

RE: THE MATTER OF AN APPEAL PURSUANT TO S.45(1) OF *THE REGIONAL HEALTH SERVICES ACT* AND S.8(1) OF *THE PRACTITIONER STAFF APPEALS REGULATIONS* WITH RESPECT TO A DECISION OF THE SASKATOON REGIONAL HEALTH AUTHORITY

BETWEEN:

DR. RUSSELL JOHNSON and DR. TYLER McLAREN

APPELLANTS

AND:

THE SASKATOON REGIONAL HEALTH AUTHORITY,

RESPONDENT

DECISION OF THE PRACTITIONER STAFF APPEALS TRIBUNAL

Christine Glazer, Q.C. and Anita Wandzura appeared and acted on behalf of the Appellant
Evert Van Olst appeared and acted on behalf of the Respondent

A. INTRODUCTION

[1] This appeal concerns whether the Saskatoon Regional Health Authority's ("SRHA") decision to appoint the Appellants to its Associate Medical Staff rather than its Active Medical Staff should be disturbed by the Tribunal in accordance with its jurisdiction under s.45(1)(a) of *The Regional Health Services Act*, S.S. 2002, c. R-8.2 to hear appeals regarding "the appointment of the person to the practitioner staff or the reappointment, suspension or termination of appointment of the person."

[2] Drs. Johnson and McLaren assert that they have served a probationary period, therefore, should be appointed to the Active Medical Staff in keeping with the procedure established in the *Saskatoon Regional Health Authority Staff Bylaws* ("Bylaws") as no evidence has been presented to establish that they lack the requisite interpersonal or professional skills for appointment. Moreover, the Appellants argue that if required to complete an additional probationary period, they cannot be assured that they will be treated fairly. In the alternative, the SRHA contends that its Board of Directors ("Board") adequately remedied the use of an inappropriate hiring process by the Appellants' Department when it ordered that a new hiring process, consistent with the Bylaws, be undertaken. The Respondent, therefore, argues that its decision to appoint the Appellants to Associate Medical Staff should not be disturbed as the decision followed the process outlined in the Bylaws.

[3] For the reasons provided below, the appeal is allowed and the Tribunal orders that the Drs. McLaren and Johnson be appointed to the Active Medical Staff of the SRHA. In the case of Dr. Johnson, this appointment is postponed pending his obtaining certification from the Royal College of Physicians and Surgeons within the next 12 months.

B. FACTUAL BACKGROUND

[4] Dr. Russell Johnson and Dr. Tyler McLaren completed their residency in anesthesiology in the Department of Anesthesiology, Perioperative Medicine and Pain Management ("Department") at the Royal University Hospital ("RUH") in the Saskatoon Health Region ("SHR"). Dr. McLaren started his residency directly after completing Medical School at the College of Medicine at the University of Saskatchewan. Dr. Johnson joined the residency program after a number of years working as a Critical Care Associate at St. Paul's Hospital and City Hospital. As such, Dr. Johnson held Active Medical staff privileges in Adult Critical Care, Emergency Medicine and Pediatric Critical Care. In addition, Dr. Johnson was the Chief Adult Critical Care Associate in the SHR for more than 5 years immediately prior to joining the residency program.

[5] In their final year of the residency program, the Appellants were invited to join the Department on a full-time basis. Dr. Campbell, Department Head, approached Dr. Johnson about joining the staff in December 2008. Dr. Johnson accepted and began working full-time for the Department in June 2009. Dr. McLaren approached Dr. Campbell about a staff position in November 2009 and was subsequently offered a position, which he began in July 2009. In each of these meetings, Dr. Campbell discussed that the Appellants would serve a one-year probationary period.

[6] In order to begin working, the Appellants were required to complete an application form that indicated the position to which they were applying. The Appellants each selected that they were applying for an appointment to the Associate Medical Staff. The Appellants assumed they had been invited to join the Department as Associate Medical Staff because they were familiar with the normal practice in the SHR and in Dr. Johnson's case, the specific hiring process outlined in the Bylaws. Dr. Johnson was

subsequently contacted by the Human Resources Department to modify his application by selecting a temporary appointment. When asked if this was to reflect the probationary nature of his Associate Status, he was assured that it was. Dr. McLaren was not asked to modify his application.

[7] Neither Appellant received any documentation from the SRHA outlining the terms of their offers or their appointments. As a result, the Appellants reasonably assumed that the Department followed the typical hiring process for full-time employees as outlined in the Bylaws.

[8] In the Spring of 2010, as he neared the end of his first year on staff with the Department, Dr. Johnson was sent an Application for Reappointment to the Practitioner Staff. Dr. Johnson completed the application and applied for Appointment to Active Medical Staff. Again, Dr. Johnson did not receive any documentation from the SRHA confirming his appointment.

[9] In October 2010, each Appellant was called to a meeting with Dr. Campbell, and another member of the Department's Executive Committee where he was informed that his temporary (locum) appointment would not be renewed beyond June 30, 2011. A letter stating the same was subsequently provided to the Appellants. This was the first time that either Appellant learned that they were not Associate Medical Staff. The Tribunal accepts the Appellants' testimonies that they would not have accepted positions at RUH if they had known they were locum appointments.

[10] The Tribunal also accepts the Appellants' testimonies that they were given no indication why their positions were not being renewed other than a reference to "Human Resource needs." Had concerns been raised about the Appellants' performance or interpersonal skills, the Tribunal would have expected to see those concerns detailed in the letters from Dr. Campbell provided to the Appellants confirming their termination. In fact, the only evidence on the record indicates that the Appellants are capable and competent anesthesiologists who are collegial with other members of RUH staff and have an appropriate demeanor with patients.

[11] The Appellants initially felt that a mistake had been made that led the Department to believe they had locum appointments. As a result, the Appellants initially worked to correct what they perceived to be an error.

[12] In November 2010, Dr. Johnson requested a meeting with the Department's Executive Committee. In January 2011, Dr. Moulin, Senior Medical Officer, replied to Dr. Johnson's letter outlining that Dr. Johnson had never held Associate Medical Staff status with the Department.

[13] With the aid of legal counsel, the Appellants sought a remedy from the Board. Specifically, the Appellants requested that the Board recognize that they were inappropriately hired into a locum position. Dr. Johnson further requested recognition that he qualified for Active Medical Status while Dr. McLaren initially sought Associate Medical Status. Dr. McLaren is now asking that the Tribunal grant him Active Medical Staff status given the time it has taken to resolve this matter.

[14] On June 23, 2011, the Board sent a letter to the Appellants confirming that they held locum appointments with the SRHA. The letter, however, recognized that the Department's hiring process was not consistent with the Bylaws. As a consequence, the Credentials Committee (CC) and the Practitioner Advisory Committee (PAC) had not considered the Appellants' applications as normally would have been the case. The Board, therefore, felt the appropriate remedy was to process the Appellants' applications for Associate Medical Staff in strict accordance with the Bylaws.

[15] The question of whether the appointment should occur retroactively was not put to the PAC or the CC. Therefore, the PAC and CC did not consider whether it was appropriate to recognize the time served in the locum appointment as a probationary period and appoint Dr. Johnson or Dr. McLaren to Active Medical Staff.

[16] While their applications were being processed, the Appellants' temporary status with SRHA was extended for three months ending September 30, 2011. When the application process had not been completed by the end of September, the Appellants' temporary status was extended for a further three months. Regrettably, the extensions were rendered meaningless by an inflexible schedule. Because the Department's schedule is prepared three months in advance, the Appellants were not put in the regular rotation for shifts. They were instead offered shifts on an ad hoc basis as they became available. As would be expected, the Appellants sought and found work elsewhere as they awaited the outcome of the application process.

[17] On November 30, 2011, the PAC recommended that Dr. McLaren be appointed to the Associate Medical Staff. After considering the recommendation of the CC, the PAC recommended that Dr. Johnson also be appointed to the Associate Medical Staff pending proof of eligibility to write the Royal College Certification Examination. The Board accepted these recommendations and granted the Appellants Associate Medical Staff status effective December 1, 2011.

[18] The Appellants did not accept the Board's recommendation because it required the completion of another probationary year; they assert that they have served a probationary term and should not be required to do so again. Instead, the Appellants seek retroactive appointments that view their probation as completed. Moreover, the PAC's recommendation was made despite opposition from the Executive Committee of the Department. In particular, Dr. Campbell repeatedly raised unsubstantiated concerns about the suitability of the Appellants for appointment. As a result, the Appellants do not feel they will be fairly treated and assessed in a new probationary period.

[19] The Respondent asserts that a retroactive appointment is not appropriate because the Appellants' suitability for appointment as Active Medical Staff has not been adequately assessed. The temporary nature of their initial locum appointment did not facilitate the formal assessment process associated with Associate Medical Staff status. Moreover, the Appellants can now avail themselves of the procedural safeguards contained in the Bylaws in the event they feel they are being unfairly treated or assessed in the Department. The Bylaws provide that the CC, the PAC and the Board review all appointments to Active Medical Staff.

C. ANALYSIS

Jurisdiction

[20] The parties do not dispute that the Tribunal has jurisdiction to hear this appeal arising from s.45(1)(a) of the *Regional Health Services Act* (the "Act"), which provides that:

45(1) A person who is aggrieved by a decision of a regional health authority or an affiliate made in relation to the following matters may, in accordance with the regulations, appeal the decision to a tribunal established by the regulations:

(a) the appointment of the person to the practitioner staff or the reappointment, suspension or termination of appointment of the person;

Section 8(1) of *The Practitioner Staff Appeals Regulations*, (the “Regulations”) enacted pursuant to the Act, further provides:

8(1) A practitioner who is aggrieved by a decision of a board with respect to a matter set out in subsection 45(1) of the Act may appeal that decision to the tribunal by serving a notice of appeal on the tribunal and a copy of the notice of appeal in the respondent within 30 days after the day on which the practitioner is served with a copy of the decision.

[21] Nor do the parties dispute that s.11(1) of the Regulations provides that the Tribunal is to conduct a hearing *de novo*. During the hearing, however, the nature of a hearing *de novo* was discussed. At issue was the degree to which the Tribunal should give deference to the Board’s decision. To this end, the Respondent directed this Tribunal to its earlier decision in *Dr. Charles Smith v. Saskatoon Regional Health Authority (Smith)* where that Tribunal concluded that:

...although this is an appeal *de novo* – and accordingly we are to determine this matter on the basis of the evidence before us – an important consideration when determining whether the decision of the Board was right or wrong is to take into account whether the Board properly exercised its discretion [page 9].

As the Board’s exercise of its discretion in determining how to remedy the Appellant’s complaint was not unreasonable, arbitrary, capricious or discriminating, the Respondent argues this Tribunal should be hesitant to disturb the Board’s decision.

[22] Ultimately the issue this Tribunal must decide is whether the Board erred in not directing the CC and PAC to consider retroactive appointments for Dr. Johnson and Dr. McLaren. As this is a hearing *de novo*, the Tribunal’s decision in *Smith* correctly states that how the Board exercised its discretion is just one of the factors that should be considered by the Tribunal.

[23] In addition to the evidence presented by the parties, the Tribunal considered the important role a probationary period serves in safeguarding the quality of health services provided by practitioners. The Tribunal also considered that the statutory regime, including the Bylaws, establishes a hiring process whereby applicants are assessed by the PAC and the CC whose members are in the best position to assess a practitioner’s skills and competencies as well as the needs of the Health Region. Thus, it is important to clearly state that it would be only in the rarest of circumstances that this Tribunal would decide to appoint a practitioner to Active Medical Staff without that practitioner first serving as Associate Medical Staff. For the reasons outlined below, this case presents one of those rare circumstances.

Main Appeal

[24] In deciding that the Board erred in not directing the CC and PAC to consider a retroactive appointment, the Tribunal reflected on the need for additional probationary service in this case. The Tribunal does not accept that the Respondent’s assertion that a probationary period is required to adequately assess the skills and character of the Appellants.

[25] When the Appellants were told that their locum positions would not be extended beyond June 30, 2011, Dr. Johnson had worked for the Department for over 16 months after completing his residency. Dr. McLaren had worked close to 4 months with Department after completing his residency. Both Appellants also continued to work in the Department on a full-time basis until the expiry of their initial locum appointment. Moreover, both Appellants were known to the Department as they had completed their

residency at RUH. The PAC and CC could have gathered enough information to consider a retroactive appointment by canvassing other members of the SRHA who have worked with Appellants.

[26] In addition, the Department's Hiring Policy, although inconsistent with the Bylaws, was created to 'pre-screen' all applicants for positions within the Department. In a letter from Dr. Campbell to Dr. David Poulin, VP Medical Affairs for the SHR, dated June 29, 2011, Dr. Campbell described that the Department created the process outlined in the Hiring Process to ensure that new hires "fit" with the Department. Some assessment of the Appellants' skills and character must therefore have been undertaken in the determination that they did not fit. Moreover, the Executive Committee of the Department opposed the Appellants' appointment to Associate Medical Staff. Although the Tribunal notes that the grounds asserted for their opposition were unsubstantiated, the Executive Committee must have reached their position after some assessment of the Appellants. The Respondent's position, therefore, that such an assessment did not or could not have occurred is irreconcilable with the action of the Executive Committee.

[27] The Tribunal also finds it difficult to accept that there is no oversight of newly trained anesthesiologists within the Department from which an assessment of their skills can be garnered. Such a practice could put patients at risk and is inconsistent with Dr. Campbell's report that the Department is highly regarded. In the June 29, 2011 letter to Dr. Poulin, Dr. Campbell notes the Department received a positive External Review and was highlighted in the SHR's most recent Accreditation Report.

[28] In reaching the conclusion that the Board erred by not directing the consideration of a retroactive appointment, the Tribunal is also cognizant of the time it took for the Board to resolve this matter and the impact that had on the Appellants professionally and personally. The Department's Hiring Policy is a deliberate attempt to circumvent the statutory regime established for hiring Practitioners. Moreover, the Appellants were not informed that the Department was not adhering to the hiring process outlined in the Bylaws. It is not unreasonable for the Appellants to have expected that as soon as the Board learned of the Department's policy, the Board would resolve the situation in a timely manner. It is unreasonable to require the Appellants to leave their eligibility for Active Medical Status unresolved for yet another year when this matter would have been settled in July 2010 for Dr. Johnson and July 2011 for Dr. McLaren if the Department had followed the Bylaws.

[29] Finally, the Tribunal finds the Board erred in not directing the PAC and CC to consider a retroactive appointment because of the potential for the Appellants not to be fairly assessed during an additional probationary period. There can be no doubt that the Department's leadership does not want the Appellants as a part of its staff. In a letter provided to the PAC and the CC, Dr. Campbell raises questions about the Appellants' character without providing any evidence to substantiate these claims despite the lasting consequences this could have on the Appellants' professional lives. It is not clear to the Tribunal how widely these views were shared within the Department and other members of RUH, however, the Appellants will return to a workplace under a cloud of questions about their abilities. It is difficult to imagine how the Appellants can be fairly assessed in this environment.

[30] Moreover, the Department's allegations against the Appellants did not address how the perceived shortcomings in the Appellants' character affected the quality of services provided to patients. In regulated professions where the ability to practice one's occupation is restricted, it is especially important that a qualified and competent professional not be denied the right to practice because of personality conflicts where such conflicts do not undermine one's clinical effectiveness, compromise the quality of patient care, or create an unsafe workplace for colleagues. Character, therefore, is only relevant to the extent that it has an impact on one's ability to competently perform the task they were hired to do or impairs another from doing the same.

[31] Furthermore, notwithstanding the Department's recent history with unprofessional colleagues, the Tribunal was alarmed by reference to the Department's position that they "should do everything in our power to protect our Department from individuals who display unwanted negative interpersonal and intraprofessional relationship behavior" and that they are in "an enviable position to carefully choose who we wish to join our Departmental family." An overemphasis in hiring criteria on character and personality without reference to impact on clinical skills, the quality of patient care, or workplace safety can create barriers to diversity in the workplace.

Remedy

[32] Having found that the Board erred in not directing the PAC and CC to consider a retroactive appointment for the appellants, the Tribunal could direct that the matter be sent back to PAC and CC for consideration. Fairness dictates, however, that this matter be resolved as soon as possible. As previously outlined, the Tribunal has decided that each Appellant should be appointed to the Active Medical Staff in the SHR.

[33] The Tribunal finds that the Appellants' uniformly, positive assessments from their recently completed Residency program supports their appointment to Active Medical Staff. Given the breadth of skills and competencies on which residents are evaluated and the lack of evidence demonstrating any concern about their professional and interpersonal skills, the Tribunal does not accept the assertion that the Appellants are anything less than competent anesthesiologists. The Tribunal further notes that the suggestion that Dr. Johnson lacks the requisite interpersonal skills to work well with other members of hospital staff is inconsistent with he having been previously promoted to a position of leadership within the SHR.

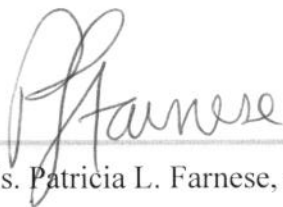
[34] In the case of Dr. McLaren, this appointment is effective pending his resignation from the Active Medical Staff of any other regional health authority to which he belongs as required by s.24(2) of the Bylaws. Dr. McLaren has until December 15, 2012 to communicate to the SRHA his intention to hold Active Medical Status with the SHR.

[35] The Tribunal recommends that Dr. Johnson's appointment be postponed until he has achieved Certification from the Royal College of Physicians and Surgeons. The Tribunal accepts that it is the practice in the Department that Royal College certification is a prerequisite of Active Medical Staff status where a physician has completed their residency in Canada. This practice is consistent with the Credentialing Approval Process of the Credentials Committee. To this end, Dr. Johnson will maintain Associate Medical Staff status for up to an additional 12 months pending his successful completion of the Royal College examination. This timeframe best approximates, in the circumstances, the restriction contained in s.23(5)(b) of the Bylaws that prohibits any physician from holding Associate Medical Staff status for more than 24 months. All other factors considered in determining the successful completion of the probationary period related to Associate Medical Status are deemed to have been satisfied.

D. CONCLUSION

[36] For the reasons provided above, the Tribunal allows the appeal and concludes that the Board erred in failing to direct the CC and PAC to consider retroactive appointments.

Dated at Saskatoon, Saskatchewan, this 11 day of October, 2012.

A handwritten signature in cursive script, appearing to read 'P. Farnese', written over a horizontal line.

Ms. Patricia L. Farnese, vice –Chair and Member

Dated at Herbert, Saskatchewan, this 16th day of October, 2012.

A handwritten signature in cursive script, appearing to read 'S. Kassett', written over a horizontal line.

Dr. Suresh Kassett, Member

Dated at Yorkton, Saskatchewan, this 15th day of October, 2012.

A handwritten signature in cursive script, appearing to read 'J. Howlett', written over a horizontal line.

Dr. James Howlett, Member