

National Appeal Panel

Constituted under

**THE NATIONAL HEALTH SERVICE (PHARMACEUTICAL SERVICES)
(SCOTLAND) REGULATIONS 2009 (AS AMENDED)
("THE REGULATIONS")**

DECISION

of the

CHAIR

of

THE NATIONAL APPEAL PANEL

In the application relating to

21-21B Roxburgh Street,

Kelso. TD5 7DN

Applicant and Appellant: S Manson

Health Board: NHS Borders ("the Board")

PPC Decision Issued: 28 August 2024

Panel case number: NAP 130 (2024)

Decision of the Chair of The National Appeal Panel

1. Background

- 1.1. This is an appeal against the decision of the Pharmacy Practices Committee (“the PPC”) of the Board which was issued on 28 August 2024 in relation to the application of Mr S Manson (“the Appellant”).
- 1.2. The application was originally made on 26 February 2024. The application was considered at a meeting of the PPC on 28 August 2024. The PPC issued its decision to refuse the application on or around that time.
- 1.3. An appeal was lodged against the decision of the PPC by the Appellant on 4 October 2024.

2. Grounds of Appeal

- 2.1. The Appellant makes a number of criticisms regarding the determination of their application including the procedure followed in advance of the hearing, during the hearing and the decision itself. None of these criticisms are made with reference to those Grounds of Appeal permitted in terms of the Regulations.
- 2.2. I have, however, attempted to summarise the arguments or complaints being made, consider whether they relate to any of the permitted grounds of appeal (see paragraph 3.1 below) and whether they are, in turn, reasonable grounds of appeal to the extent of being upheld or not.
- 2.3. Ground of Appeal 1. This relates to whether the Regulations were adhered to when the Board are considered to have accepted written representations outwith the time limit provided for in the Regulations. I have taken this ground to relate to a perceived procedural defect in terms of the Regulations (paragraph 5(2B)(a) of Schedule 3).

- 2.4. Ground of Appeal 2. This relates to whether the Regulations were adhered to when the Board allowed one of the interested parties to be supported by a pharmacist who, as another interested party, was notified of the application but did not enter an appearance in the process by way of timeously submitting written representations. Again I have taken this ground to relate to a perceived procedural defect in terms of the Regulations (paragraph 5(2B)(a) of Schedule 3).
- 2.5. Ground of Appeal 3. This ground relates to a perceived conflict of interest in respect of one of the Pharmacist members of the PPC who the Appellant considers to be operating within a relevant locality. Again I have taken this ground to relate to a perceived procedural defect in terms of the Regulations (paragraph 5(2B)(a) of Schedule 3).
- 2.6. Ground of Appeal 4. This ground relates to whether there was a failure of the PPC to properly narrate the facts or reasons upon which their determination of the application was based (paragraph 5 (2B) (b) of Schedule 3).
- 2.7. Ground of Appeal 5. This ground relates to a number of criticisms regarding the accuracy of the Minutes of the Meeting of the PPC dated 28 August 2024.

3. Legislative framework

Appeals

- 3.1. The Regulations provide, at paragraph 5(2B) of Schedule 3, a limited right of appeal against a decision of the Board. These are errors in law in terms of the application of the Regulations and are as follows:
- 3.1.1. A procedural defect in the way the application has been considered by the Board;
- 3.1.2. A failure by the Board to properly narrate the facts and reasons upon which their determination of the application was based; or
- 3.1.3. A failure to explain the application by the Board of the provisions of these Regulations to those facts.

Consideration by the Chair

3.2. The Regulations provide, at paragraph 5 of Schedule 3, that as Chair I am required to consider the notice of appeal and:

3.2.1. To dismiss the appeal if I consider that they disclose no reasonable grounds or are otherwise frivolous or vexatious; or

3.2.2. Remit the decision back to the Board for reconsideration if I consider that any of the circumstances set out in points 3.1.1 to 3.1.3 have occurred or;

3.2.3. In any other case, convene the National Appeal Panel to determine the appeal.

PPC: Legal test and determination of applications

3.3. The Regulations provide, at Regulation 5(10), the relevant test to be applied by the Board when considering an application to be on the Pharmaceutical list. That test, which has in its previous comparable iteration been the subject of judicial treatment is, put simply, whether the present services are inadequate and, if so, whether the application is necessary or desirable in order to secure adequate provision. If the answer is yes to both of these questions the Board is to grant the application.

3.4. The Regulations provide, at paragraph 3(1) of Schedule 3, those matters that the Board shall have regard to in considering an application. These matters include current service provision, representations received by the Board, the Consultation Analysis Report (the “CAR”), the pharmaceutical care services plan (prepared by the Board for its area annually), the likely long term sustainability of the services to be provided by the applicant and any other relevant information available to the Board.

4. Consideration

4.1. Ground of Appeal 1. This ground relates to whether the Regulations were adhered to when the Board are considered to have accepted written representations outwith the time limit provided for in the Regulations. I have taken this ground to relate to a

perceived procedural defect in terms of the Regulations (paragraph 5(2B)(a) of Schedule 3).

- 4.2. The Minutes of the Meeting of the PPC on 28 August 2024 confirm that Boots Pharmacy responded as an interested party within the time limit provided for and they were subsequently represented at that meeting. Rowlands Pharmacy responded outwith the time limit. The PPC may choose, usually at the discretion of the Chair, to allow such a letter to be received late as part of “any other relevant information available to it” under paragraph 3(1)(a) of Schedule 3. In these circumstances, however, although the letter was with the papers had not been accepted though late, that is to say it was not referred to or considered at the oral hearing.
- 4.3. Taking all this into account I have concluded that there was nothing defective in the way in which the Board went about dealing with the written representations received late. This ground of appeal is not therefore upheld.
- 4.4. Ground of Appeal 2. This relates to whether the Regulations were adhered to when the Board allowed one of the interested parties (Boots) to be supported by a pharmacist (Rowlands) who, as another interested party, was notified of the application but did not enter an appearance in the process by way of timeously submitting written representations. Again I have taken this ground to relate to a perceived procedural defect in terms of the Regulations (paragraph 5(2B)(a) of Schedule 3).
- 4.5. Where the Board hears oral representations the procedure is, broadly, at the discretion of the Chair, but an applicant and interested party will be notified and, generally, have the opportunity to speak to and amplify what it said in their application or submissions, and respond to questions put to them in that regard. The notice requirements are set out at paragraph 3(3) of Schedule 3 of the Regulations.
- 4.6. That paragraph also provides that the Board must permit an applicant or interested party to speak to their own representations or have someone assist them on their behalf. The only prohibition on a person assisting the applicant or interested party is that they are not appearing in the capacity of counsel, solicitor or paid advocate.

Although unusual to an extent, the participation of the representative of Rowlands Pharmacy to assist the interested party, Boots Pharmacy, was not defective in terms of the Regulations. On this basis, this ground of appeal is not upheld.

- 4.7. Ground of Appeal 3. This ground relates to a perceived conflict of interest in respect of one of the Pharmacist members of the PPC who the Appellant considers to be operating within a relevant locality.
- 4.8. The Appellant advances this argument with reference to one of the PPC members nominated by the Area Pharmaceutical Professional Committee, Mr R Graham, who is the owner of a Pharmacy in Jedburgh. The Appellant describes this as being in the same “Cheviot locality” as Kelso and notes that the Pharmacy in Jedburgh processes prescriptions from the Kelso Medical Practice. The Appellant considers Mr Graham to have, therefore, a vested interest in the outcome of the application and on this basis he should not have been a pharmacy advisor to the PPC.
- 4.9. As is mentioned above this ground is advanced without reference to those grounds of appeal permitted in terms of the Regulations. That being said, failure to follow the Regulations in terms of those provisions that safeguard against conflicts of interest would represent a procedural defect in terms of the Regulations (paragraph 5 (2B) (a) of schedule 3). I have therefore approached this ground of appeal on that basis.
- 4.10. The Regulations make provision for the (avoidance) of conflicts of interests in two key places. The first is in relation to the PPC hearing itself, namely, that those participating declare any interests at the outset (paragraph 4 of Schedule 4). The second is in relation to those PPC members who are entitled to vote and those that are not (paragraph 6 of Schedule 4). The first safeguard is self-explanatory. The second safeguard recognises or seeks to distinguish between those providing professional assessments or technical input to a decision maker but who are not involved in taking the decision itself. This recognises that members of the Pharmaceutical community in Scotland will come into contact with one another from time to time in terms of competition and their regulation.

- 4.11. The decision of the PPC dated 26 August 2024 at paragraphs 3.6 and 3.7 discloses that members were asked to declare any interests and that none were declared. The Appellant, then the applicant, was represented at that meeting and made no objections at this point. When it came to voting the member mentioned withdrew from the meeting (paragraph 15.1) and was not, therefore, a decision maker.
- 4.12. Given the foregoing there is no procedural defect in the way the application has been considered by the Board in terms of declaration of interests or voting. This ground of appeal is not therefore upheld.
- 4.13. Ground of Appeal 4. This ground relates to whether there was a failure of the PPC to properly narrate the facts or reasons upon which their determination of the application was based (paragraph 5 (2B) (b) of Schedule 3).
- 4.14. The Appellant advances this ground of appeal with reference to the concluding paragraphs (14.5-10) of the Minutes of the Meeting of the PPC dated 28 August 2024 in which adequacy is discussed and a conclusion is later reached on that question.
- 4.15. I agree with the Appellant in this regard. It is not sufficient to simply note how the PPC went about taking certain information into account and qualify some aspects of that information before stating the decision.
- 4.16. The relevant sources of information must be set out, what that information speaks to and reasons given why for one source, for example, was preferred over another. Put another way, what were the arguments, and which arguments prevailed on balance. In particular, in that part of the Minutes of the Meeting of the PPC headed "Conclusion", specific reasons must be given for it considering that the current provision was adequate. I will therefore uphold this ground.
- 4.17. Ground of Appeal 5. This ground relates to a number of criticisms regarding the accuracy of the Minutes of the Meeting of the PPC dated 28 August 2024. Whilst not a ground of appeal permitted in terms of the Regulations I would suggest to the PPC that, when reconsidering the application in relation to Ground of Appeal 4 (duty to give reasons), these matters are clarified for completeness. That is to say whether the

Minutes of the Meeting of the PPC dated 24 August 2024 are accurate and properly record what was said at and in turn considered by the PPC.

5. Disposal

- 5.1. For the reasons set out above I consider that the appeal is successful in relation to Ground of Appeal 4. I shall therefore refer the matter back to the PPC for reconsideration.
- 5.2. In reconsidering the application in relation to that ground of appeal the PPC should take the opportunity to address the issues raised by the Appellant in relation to Ground of Appeal 5 for completeness.

(sgd)

C W Nicholson WS

Chair

National Appeal Panel

20 November 2024