



Community Care and Assisted Living Appeal

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DECISION NO. CCALB-CCA-21-A003(a)

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

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|-------------------|--------------------------------------------------------------------------------------------------|-------------------|
| BETWEEN: | Ghalia Rebei Adlani (Moonlight Daycare) | APPELLANT |
| AND: | Dr. Emily Newhouse, Medical Health Officer, Fraser Health Authority | RESPONDENT |
| BEFORE: | A Panel of the Community Care and Assisted Living Appeal Board Alison Narod, Chair | |
| DATE: | Conducted by way of written submissions concluding on September 17, 2021 | |
| APPEARING: | For the Appellant: Kenneth D. Craig, Counsel For the Respondent: Robert P. Hrabinsky, Counsel | |

Decision Regarding Application for a Temporary Suspension

Introduction

[1] This decision relates to whether to grant the Appellant a temporary suspension of the Respondent's June 9, 2021 reconsideration decision (the "Reconsideration Decision") of Medical Health Officer ("MHO") Dr. Emily Newhouse to cancel the Appellant's license effective September 15, 2021, pending the outcome of the Appellant's appeal of that decision. The appeal is scheduled to be heard in early December 2021.

[2] In accordance with section 29(6) of the *Community Care and Assisted Living Act*¹ (the "Act"), the Board may not suspend a decision unless it is satisfied that a suspension would not risk the health or safety of a person in care. If, and only if, the Board is so satisfied, it may consider other relevant factors in deciding whether to exercise its discretion to grant the suspension.

¹ *Community Care and Assisted Living Act*, SBC 2002, c 75.

[3] The Board determines whether or not to grant a suspension on “summary application”². In so doing, it does not conduct a full hearing of the case on its merits and does not determine the legal and factual issues to be decided in the appeal. Accordingly, in an application of this type, Board does not have the full facts and law. My findings of fact and law do not bind the panel that hears the appeal. The legal and factual issues continue to be matters for the Board to decide at the appeal hearing.

[4] The issues I must decide in this application are 1) whether granting a suspension of the underlying decision would risk the health or safety of a person in care; and 2) if not, whether, in the particular circumstances of this case, I should grant the temporary suspension.

[5] For the reasons below, I am satisfied that a temporary suspension of the Reconsideration Decision pending the outcome of the appeal should be granted on terms that mitigate the risk to the health and safety of a person in care.

Background

[6] The decision under appeal is the June 9, 2021 Reconsideration Decision. The subject of the Reconsideration Decision is the MHO’s reconsideration of the July 9, 2020 decision of Licensing Officer JS to impose conditions on the Appellant’s license (the “Licensing Decision”). The conditions imposed in the Licensing Decision prohibited the Appellant from caring for school aged children, and required her to take a series of ethical practice courses. The conditions imposed in the Licensing Decision were not set to take effect until August 9, 2020, one month after the issuance of the decision.

[7] On December 8, the Appellant sought reconsideration of the Licensing Decision.

[8] In the Reconsideration Decision, the MHO cancelled the Appellant’s license effective September 15, 2021, and revised and added to the conditions which the Licensing Officer attached to the Appellant’s license. I note that the MHO’s decision to cancel the Appellant’s license did not take immediate effect, but was suspended for a period of just over three months, during which time the Appellant was permitted to continue to operate the daycare in order to give parents the opportunity to make alternate daycare arrangements.

[9] More specifically, the MHO imposed the following terms at page 9 of her decision:

1. I am cancelling your License, effective September 15, 2021.
2. I confirm that the condition attached to your License that you must not provide care to school aged children as per the definition in the CCLR will remain in place.

² Section 29(6) of the Act.

3. As your License is being cancelled, I am removing the condition that you must complete the "Best Choices: The Ethical Journey" training series through Early Childhood Educators of BC or equivalent ethical practice training.
4. In addition, I am attaching further conditions to your License, effective July 15, 2021:
 - a. You must not accept or enroll any new children into your care.
 - b. You must provide Licensing with a list of all children currently in attendance at Moonlight Daycare and the dates and times that they attend, and you must notify Licensing in advance if there will be any deviation from this schedule.
 - c. You must advise the parents of children in your care that you will no longer provide care as of September 15, 2021.

[10] On August 17, 2021, the Appellant requested a temporary suspension of the Reconsideration Decision. Among other things, the Appellant argued that, based on no fresh evidence, the MHO made a retaliatory decision to terminate the Appellant's licence. This was effectively a new order. Procedural fairness demands the Appellant have sufficient time to seek reconsideration of the order. The Appellant was denied due process. Licensing engaged in dishonesty by fabricating evidence. There has been no fresh evidence or fresh complaints since the summer of 2020. The health and safety of the non-school age children in the Appellant's care is not at risk.

[11] On August 31, 2021, the Respondent opposed that request on the same grounds that supported the Reconsideration Decision: the Appellant engaged in a repeated pattern of providing care in ways that violate her license, despite receiving repeated education from Licensing about this; her actions put children at risk by, for example, leaving a school age child unattended, moving children between locations and leaving school age children in the sole care of unqualified and unsupervised employees; she exhibited a pattern of evasion, dishonesty, concealment and obstruction that interfered with Licensing's ability to perform its duties; and her conduct demonstrated a disregard for the legislation and the terms of her license and demonstrated unsuitability for a licence.

[12] On September 13, 2021, I granted an interim suspension order pending a final determination of the suspension application, and in so doing I continued the terms which the MHO imposed for the three months between the date of her decision and the date cancellation of the facility was to become effective. Among other things, I stated:

In my analysis of potential risk, I considered Dr. Newhouse's own temporary suspension of the Cancellation Order. I would have expected that if there was serious and/or immediate risk to the health or safety of the children in the Appellant's care that Dr. Newhouse would have cancelled the Appellant's license immediately. I also expect that Dr. Newhouse was satisfied that the conditions placed on the license were sufficient to ensure the safety of the children in the Appellant's care for at least three months.

[13] I also stated:

If at any time during the interim suspension the Appellant breaches any of the conditions on her license, or if information comes to the attention of the Respondent which indicates possible risk to the children in the Appellant's care, the Respondent shall be at liberty to make an application to lift the interim suspension and I will hear the application on an expedited basis.

...[T]hough I may be satisfied at this stage that a brief suspension of the Cancellation Order will not cause harm to children in her care, considerations for a lengthier suspension may lead me to a different conclusion.

[14] The Respondent has not made a subsequent application to lift the interim suspension. However, it disclosed two Facility Inspection Reports, dated September 14 and 15, 2021, respectively, which it relies on in support of its opposition to the requested suspension.

[15] According to the Reports, Licensing visited the Appellant's facility on September 14, 2021, and found two children present who had not been listed in the children's attendance list the Appellant submitted in July 2021, as per the conditions on her License. On September 14, 2021, the Appellant provided Licensing with explanations for their presence and asserted that she had not knowingly breached the conditions on her license. Licensing concluded that the Appellant breached the condition that she not enroll new children, and that she contravened section 7(1)(b) of the Act.

[16] Licensing then obtained information from the children's parents that conflicted with the Appellant's explanations. When Licensing presented this new information to the Appellant on September 15, 2021, she maintained her position. As a result of this exchange and additional information gathered that day, Licensing concluded that the Appellant breached the condition that she advise Licensing in advance if there was a deviation in the dates and times that the children attended the facility, as well as the condition that she notify the children's parents that the facility would cease providing care on September 15, 2021. This was a breach of section 7(1)(b) of the Act. Additionally, the Appellant had contravened section 12(1)(a) of the Regulation, because she obstructed Licensing during an investigation by providing false information that she had made parents aware of the potential closure, when she had not done so.

[17] In the result, Licensing required that the Licensee take corrective action to bring the facility into compliance and provide a written response to Licensing.

[18] Counsel for the Appellant made written submissions providing further responses to the September 15, 2021 Report, referred to below.

Positions of the Parties

[19] I have considered the submissions of the parties both for and against the temporary suspension.

[20] In particular, I have considered the Appellant's arguments that license cancellation is the most serious issue possible for the Appellant's licence, and that the outcome substituted by the MHO in place of the Licensing Decision without new

evidence or complaints could amount to a denial of due process. Among other things, the Appellant argues that:

- a. Licensing acted with dishonesty and fabricated evidence;
- b. the MHO substituted a retaliatory and more serious decision to terminate the licence without any new evidence or complaints;
- c. this action deprived the Appellant of time to seek reconsideration and amounted to a denial of due process;
- d. the Appellant will suffer substantial economic harm; and
- e. the health and safety of the younger children still in care is not at risk.

[21] I note that the MHO did obtain new evidence from a parent, herself, before making her Reconsideration Decision, which she referenced at pages 4, 5, 7 and 8 of that decision.

[22] I have also considered the Respondent's argument that compares the suspension application to an application for injunctive relief, where the multi-pronged test would include proof of irreparable harm and that the arguments supporting cancellation of the license also support denial of the suspension. Among other things, the Respondent argues that:

- a. the Appellant has a history of non-compliance with the Act, the Regulations and her own compliance plans;
- b. she provided care at an unlicensed secondary location;
- c. she engaged in a pattern of evasion and dishonesty, concealed information and actions and obstructed Licensing;
- d. there is a real risk to the safety and well-being of children in care;
- e. the public interest will suffer irreparable harm in the event of a temporary suspension; and
- f. the Respondent's due process argument is contradicted by section 17(3)(b) of the Act, which provides the MHO the authority to substitute its decision for an action under reconsideration.

[23] I have also reviewed the Respondent's subsequent Inspection Reports dated September 14 and 15, 2021, as well as the Appellant's response and position that she now wishes to turn a new page on this file and accepts the restriction placed on her in July 2020. Moreover, she is willing to attend any form of education or training that would satisfy Licensing that she is in the process of remedying past transgressions.

Analysis

[24] The Respondent focuses much of its submission on the MHO's findings regarding the Appellant's non-compliance with Licensing's instructions and the terms of her license. In particular, the Respondent argues that the Appellant's repeated pattern of providing care in numbers, hours, and locations in violation of her license supports the decision to cancel the Appellant's license, and should also support the denial of this suspension application. Further, the Respondent

highlights what it describes as the Appellant's pattern of evasion, dishonesty, and obstruction of Licensing as support for denial of this application.

[25] I note that the Respondent does not devote a great deal of its submission to specifically addressing the issue of whether a temporary suspension of the MHOs' decision to cancel the Appellant's license would risk the health or safety of a person in care. On the evidence before me, it appears that the remaining persons in care since Licensing's decision are confined to children under school age.

[26] The Respondent argues in favour of applying the test for injunctive relief, and in particular, contends that harm to the public interest is taken to amount to irreparable harm. That, however, is not the statutory test for a suspension of the MHO's decision under the Act, which turns on the risk of harm to the health or safety of a person in care.

[27] In its submission the Respondent highlights three examples where the MHO previously found that the Appellant put children at risk: leaving a child unattended, moving children between locations, and leaving children in the care of employees who are not permitted to supervise children alone under the Appellant's license. Although not expressly argued by the Respondent, the implication of this submission is that if the Appellant is allowed to continue operating her daycare, children may again be put in similar situations and therefore be placed at risk.

[28] However, the conduct given rise to the examples that the Respondent relies on appears to have been curtailed. The child left unattended was a school age child, as were the children left in care of the person who was not permitted to supervise them. There is no evidence that the Appellant continues to care for school age children, directly or indirectly. Moreover, the child left unattended and the children moved between locations, were transported by the Appellant's husband. There is no evidence that he or anyone else on continues to transport children in the Appellant's care on her behalf.

[29] I note that the September 14 and 15 Reports record contraventions that echo the Appellant's past contraventions of statutory standards. These are troubling. I also note that Counsel for Appellant's response to those Reports expresses the Appellant's acceptance of the terms imposed on her License in July 2020, her wish to "turn the page", and her willingness to undertake education and remedy "past transgressions". It appears that she now acknowledges, to some extent, problems with her past conduct. It remains to be seen whether the Appellant will actually turn the page.

[30] I remain cognizant of the fact that neither the Licensing Officer nor the MHO felt it necessary to immediately terminate the Appellant's License, which suggests that continued operation of the facility under tight conditions was sufficient to protect against the risk to persons in care, at least for a time.

[31] Moreover, the outcome of the September Inspection Reports was to require that the Appellant bring the facility into compliance. This does not suggest that the Appellant's conduct, at least in the short term, added significantly to the overall risk to persons in care.

[32] In making these observations, I note that the Appellant's conduct was said to amount to breaches of statutory and regulatory standards, on the one hand, and

the question of her character on the other hand. Where there is no risk to a person in care or where that risk can be mitigated, there may be circumstances where an issue of character weighs more heavily in favour of a temporary suspension than an issue of a statutory or regulatory breach. In my view, this is such a case.

[33] I am particularly mindful of the proximity of the hearing of this matter, which is scheduled for early December, and the fact that neither decision-maker (the Licensing Officer nor the MHO) decided that immediate termination of the license was warranted. I take notice of the tribunal's experience that cancellation of a licence pending an appeal is often a death-knell to the underlying business which may not be remedied even if an appellant is successful on the merits of an appeal. I am also aware that circumstances may change that may warrant revisiting a temporary suspension.

[34] In the particular circumstances of this case, I am satisfied that continuation of the conditions placed on the Appellant's license is, at present, sufficient to ensure the safety of the children in the Appellant's care pending the outcome of the appeal. As a result, I grant a temporary suspension until the outcome of the appeal, on the condition that the Appellant complies with the terms and conditions that presently apply to the Appellant's Licence.

[35] I have made this decision with some reservation, given the seriousness of the allegations and counter-allegations and point out to the Appellant the importance of forth-rightness and collegiality with Licensing, and compliance with the Act and Regulations. However, I give leave to the Respondent to apply to the Board, or the Panel seized with this case, to revisit the terms of this decision on an expedited basis if circumstances change.

"Alison Narod"

Alison Narod, Chair
Community Care and Assisted Living Appeal Board

October 21, 2021