing care to too many preschool-aged children. She ultimately voluntarily surrendered her license. She was subsequently discovered to be operating an unlicensed community care facility on various occasions by exceeding maximum capacity without the requisite license. The respondent Vancouver Island Health Authority succeeded in obtaining an injunction to curtail her non-compliance, but she breached that injunction and continued operating an unlicensed facility until the authority obtained not one, but two contempt orders.

[19] The decision that the appellant in that case appealed was a decision to deny her application for a new license to operate a group childcare facility. The decision was issued after the above-noted court orders were issued. The decision took into account the appellant's history, as well as those court decisions. The decision-maker rejected the applicant's request for a new license, among other things, because of her failure to comply with the *Act* and the Orders of the Supreme Court of B.C., as well as her blatant disrespect for the law.

[20] The appellant's appeal was dismissed. It was in the context described above that the Appeal Board said that:

> ... [H]er repeated 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 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 that she cannot be relied on to comply with her own assurances that she will comply with her obligations under the *Act* and Regulation. (at paragraph 50)

[21] Those facts are different from the facts in the instant case where the new information relied on by the Respondent in making its application for summary dismissal occurred after the decision at issue was rendered and where the substance of the subsequent conduct is materially different than the conduct on which the cancellation of the Appellant's license was based. Here, the cancellation was based on the Appellant's alleged substance misuse and mental health issues. The subsequent, alleged conduct

relates to operating an illegal childcare facility by providing care to more than two children and making claims for subsidies for more than two children.

[22] In our view, although there may be some overlap, the alleged pre-decision conduct and the alleged post-decision conduct give rise to substantially different issues. There has been no finding, after an investigation or otherwise, that the post-decision conduct breaches the *Act* or Regulation. There is no allegation that the appeal, based on the pre-decision conduct alone, should be summarily dismissed. In the circumstances, it would not be appropriate to use the post-decision allegations as a basis for a decision that the Appellant's appeal ought to be summarily dismissed on the grounds that it is frivolous or vexatious, or that the appeal based on that conduct has no reasonable prospect of success, when the same could not be said for the alleged pre-decision conduct in the absence of that new information.

[23] Moreover, given the circumstances, given the conflicting evidence about the new information, and given that there has been no hearing to test that evidence, we are unable to say that the new information, together with the pre-decision evidence, clearly demonstrates the Appellant is unable or unwilling to act lawfully in compliance with the *Act*, the Regulation or any possible terms and conditions which the Board might grant on a successful appeal. In short, the pre-decision conduct and the post-decision new information are too different in substance and too hotly contested to reach that conclusion on a summary dismissal application.

[24] Accordingly, the application for summary dismissal of the Appellant's appeal is dismissed.

May 25, 2010

"Alison Narod"

Alison H. Narod, Panel Chair

"Nathan Bauder"

Nathan Bauder, Member

"Liz Keay"

Liz Keay, Member