BRITISH COLUMBIA

Community Care and Assisted Living Appeal Board

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DECISION NO. 2014-CCA-005(b)

In the matter of an appeal under section 29 of the *Community Care and Assisted Living Act*, S.B.C. 2002, c. 75

BETWEEN:	ZH-H, Licensee, (operating Playtime Childcare Center's Kwaleen Daycare and After School Program and Playtime Childcare Center's - Westridge Daycare)	**APPELLANT**
AND:	Dr. Robert Parker, Medical Health Officer, Interior Health	**RESPONDENT**

BEFORE: Alison H. Narod, Vice Chair

DATE: Conducted by way of written submissions concluding on February 18, 2015

APPEARING: For the Appellant: Self-represented
For the Respondent: Erika Lambert, Counsel

PRELIMINARY DECISION

[1] This Decision deals with preliminary matters raised by the Appellant in connection with:

(a) the Respondent's Appeal Record, and

(b) the Appellant's Preliminary Statement of Points.

[2] I will address each issue, in turn, below.

(a) RE: RESPONDENT'S APPEAL RECORD

[3] By letter dated February 10, 2015, the Appellant says that the Respondent's Appeal Record is deficient because it does not include many pertinent documents available to and in the possession of Licensing at the time the December 4, 2014

decision under appeal was made. She says that this shows there was an intentional cover-up by the Respondent.

[4] In the same letter, the Appellant provides a list of 73 documents (the "List of Documents") she says the Respondent neglected to include in the Appeal Record and advises that they will be included in the Appellant's Appeal Record as part of her Statement of Points. However, the Appellant has not yet supplied the documents themselves.

[5] In response to the Appellant's allegations regarding the 73 documents, the Respondent notes that the contents of the Appeal Record are prescribed by Rule 7(1) of the *Rules for Appeals under the Community Care Assisted Living Act* (the "Rules"), which states:

> The appeal record consists of the decision being appealed, the respondent's reasons for decision and all documentary evidence, reports, policies, legislative provisions and submissions considered by the respondent in making the decision, but it does not include solicitor client privileged communications between the respondent and the respondent's lawyer.

[6] The Respondent says that although copies of the listed documents have not been supplied by the Appellant, it has reviewed the Appellant's List of Documents and offers the following conclusions:

(a) A number of the documents were considered by the Respondent in making the Decision under appeal but were inadvertently left out of the Appeal Record by the Respondent due to an internal administrative error. These include email correspondence from September 6-9, 2013 and from November 18-25, 2014 (the "Email Correspondence"). The Respondent apologizes for this omission.

(b) Thirteen of the listed documents are already in the Appeal Record. The Respondent has listed the number of each such document and notes where it is located in the Appeal Record.

(c) The rest of the listed documents should not be included in the Appeal Record because:

(a) they were not considered by the Respondent in making the Decision, and

(b) in any event, some of the documents post-date the Decision.

[7] The Respondent says the Board has the jurisdiction to correct the Appeal Record. The Board can fully remedy this error at this stage by directing the

Respondent to add the inadvertently omitted Email Correspondence to the Appeal Record as Tabs 48A and 131, respectively, to ensure the Appeal Record remains in sequential order. To this end, it has supplied the Board and the Appellant with the documents and tabs for insertion into the Appeal Record.

[8] The Respondent also says the inadvertent error does not prejudice the Appellant in any way because the Appellant:

(a) may review the Email Correspondence before providing her statement of points to the Board and before the hearing of the Appeal and in fact presumably has had access to the Email Correspondence all along;

(b) may make submissions in respect to the Email Correspondence in her Statement of Points and during the hearing of the Appeal.

DECISION RE: APPEAL RECORD

[9] I will first canvass relevant provisions of the Rules.

[10] For convenience, I reproduce the Rule 7(1) below:

> The appeal record consists of the decision being appealed, the respondent's reasons for decision and all documentary evidence, reports, policies, legislative provisions and submissions **considered by the respondent in making the decision**, but it does not include solicitor client privileged communications between the respondent and the respondent's lawyer. [emphasis added]

[11] The *Community Care and Assisted Living Act* (the" *Act")* provides the Board with jurisdiction to hear an appeal of the nature commenced by the Appellant. Section 31.1(1) states the following:

> 31.1(1) The board has exclusive jurisdiction to inquire into, hear and determine all those matters and questions of fact, law and discretion arising or required to be determined in an appeal under section 29 and to make any order permitted to be made.

[12] Section 29(2) is the source of the Board's jurisdiction to hear the specific appeal commenced by the Appellant and states, in relevant part:

> 29(2) A licensee ... may appeal to the board in the prescribed manner within 30 days of receiving notification that
>
> ...
>
> (b) a medical health officer has acted or declined to act under section 17(3)(b) [of the *Act*] ...

[13] Section 17(3)(b) is the source of a medical health officer's authority to "confirm, rescind, vary or substitute for the action or summary action" taken under Section 17(2) to suspend or cancel a license granted under the *Act* such as the licenses formerly held by the Appellant.

[14] Section 29(11) addresses the hearing that the Board conducts in an appeal in the following terms:

> 29(11) The board must receive evidence and argument as if a proceeding before the board were a decision of first instance but the applicant bears the burden of proving that the decision under appeal was not justified.

[15] The determinations the Board has the discretion to make are described in Section 29(12), which states:

> 29(12) The board may confirm, reverse or vary a decision under appeal, or may send the matter back for reconsideration, with or without directions, to the person whose decision is under appeal.

[16] The hearing of this Appeal has not yet commenced. At this point, the Respondent has prepared and distributed an Appeal Record, which is the first step in the appeal process. As per Rule 7(1) of the Rules, it is comprised of the decision being appealed, the Respondent's reasons for the decision, and all documentary evidence and certain other materials "considered by the Respondent in making the decision."

[17] Accordingly, it should not contain materials that the Medical Health Officer did not consider in making the decision at issue. However, that does **not** mean that the Board is prevented from considering other evidence that an Appellant seeks to have admitted as evidence at the hearing of an appeal, provided that it is relevant and admissible. Rather, the Board is entitled to receive any information that it considers "relevant, necessary and appropriate" and it is not bound by the strict rules of evidence that bind a court (Section 40(1) of the *Administrative Tribunals Act*). In short, the Appeal Record is a category of evidence; it is a record of the documentary evidence that the Medical Health Officer considered in deciding to take action and in reconsidering that action as set out in section 17 of the *Act*. It is not the whole of the evidence that a panel of the Board may consider on appeal.

[18] On the contrary, as set out in the Board's information sheet that was previously provided to the parties and entitled "Preparing the Licensing, Certification or Registration Appeal Record":

> The record only includes information up to and including the licensing, certification or registration reconsideration decision under appeal. The purpose is to give to the appeal board and the appellant, <u>as a starting point for the appeal</u>, a complete and full copy of all information that was used or considered in making the decision. [emphasis added]

> Any later correspondence regarding the appeal to the appeal board is not part of the appeal record that the respondent must prepare. Other documents and information will be provided to the board separately leading up to the hearing of the actual appeal itself, but the licensing/certification/registration "appeal record" is meant to be a complete record of the decision below leading up to the appeal.

[19] In the instant case, the decision under appeal is the reconsideration decision of Dr. Robert Parker, medical health officer, dated December 4, 2014 upholding the November 24, 2014 intended decision to cancel the Appellant's licenses. Therefore, the only materials that should be in the Appeal Record in addition to the decision under appeal and the reasons for that decision are "all documentary evidence, reports, policies, legislative provisions and submissions **considered by the respondent in making the decision**" excluding solicitor client privileged communications between the Respondent and the Respondent's lawyers [emphasis added].

[20] As noted, the Respondent admits that certain documents in the Appellant's List of documents were in fact considered by the Respondent in making the decision but were omitted from the Appeal Record. The Respondent says this omission was inadvertent. The Appellant challenges these representations. The Respondent says that thirteen of the documents the Appellant says are missing from the record are in the Appeal Record. The Appellant notes this. With respect to the remaining documents, the Respondent maintains they were not considered by the Respondent in making the Decision and ought not to be in the Appeal Record. The Appellant contests this.

[21] The Board has an obligation to conduct its proceedings in accordance with the principles of natural justice and procedural fairness. The Board can make orders that promote the ability of the parties to prepare and present their case at the hearing in an efficient and timely manner. In view of the fact the Appellant takes issue with 73 documents but has not produced them, and in view of the Respondent's admission that some documents were omitted from the Appeal Record distributed to the Board and the Appellant, it is appropriate at this stage for the Board to make pre-hearing orders with a view to rectifying the Appeal Record and addressing the other documents in dispute. In this regard, I am taking a leaf from the pages of the Supreme Court Civil Rules and I make the following pre-hearing orders:

> (1) within 21 days of the date of this decision, the Appellant is to produce to the Respondent copies of the 73 documents listed in her February 10, 2015 letter;
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> (2) within a further 21 days, the Respondent is to:
>
> (a) review the 73 documents the Appellant produces;
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> (b) produce an Amended Appeal Record and a List of Documents listing all documents in the Amended Appeal Record;

(c) supply an Affidavit verifying that the List of Documents lists all documents considered by Dr. Parker in making the decision under appeal; and

(d) if the List of Documents omits any such documents, the Affidavit shall provide an explanation for the omission of that document;

[22] At the hearing, the Appellant may address whether there are any further documents to be added to the Amended Appeal Record. Additionally, the Appellant may seek to have any of the 73 documents that are not included in the Appeal Record entered as evidence at the hearing and the Panel will consider their relevance and admissibility.

[23] Moreover, both parties may address issues relating to the inclusion in or exclusion from the Amended Appeal Record of any of the 73 documents at the hearing.

[24] Finally, the Board registry office will be in touch with the parties to set out the schedule to resume the usual appeal process with submission of the parties' Statements of Points addressing the merits of the appeal of the cancellation decision, witness lists and identification and disclosure of any new or additional documents to be relied on and entered as evidence by the parties at the hearing.

(b) RE: THE APPELLANT'S PRELIMINARY STATEMENT OF POINTS

[25] By letter dated February 16, 2015, the Appellant provided a Preliminary Statement of Points, which includes a number of requests for orders. The document is reproduced below:

> (1) In light of appellant's list of missing Appeal Record documents submitted by fax to the Community Care and Assisted Living Appeal Board (CCALAB) and to the respondents on February 12, 2015, it is apparent that Dr. Parker was either deprived of relevant information when making his decision to cancel Playtime Childcare Centre's Kwaleen Daycare and After School Program, and Westridge Daycare and/or knew of the missing documents and lied to the CCALAB making representations that were utterly unsubstantiatable given the information enclosed in the Appellant's supplement to the Appeal Record.
>
> (2) It is also apparent that employees of Interior Health Authority (IHA) either suppressed information and/or fabricated evidence In order to arrive at the conclusions proffered by Dr. Parker.
>
> (3) The said conclusions proffered by Dr. Parker are utterly refuted and the comments of Playtime is substantially proven given the information not provided to the CCALAB by IHA.

(4) In consequence, because this is beyond the CCALAB's capacity and authority under law to adjudicate the CCALAB is asked to order a return of this matter for evidentiary hearing by IHA with both Playtime and IHA employees present.

(5) In the alternative, the CCALAB is asked to grant the appeal on the basis of the gross neglect or wilful suppression of evidence by IHA to the CCALAB.

(6) If the CCALAB does not render Playtime reinstituted, including an order for restitution of the facility license and an order for hearing to determine damages caused by the wilful suppression of evidence by IHA, the CCALAB is given notice that the only alternative remedy to go before the BCSC.

(7) The CCALAB could set an evidentiary hearing whereat the suppressed evidence and its consequences and resulting damages could be addressed but this is unlikely to be within the CCALAB's jurisdiction or authority under law.

(8) The CCALAB now needs to determine whether it needs to wash its hands of this matter, or uphold the misconduct that Dr. Parker and others and become part of the problem in subsequent legal proceedings including requests for costs and damages.

[26] The Respondent makes several points in response to the Appellant's Preliminary Statement of Points. I will paraphrase them below:

(1) The Respondent denies that he was deprived of relevant information when making the Decision, that he lied or that he made misrepresentations to the Board. He says the Decision is well supported by the documentation in the Appeal Record and the Email Correspondence the Respondent says should be included in the Appeal Record but was inadvertently omitted.

(2) The IHA denies deliberately suppressing information and fabricating evidence and there is no evidence to support such allegations.

(3) The Respondent denies that the conclusions in the Decision are "utterly refuted" and the Appellant's comments "substantially proven" by the omitted Email Correspondence. Rather, the Email Correspondence supports the Decision.

(4) The Respondent says it is the Board, not the IHA that has jurisdiction to deal with a breach of the Board's procedural rules, and that the IHA lacks authority to hold an evidentiary hearing.

(5) The Respondent denies gross neglect or wilful suppression of evidence and the Appellant has not supplied evidence to support this allegation.

(6) The Respondent disagrees that judicial review is available at this stage of the proceedings to deal with matters raised in the Appellant's Preliminary Statement of Points.

(7) The Respondent says the Board has exclusive jurisdiction to deal with a breach of its procedural rules and can remedy the inadvertent omission of the Email Correspondence from the Appeal Record.

(8) The Respondent denies that Dr. Parker has engaged in any misconduct and says the Appellant has not provided evidence to support this allegation. The Respondent objects to what appear to be threatening and inappropriate comments made in point 8 of the Appellant's Preliminary Statement of Points.

[27] By letters dated March 2, 2015, the Appellant and Mr. B, the author of some of the correspondence in the List of Documents, each make reply. While it is unusual to allow two separate parties to make submissions on behalf of a single Appellant, I will consider the submissions of Mr. B in this pre-hearing decision, since they are adopted by the Appellant.

[28] Mr. B advises that since this matter will most likely go to court, he focused his comments on what will be presented to a Supreme Court Justice in the event the appeal is not granted and reset for a process where certain named individuals are compelled to testify under oath.

[29] Mr. B makes various allegations such as that IHA employees fabricated evidence, suppressed evidence or refused to address challenges to bogus findings based on fabricated evidence. He says that where suppression and/or fabrication of evidence is alleged, the law is clear. Once charged the burden of proof shifts to the spoliator. Spoliation is subject to serious costs consequences. He says these allegations cannot be dismissed without some form of evidentiary proceeding in which the alleged spoliator is subject to examination. The Board can grant the appeal conditionally and compel examination of the charge of spoliation.

[30] Mr. B goes on to provide responses to procedural comments made by counsel for the Respondent. These submissions include, but are not limited to, the following:

(1) the suggestion that Dr. Parker considered all of the suppressed documents leads to a conclusion that Dr. Parker is lying or was irresponsible and grossly or wilfully negligent.

(2) the advice that thirteen of the 73 documents in the Appellant's List of Documents are found in the Appeal Record is noted.

(3) There is an interesting comment that documents 63 to 73 are not relevant. These documents are relevant to any subsequent claim for damages and the subject matter of the appeal, to wit, the validity of the termination of the license and whether there was an alternative which would have allowed the daycare to continue in operation.

(4) The nature, content and volume of the documents suppressed was more than an "inadvertent breach" and the suppression and fabrication prejudices the Appellant given the present lack of a mechanism to examine certain named individuals. Without such examination, the Appellant's submissions will have no force and effect and the Board will have no proof of the allegations of spoliation and substantive error.

(5) With respect to comments made by counsel for the Respondent on the Preliminary Statement of Points, no comment can be made at present. Submissions are meaningless without an evidentiary hearing. The documents offer prima facie evidence warranting an examination of the named individuals. The Board has exclusive jurisdiction and a process could be set up where the alleged spoliation is addressed.

[31] The Appellant's reply adopts Mr. B's reply and includes additional submissions, such as that:

(1) the so called "internal administrative error" is proof of her continual harassment by the Respondent for the past two years, making it almost an impossibility to operate the daycare.

(2) the remainder of the documents that are missing from the Appeal Record are relevant and must be included in the Appeal Record. The attempt to suppress these documents is proof of a cover up.

(3) the Respondents are deliberately attempting to cause grief and hardship to the Appellant in a fraudulent manner.

[32] The fact that I may not have described all of the parties' submissions above should not be taken to mean that I have not considered them. Rather, I have taken them all into consideration.

DECISION RE PRELIMINARY STATEMENT OF POINTS

[33] The primary issue underlying the Appellant's submission appears to be whether the issues she raises can be addressed in an evidentiary hearing either before the Medical Health Officer or the Board. I note that the Appellant wishes to raise issues regarding such matters as fabricated evidence, suppressed evidence, gross neglect, spoliation, restitution and damages, among other things. Each party wishes to address the scope of the Board's jurisdiction to address these issues. Additionally, the Appellant wishes to examine certain employees of the IHA.

[34] As this Board has previously held, the *Act* does not provide for the Medical Health Officer to hold a full evidentiary hearing when making a decision about whether to cancel a license (*JM v. Interior Health Authority*, 2013-CCA-002(b), at paras. 54 to 56). However, an appeal of such a decision is available as of right to the Board, where a panel of the Board will "receive evidence and argument as if a proceeding before the board were a decision of first instance" (s.29(11) of the *Act*).

[35] As was recently stated:

> The Panel must therefore conduct the proceeding as if it were a fresh hearing, examine the evidence and argument anew, undertake its own analysis of the issues and, where appropriate, make its own findings of fact.
>
> (*AMS v. Vancouver Island Health Authority*, 2012-CCA-002(b), at para. 94)

[36] In the event there is a misunderstanding about the manner in which an appeal to the Board is conducted and the Board's remedial jurisdiction, it should be noted that the Board will conduct an evidentiary hearing of the appeal, at which time each party will be able to adduce evidence through witness testimony under oath and through the submission of documentary evidence (whether contained in the Appeal Record or submitted separately by the parties), following which each party will have an opportunity to provide their arguments in support of their case.

[37] As mentioned above, at the present time, the Appellant has not supplied copies of the documents contained in her List of Documents and no evidence has yet been formally adduced because the hearing has not commenced. Therefore, there is no evidentiary basis on which the Appellant's submissions about those documents can be properly made.

[38] With respect to the scope of the Board's jurisdiction and powers, I note that the Board is a creature of statute and has only the powers and jurisdiction conferred on it by statute. I have reproduced above key legislative provisions in the *Act* about the source and scope of the Board's jurisdiction and its remedial powers. Provisions in other legislation, such as the *Administrative Tribunals Act*, may also be relevant, although they are not quoted above.

[39] I repeat that the Board's remedial powers in an appeal of a decision such as the one at issue permit it to confirm, reverse or vary a decision under appeal or send the matter back for reconsideration, with or without directions, to the person whose decision is under appeal.

[40] Notably, the Board is not empowered to award damages or costs, except for the authority under section 47(1)(c) of the *Administrative Tribunals Act* to order a party to pay part of the actual costs of the Board for conducting the hearing, if the hearing panel determines that the conduct of a party at a hearing has been improper, vexatious, frivolous or abusive.

[41] Accordingly, it is premature to attempt to resolve the issues raised in the Appellant's preliminary statement of points. Rather, in fairness to all parties, it is preferable that the hearing proceed in the usual way. This includes the pre-hearing submission of a full Statement of Points, identification of witnesses to be called at the hearing and production of any additional documents in preparation for an oral hearing on the merits of the appeal, which will be scheduled once the parties have completed the pre-hearing submissions process.

[42] At the hearing, each party can present its evidence and position, which may include positions about the scope of the Board's jurisdiction to address issues one or the other may raise. In this manner, each party will have an opportunity to prepare and present its case about the appeal and respond to the opposing party's case. Moreover, the Board will have the evidentiary basis on which to make its determinations along with the benefit of the parties' submissions.

[43] I am of the view that the hearing panel would benefit from the parties' respective submissions as to the scope of its jurisdiction as it relates to the issues raised by the Appellant, given the applicable legislation.

[44] With respect to the submissions relating to the prospect of judicial review, I note that the Board's obligation is to address the appeal in accordance with the applicable legislation and relevant jurisprudence. At any time, the Appellant may wish to take any steps available to her at law to address the subject matter of the appeal, including by seeking judicial review. If she does so, that is her prerogative.

" Alison Narod"

Alison H. Narod, Vice Chair
Community Care and Assisted Living Appeal Board

May13, 2015