BRITISH COLUMBIA

Community Care and Assisted Living Appeal Board

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DECISION NO. 2019-CCA-004(b)

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

BETWEEN:	Ofra Sixto (Operating as ICARE Childcare Inc.)	**APPELLANT**
AND:	Dr. Meena Dawar, Medical Health Officer, Vancouver Coastal Health Authority	**RESPONDENT**
BEFORE:	A panel of the Community Care and Assisted Living Appeal Board Alison Narod, Board Chair	
DATE:	Conducted by way of written submissions concluding on April 03, 2020	
APPEARING:	For the Appellant: Self-represented For the Respondent: Robert P. Hrabinsky	

Preliminary Decision on Form of Hearing

[1] This is a preliminary decision in the above-noted matter. The issue is what form will the hearing of the Appellant's appeal take. The Respondent initially sought an adjournment of the hearing on the basis that the Medical Health Officer (the "MHO") was unavailable due to the current Coronavirus pandemic. Now the Respondent seeks a written hearing. The Appellant seeks an oral hearing and is prepared to wait until the MHO's duties respecting the pandemic abate and she can make herself available.

[2] I have decided that the hearing shall be held in oral form. My reasons are set out below.

BACKGROUND

[3] The background of this matter has been summarized by the Vice-Chair of the Board in a recent decision [**Decision No. 2019-CCA-004(a)**], in which she dismissed the Respondent's application for a summary dismissal of this case, before a hearing, where the Respondent had argued that the appeal had no reasonable prospect of success.

[4] The Appellant has been in the child care business for approximately thirty years. At the relevant time, she was licensed to operate two types of group child care at a single site in Richmond, B.C.:

a. a group child care for children 30 months to school age (capacity 16); and

b. a group child care for children under 36 months (capacity 12).

[5] I will refer to the two licenses, collectively, at the "Licence" in this decision.

[6] The Appellant was both the Licensee and the Manager of the child care facility. In the winter of 2018-2019, Licensing received complaints about the Appellant's operation of the facility and treatment of children. Licensing commenced an investigation. Concurrently, a Health and Safety Plan was implemented that required the Appellant to stay away from the facility during its hours of operation, from December 18, 2018 until the investigation was complete.

[7] In Reasons for Decision issued June 5, 2019 (the "First Licensing Decision"), Licensing Officers stated that they believed there was an immediate risk to the health and safety of children in care. In particular, the Appellant had demonstrated that she presently lacked the personality, temperament and suitability required to continue in the role of manager. They decided to take a "summary action" pursuant to section 14 of the *Community Care and Assisted Living Act,* SBC 2002 c 75 (the "Act") of imposing an interim condition that that the Appellant not be allowed on the premises of the facility during operational hours of the program. This would persist pending a "final determination" of whether, pursuant to Section 13 of the Act, that condition should be placed on the License for a period of 12 months commencing from the date of "any final determination", and subject to further review prior to the expiry of that 12-month period.

[8] On July 4, 2019, the Appellant applied to the MHO for reconsideration of the decision to implement that summary action. Among other things, the Appellant submitted that there were reasonable grounds to rescind the summary action, and in this regard, she raised questions relating to the procedural fairness of the investigation, the accuracy of the conclusions reached in the First Licensing Decision and the necessity of the condition for the protection of the children's health and safety.

[9] That reconsideration has not yet been decided.

[10] On September 11, 2019, a Regional Manager advised the Appellant that Licensing had implemented an "action" in identical terms as the "summary action" imposed on July 5, 2019.

[11] In Reasons for Decision issued on September 19, 2019 (the "Second Licensing Decision"), Licensing Officers found that the Appellant contravened Section 7(1)(b)(i) of the Act and paragraphs 19, 34, 48, 51(1)(a) and 52(1)(c) of the *Child Care Licensing Regulation* (the "Regulation"). The Appellant was told that the interim condition (i.e. the summary action of June 5, 2019) was implemented because Licensing believed there was an immediate risk to the health and safety of the children in care. "In, particular, [the Appellant] demonstrated that she lacked the personality, temperament and suitability required to continue in the role of manager." Additionally, Licensing Officers found that the Appellant had accessed the premises on several occasions, in breach of the condition in the Health and Safety Plan barring her from the premises during operating hours. Moreover, Licensing found that despite making some admissions, the Appellant had not been truthful in her account of accessing the premises.

[12] The Second Licensing Decision stated:

> Based on the findings [Licensing] believes there is an immediate risk to the health and safety of the children in care. [The Appellant] has consistently demonstrated that she lacks the personality, temperament and suitability required for the role of manager. In particular, her willingness to beach *[sic]* the health and safety plan, as well as the condition imposed on the license, demonstrates a disregard for the regulatory system in which she has operated She is, in essence, ungovernable.

[13] As a result, the Licensing Officers immediately suspended the License, pursuant to section 14 of the Act (which it defined as the "Summary Action") and cancelled the License, effective October 21, 2019, pursuant to section 13 of the Act (the "Action").

[14] On September 24, 2019, the Appellant applied to the MHO for reconsideration of both the Summary Action and the Action in relation to the suspension and cancellation of the License. Among other things, the Appellant argued that the foundation of the June 5, 2019 summary action to impose a condition barring the Appellant from the premises temporarily as well as of the alleged breach of that condition was the same: i.e., that there was an immediate risk to the health and safety of the children in care. The Appellant contended that there was never a threat to the health and safety of the children in care. There was no basis in the Second Licensing Decision for that conclusion. The Second Licensing Decision did not set out any facts in support of it. It established only that the Appellant breached a condition, which was under appeal.

[15] The MHO rendered a decision on the second application for reconsideration on October 18, 2019 (the "Reconsideration Decision"). In brief, the MHO confirmed the suspension and cancellation of the License, saying:

> I am satisfied that [the Appellant] was not candid with [Licensing] when questioned about her attendances at the facility. I am also satisfied that [the Appellant] breached the condition imposed on the licence on eight occasions and that she did so with little regard for the legislative regime under which she is expected to operate. I also agree with [Licensing] that [the Appellant] has

> demonstrated herself to be ungovernable. Pursuant to paragraph 17(3)(b) of the [Act], I confirm the action.

[16] It appears that the alleged 8 instances of access occurred in August 2019.

[17] On November 12, 2019, the Appellant filed a Notice of Appeal, apparently without the assistance of counsel. Among other things, she asked the Board to "look at all the material, the way the [Respondent] handled it all, and what they based their decision on". She submitted that she was "sure that you will find that this case is the most unfairly handled and unfairly judged". She also claimed the MHO "made her decision based on licensing findings. Where is the justice there?"

[18] On February 7, 2010, the Respondent applied for a summary dismissal of this appeal on the ground that there was no reasonable prospect that the appeal would succeed.

[19] On March 31, 2020, after considering the parties' submissions, the Board's Vice-Chair dismissed the application. She noted that the Appellant had raised issues of procedural fairness in relation to the entire course of conduct of Licensing and the MHO. The Appellant was not seeking to limit the Board's review to any one issue and/or decision. The Appellant's question about the lack of "justice" in the MHO basing her decision on the findings of Licensing, indicated the Appellant was attacking the MHO's decision at least in part, on the basis of what she argues are significant flaws with the earlier decisions of Licensing. The Vice-Chair found the decisions relating to the placement of the condition on the Licence and to its suspension and cancellation were inextricably linked. The First and Second Licensing Decisions and the MHO's October 18, 2019 Reconsideration Decision were all connected and intertwined. (See paras 23-25.)

[20] In the result, the Vice Chair found that the Appellant had raised appealable issues which were grounded on alleged failures on the part of Licensing and the MHO to follow the principles of natural justice and procedural fairness.

THE PARTIES' SUBMISSIONS

[21] At a Case Management Conference, the Respondent asked for an adjournment of the hearing of this appeal, which was then scheduled for 5 days commencing on May 11, 2020, because its application for summary dismissal had not yet been decided and because the MHO was then preoccupied with management of the Coronavirus pandemic as part of her duties. The Appellant indicated she had about 10 witnesses to call. I asked the parties for submissions about how to conduct the hearing.

[22] Events overcame process, the Summary Dismissal decision was issued and the Board decided to cancel all oral hearings due to the impact the pandemic had on its operations. Accordingly, the Board adjourned the oral hearing and asked the parties for submissions about what form that the hearing should take: written or electronic at present or oral when circumstances permit.

[23] By letter dated April 1, 2020, the Respondent submitted that the hearing should proceed as a written hearing on the basis of affidavit evidence, with leave for both parties to request that any affiant be cross-examined before the CCALAB

as may appear to be necessary after affidavits are filed. This would allow the matter to progress more efficiently while the COVID-19 public health emergency persists. The Respondent noted that it is possible that no cross-examination would be needed and the hearing could be entirely in written form. Alternatively, if some cross-examination were required, any in-person hearing could be heard in less than 5 hearing days.

[24] The Appellant, on the other hand, indicated that she no longer has a lawyer and prefers to wait until an oral hearing can be held.

DECISION

[25] The issue here is whether the hearing of this appeal should be in oral form at a later date or in a composite of written and oral form at present.

[26] As indicated in the Appeal Management Conference, the Board's practice has been to hold oral hearings. In a recent decision, **Decision No. 2019-CCA-003(a)**, I elaborated on the issue of the form of hearings.

[27] The principles of natural justice were recently described by the BC Court of Appeal, in *Cariboo Gur Sikh Temple Society (1979) v British Columbia (Employment Standards Tribunal)*, 2019 BCCA 131 as follows (at para 13):

> The principles of natural justice reflect procedural protections that ensure parties are afforded the right to know the case against them, the right to respond, and the right to have their case decided by an impartial decision-maker, the content of which rights varies with the statutory, institutional and social context in question.

[28] The jurisprudence also indicates that although a quasi-judicial tribunal such as the CCALAB owes a duty of procedural fairness to parties appearing before it, the content of that duty may vary according to the statutory, institutional and social context. A summary of the factors relevant to deciding the content of that duty in a particular case is set out below (see *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, and *Allard v Assessor of Area #10 – North Fraser Region*, 2010 BCCA 437):

> (1) the nature of the decision being made and process followed in making it; (2) the nature of the statutory scheme and the terms of the statute pursuant to which the body operates; (3) the importance of the decision to the individual or individuals affected; (4) the legitimate expectations of the person challenging the decision; (5) the choices of procedure made by the agency itself. This list is not exhaustive.

[29] The jurisprudence makes it clear that the duty of procedural fairness does not always require an oral hearing and that the form of hearing is a matter of the tribunal's discretion, where there are no statutory or legal constraints requiring otherwise (*Allard* at paras 90 and 100).

[30] In my view, the content of the duty of fairness owed to the Appellant is relatively high. The nature of the appeal decision is a quasi-judicial matter, to be conducted pursuant to a statutory power of decision. The nature of the statutory

scheme is to regulate, in the public interest, community care and assisted living facilities that care for some of the most vulnerable members of our society. The decision is of great importance not only to the Authority responsible for regulation, but also to the proposed operator, whose livelihood has already been significantly affected by the decisions at issue. The imposition of the condition barring access to the facility and the suspension and cancellation of the Licence based on alleged breaches of the condition were on a ground of further personal and professional concern to the Appellant; they were based on the Appellant's alleged lack of the requisite personality, ability and temperament, and in the latter case on findings about her being untruthful and "ungovernable". The legitimate expectation of an applicant on appeal is to have a fair and full hearing before a neutral adjudicator.

[31] I take notice of the fact that while various tribunals may typically hold hearings in one form, whether it is written, electronic or oral, they often consider similar criteria in determining whether that or another form will better provide a just and timely hearing for the parties coming before it. Those criteria may include, but are not limited to, the following:

a) Whether there are material facts in dispute;

b) Whether credibility is a significant or central issue;

c) Whether there are legal issues in dispute, that do not involve significant issues of fact or credibility;

d) Whether the proposed form of hearing is proportional to the circumstances, including, for example, the importance, complexity and costs of the matter;

e) Whether the proposed form of hearing will provide a party with a fair and full opportunity to be heard;

f) Whether the form of hearing will be prejudicial to a party;

g) Whether there are unusual circumstances or particular needs of a party.

[32] This list is not exhaustive. Moreover, the presence or absence of any one of these criteria is not necessarily determinative.

[33] The choices of procedure made by the CCALAB, have in practice been to offer oral hearings. This practice arose from the tribunal's experience and expertise with the parties to these appeals.

[34] Because of the nature of the hearing – a hybrid closer to a de novo one - and the types of allegations made, an appellant typically wants to adduce new evidence, call witnesses who were not necessarily involved in the underlying decision and question the findings of Licensing employees who were involved in investigations. This is an important aspect of the hearing process and an important part of providing a meaningful avenue of appeal to appellants who are oftentimes unrepresented (while respondents typically have counsel) and need an opportunity to tell their side of the story. This is particularly the case where the subject matter of the appeal relates to an appellant's livelihood or personal characteristics and/or where the evidence in the hands of the Authority spans a lengthy period of time and has not been fully accessible to the appellant prior to a MHO's final decision.

[35] As such, where new evidence is tendered which needs to be tested, or where issues of credibility arise when testimonial and other evidence is disputed, and/or where breaches of procedural fairness in the underlying proceeding have been alleged, an oral hearing is generally the most balanced and appropriate way to accept this new evidence, test witness testimony through cross-examination, and cure breaches of procedural fairness if they have occurred. A practice is not binding, however, and parties may request that the hearing be held in another form or a combination of forms.

[36] I now turn to the other criteria that have been considered in deciding whether an oral or written hearing should be held. In this case, I am persuaded by the following that in the instant case, an oral hearing is warranted:

a) There are material facts in dispute. The Appellant challenges whether certain facts occurred and intends to call testimonial evidence in support of her challenges. She wishes to have her case heard.

b) Credibility is a central issue in this matter. There is a dispute between the parties about whether to accept the credibility of the Appellant, her references and her witnesses or the people who made complaints against her. Additionally, there is a question about whether the Appellant was untruthful about her attendances at the facility, which was a central issue in determining to suspend and cancel the License. Truthfulness is a credibility issue.

c) There are disputes about whether there were breaches of the duty of procedural fairness owed to the Appellant in the course of the investigation and during the decision-making process. A party may make its case through the mouth of its adversary. The Appellant should have access to the power of cross-examination to test her argument. This will require an oral component to the hearing in any event

d) There are disputes about questions of mixed fact and law, including whether there was at any time a sufficiently serious risk to the health and safety of the children in care to justify the summary actions and actions taken by the Appellant, and in particular, to suspend and cancel the Licence.

e) There are also legal issues that may be addressed, such as whether events underlying a complaint made in 2015 that Licensing found to be unsubstantiated can be relied on in this matter.

f) There are questions of efficiency of the hearing itself. The Board is the master of its own procedure. The Appellant advises that she intends to call about 10 witnesses. It will be more complicated and less efficient for the decision-maker to deal with the evidence of so many witnesses who the Appellant says will contradict the Respondent's evidence in a written hearing as opposed to an oral hearing. Similarly, it may be difficult for a lay person to conduct an efficient hearing in written form in a case like the instant one. This may adversely affect an unrepresented Appellant to be meaningfully heard.

g) Finally, the Respondent has not raised any prejudice to itself of waiting for circumstances to improve so that an oral hearing can be conducted.

[37] In the result, I find that this appeal will be adjourned until an oral hearing can be conducted, provided however, that the Board or either party may revisit the matter if, after 6 months, there is no reasonable prospect of scheduling an oral hearing of this matter in the near term.

[38] In any event, at any future time, the panel will have the usual power to control its powers and procedures, including to determine whether/when to change the mode of hearing as contemplated above, or to provide for other means of hearing the evidence and argument.

"Alison Narod"

Alison Narod, Chair
Community Care and Assisted Living Appeal Board

May 07, 2020