BRITISH COLUMBIA

Community Care and Assisted Living Appeal Board

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DECISION NO. 2019-CCA-004(c)

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 July 16, 2020	
APPEARING:	For the Appellant: Self-represented For the Respondent: Robert P. Hrabinsky	

Decision Regarding Preliminary and Interim Matters

[1] The Respondent applies for directions and orders regarding certain preliminary and interim matters.

[2] First, the Respondent says that an issue of the Board's jurisdiction to hear matters that are the subject of an outstanding reconsideration application has arisen as a result of a finding made by the Board in an earlier preliminary decision. As a result, it says that these appeal proceedings must be stayed, until the outstanding application is decided.

[3] Second, and in the alternative, the Respondent says that there are insufficient particulars to permit the Respondent Medical Health Officer (the "MHO") to know the case to be met on this appeal.

Background

[4] The background of this matter has been described by the Board in two prior decisions: Decision No. 2019-CCA-004(a), and Decision No. 2019-CCA-004(b). I reproduce the description of the background in the latter case below (at paras 3-20):

> [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.
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> [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.:
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> 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.

[5] I now turn to the jurisdictional issue first and then to the issue of particulars.

Jurisdictional Issue

[6] The Respondent argues that the Board has no jurisdiction to hear this appeal because the Board has decided in two prior decisions that the circumstances of the First Reconsideration Application and the Second Reconsideration Application are inextricably linked and the First Reconsideration Application has not yet been reconsidered by the MHO.

[7] Notably, the Respondent agrees that the Notice of Appeal is sufficiently broad to capture the circumstances that are the subject of the first Reconsideration Application. However, it points out that the Board ruled in another matter that it

does not have jurisdiction to consider an appeal under paragraph 29(2)(b) of the Act , unless that decision has first been reconsidered by an MHO [see Decision No. 2019-CCA-001(a)].

[8] The Respondent points out that in the cover letter to her decision in the Second Reconsideration Application, the MHO asked the licensee to confirm whether she wished to continue with the First Reconsideration Application, but the Appellant did not respond. Accordingly, the Respondent says these appeal proceedings must be stayed until such time as the Appellant elects to proceed with the First Reconsideration Application and obtains a reconsideration decision from the MHO.

[9] The Appellant was unrepresented at the time she filed her Notice of Appeal dated November 12, 2019. The Appellant is still without a lawyer, but sent an email to the Board dated June 26, 2020 stating, in part, that the Appellant has given all the information she has with regard to procedural fairness and Licensing's misconduct in this case. The Appellant points to the written materials she sent to the Respondent's counsel from the outset of this proceeding.

[10] A question which arises is whether the MHO had the authority to stay or refuse to decide the First Reconsideration Application because she did not receive a response to her inquiry.

[11] Section 17 of the Act describes the MHO's powers of reconsideration. Section 17 states, in relevant part:

> 17(2) Thirty days before taking an action or as soon as practicable after taking a summary action, a medical health officer must give the licensee or applicant for the licence
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> > (a) written reasons for the action or summary action, and
> >
> > (b) written notice that the licensee or applicant for the licence may give a written response to the medical health officer setting out reasons why the medical health officer should act under subsection (3) (a) or (b) respecting the action or summary action.
>
> (3) On receipt of a written response, the medical health officer may, to give proper effect to section 11, 13, 14 or 16 in the circumstances,
>
> (a) delay or suspend the implementation of an action of a summary action until the medical health officer mates a decision under paragraph (b), or
>
> (b) confirm, rescind, vary, or substitute for the action or summary action.
>
> ….
>
> (5) A medical health officer **must** give written reasons to the licensee or applicant for the licence on acting or declining to act under subsection (3). [emphasis added]

[12] Section 29 of the Act relates to the scope of the Board's powers 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),….
>
> …
>
> (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.

[13] Section 31.1 of the Act addresses the jurisdiction of the Board and states:

> 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.
>
> (2) A decision or order of the board on a matter in respect of which the board has exclusive jurisdiction is final and conclusive and is not open to question or review in any court.

[14] Accordingly, the Act states that once an application for reconsideration is filed, the MHO must give written reasons for acting or declining to act in relation to that application. Additionally, the Act states that Board has the power to decide whether it has jurisdiction to hear an appeal under section 29 of the Act.

[15] I turn to the question of whether this issue should be dealt with on a preliminary basis or by the panel of the Board that hears the case on its merits.

[16] In this case there is no doubt that:

a) the MHO decided a Second Reconsideration Application, holding that the Appellant contravened a condition that was the subject of a prior First Reconsideration Application;

b) at the time the Second Reconsideration Application was decided, the same MHO had been seized for months of the First Reconsideration Application challenging the condition;

c) the First Reconsideration Application remains outstanding today; and

d) had the First Reconsideration Application been decided in the Appellant's favour, there may not have been any basis for the second one.

[17] There is no explanation before me of why the First Reconsideration Application was not decided before the second one. Nor is there an explanation of why, when both reconsideration applications were before her, the MHO elected to decide the Second Reconsideration Application before the first and before asking the Appellant whether she wanted to continue the First Reconsideration Application.

[18] The inference that can be drawn for the delay in deciding the First Reconsideration Application after the second one was decided is that the MHO asked the Appellant to confirm whether it wanted to proceed with the First Reconsideration Application in light of the decision in the second one. The hearing on the merits may elicit an explanation for how and why the MHO "triaged" the

applications before her and whether it was appropriate to do so on the facts of this case.

[19] The Appellant remains unrepresented. The judiciary and the administrative law community of BC has recognized the importance of access to justice. This includes access by unrepresented parties to justice before tribunals such as this instant one. Highly legalistic submissions and proceedings that are not easily understood by all parties to litigation can defeat their access to justice.

[20] It is not clear from her written submissions that the Appellant appreciates the significance of the issues raised by the Respondent in its written submissions. In my view, this may be ascertained and, if necessary, addressed at a hearing on the merits.

[21] The facts raise a number of issues, including, but not limited to:

a) Whether the MHO did or did not, actually or effectively, decline to act under section 17 of the Act in relation to the First Reconsideration Application;

b) If the MHO declined to act in relation to the First Reconsideration Application, is the Notice of Appeal, filed November 12, 2019 capable of being characterized as a Notice of Appeal of both decisions relating to the First and the Second Reconsideration Application in light of the finding that the matters are inextricably linked or only the latter one;

c) If it relates only to the latter one, what is the status of the First Reconsideration Application and how should its result impact the decision in the Second Reconsideration Application; and

d) Is the Board's decision in Decision No. 2019-CCA-001(a) applicable to or distinguishable from this case?

[22] In the circumstances, it is my view that the Appellant should have the opportunity to hear the submissions and respond to them in real time, rather than having to engage in written submissions on complex legalistic issues whose significance she might not fully appreciate. Additionally, dealing with these issues in a preliminary written fashion will result in a significant delay and duplication of resources, as they will address a history of facts, many of which are disputed, that will likely have to be canvassed at an oral hearing in any event. Accordingly, it will be more fair and efficient to leave such issues to the hearing on the merits.

Particulars

[23] The Respondent submits that there are insufficient particulars to permit it to know the case to be met on the appeal. The right to know the case to be met is one of the principles of natural justice.

[24] The Respondent points out that the Appellant has indicated that she has about 10 witnesses to call in the hearing on the merits. Additionally, the Respondent says that although the Appellant has raised issues of procedural fairness relating to the entire course of conduct of Licensing and the MHO and has alleged there were significant flaws with Licensing's earlier decisions, the

Respondent has no insight into what procedural deficiencies or significant flaws are alleged.

[25] Accordingly, the Respondent seeks an order that the Appellant provide brief "will-say" statements to allow the Respondent to understand the nature of the evidence expected to be given by each of the Appellant's witnesses, as well as an order that the Appellant provide the following:

a) Particulars of the "issues of procedural fairness in relation to the entire course of conduct of Licensing and the MHO";

b) Particulars of the alleged "significant flaws with the earlier decisions of Licensing";

c) Particulars of the "…alleged failures on the part of Licensing and the MHO to follow the principles of natural justice and procedural fairness"; and

d) Particulars of the "…challenges [as to] whether certain facts occurred".

[26] The Appellant responded that she has given all the information she has with regard to her allegations of procedural fairness and Licensing's misconduct in this case. Additionally, all that she is at liberty to say is that the witnesses to be called "will speak on [her] behalf." The Appellant points to the written materials she sent to the Respondent's counsel from the outset of this proceeding.

[27] The Respondent's interest in obtaining further information before the hearing is not unusual or unreasonable. However, in light of the Board's Rules and the orders already made, described below, it is premature to address this now, as the Board has a process for addressing disclosure issues.

[28] It should be noted that the Board's proceedings are not as formal as in a court. Administrative proceedings are often conducted with less extensive pre-trial procedures and exchanges than in a court setting. This is done in the expectation that the administrative proceedings will be less expensive and more efficient than in court, and that self-represented parties can have easier access to administrative justice. That does not mean that the parties are not entitled to natural justice or procedural fairness, rather that the content of those entitlements may be less onerous than in court.

[29] In the instant case, in my decision on Form of Hearing, issued on May 07, 2020, I ordered the hearing of this matter would proceed orally at a time when the parties could reconvene in person.

[30] In the usual course, when the Board is in the process of setting down an oral hearing it will hold a pre-hearing teleconference with the parties for the purpose of setting a hearing date, and conducting pre-hearing case management. During the pre-hearing conference, the Board endeavours to determine a realistic estimate of the number of hearing days required, and to find a mutually agreeable hearing date. The Board also makes orders regarding standard pre-hearing matters such as document disclosure and the exchange of witness lists and witness "will say" statements. A "will say" statement is a brief written summary of what the party expects the witness to say when the witness gives evidence at the hearing.

[31] Rule 13 of the Board's Rules sets out the content and purpose of the Appeal Management (pre-hearing) Conference as follows:

> **Rule 13 – Appeal Management Conferences**
>
> 13(1) On its own initiative or at the request of a participant, the Board may schedule an appeal management conference by written notice to the participants and may direct the participants to deliver documents or submissions prior to the conference.
>
> (2) To apply to change the date of a scheduled appeal management conference, a participant must deliver a written request to the Board that explains the reason(s) the change is required and whether other participants agree to it (if known).
>
> (3) Unless the Board authorizes otherwise, all participants or their representatives must attend appeal management conferences.
>
> (4) The Board member or delegate appointed to conduct an appeal management conference may:
>
> (a) discuss clarification and simplification of issues on the appeal,
>
> (b) mediate issues on the appeal,
>
> (c) schedule the date, time and place for the hearing of the appeal,
>
> (d) discuss the identification of agreed facts,
>
> (e) discuss any evidence that will be required and the procedure that will be followed for the hearing of the appeal,
>
> (f) order a participant to produce documents at the appeal management conference or the hearing of the appeal,
>
> (g) order a participant to give another party copies of documents by a set date or to allow another participant to inspect and copy documents by a set date,
>
> (h) discuss and set a schedule for participants' delivery and exchange of documents and submissions,
>
> (i) hear and decide applications on preliminary or interim matters, including applications to extend a time limit, amend or cancel a summons to a witness, temporarily suspend the decision being appealed or adjourn a hearing date, or
>
> (j) make any other recommendation, direction or order for the just and timely resolution of the appeal.
>
> (5) The Board member or delegate who conducts an appeal management conference may issue a report that includes any recommendations, directions or orders made by the Board member or delegate and the consensus of the participants on any facts, issues or procedural matters on the appeal.
>
> (6) A Board member who conducts an appeal management conference where confidential settlement matters are discussed will not, unless the parties agree, sit on the panel hearing the merits of the appeal.

[32] This Board did hold a pre-hearing teleconference on January 27, 2020 and made an order for disclosure of witness lists, lists of documents and statements of points. The Board did not make an order for "will say" statements at this time (which is unusual but does not preclude that it would have made such an order at a later date as the hearing approached). The January 27, 2020 CMC Report notes that the Board intended to hold another pre-hearing conference after the summary dismissal matter was dealt with:

> *The Board Chair advised that upon determination of the preliminary matter, if the appeal is set to go forward, the Board will convene another Case Management Conference to discuss further issues relating to the appeal and hearing process.*

[33] The orders for the pre-hearing matters were set as being a certain number of days out from the hearing as follows (CMC Report January 27, 2020):

> 5. Each party agrees to provide the Board with a Statement of Points, Witness List and List of Documents on the following delivery schedule:
>
> a. The Appellant will deliver one copy of each of the above-noted documents to the Board and one copy to the Respondent **no later than 20 days prior to the commencement of the hearing.**
>
> b. The Respondent will deliver one copy of each of the above-noted documents to the Board and one copy to the Appellant **no later than 10 days prior to the commencement of the hearing.**
>
> c. If the Appellant decides to provide a Reply Statement of Points, she will deliver one copy to the Board and will serve the Respondent with one copy **no later than 5 days prior to the commencement of the hearing.**

[34] On March 03, 2020, the Board advised the parties via Notice of Hearing that the hearing was set to commence May 11, 2020 for five days. Further, the Notice of hearing listed the three Panel Members assigned to hear the matter. The Appellant provided a list of witnesses via email to the Board on March 18, 2020.

[35] On March 18, 2020, the Board advised the parties it was not going to hold oral hearings during the public health emergency caused by COVID-19, and sought submissions on the form of hearing. Once the hearing was adjourned, the parties did not need to comply with the above-noted orders regarding witness lists, document lists and statements of points as the timelines had not yet passed.

[36] Had the hearing not been adjourned, the witness list, document list and statement of points would have been exchanged and may have answered some or all of the Respondent's concerns about lack of particulars. The Board would likely have also ordered will say statements before the hearing.

[37] With respect to the "will say" statements and the "statement of points", these are a normal part of pre-hearing disclosure, and once a hearing date has been set for the hearing of this appeal, the Board will order the Appellant to provide this information to the Respondent.

[38] That said, if either party is surprised at the hearing by matters that should have been disclosed by the other party prior to hearing, there are remedies, such as temporary adjournment, that the surprised party can seek at the hearing on the merits.

Conclusion

[39] For the reasons outlined above, I decline to grant the Respondent's request for a stay of these proceedings, and I decline to make an order for the provision of particulars or "will say" statements at this time.

"Alison Narod"

Alison Narod, Chair
Community Care and Assisted Living Appeal Board

August 05, 2020 – date decision was originally issued
August 25, 2020 – date corrected decision was issued

CORRIGENDUM

Paragraph 10 of this decision has been edited as follows: Reference to "the First Reconsideration Decision" has been changed to "the First Reconsideration Application".