

National Appeal Panel

Constituted under

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

**DECISION
of the
CHAIR
of**

THE NATIONAL APPEAL PANEL

In the application relating to

25 Main Street, Mid Calder, Livingston, West Lothian

Applicant: David Stevenson

Health Board : NHS Lothian “the Board”

PPC Decision issued : 10 September 2019

Panel case number : NAP 90 (2019)

Decision of the Chair of The National Appeal Panel

1. Background

- 1.1 David Stevenson (hereinafter referred to as “the Applicant”) submitted an application to the Board to be included in the pharmaceutical list of the Board to provide pharmaceutical services from and in respect of premises at 25 Main Street, Mid Calder, West Lothian (“the Premises”) . The application was dated 14 March 2016.
- 1.2 The consideration of the application has an unfortunate history. The application was first considered by the Board at a hearing of its Pharmacy Practices Committee (“the PPC”) on 17 October 2017 and a decision was issued on 24 October 2017. An appeal was lodged against that decision by Lindsay & Gilmour Pharmacy (“the Appellant”). After consideration of that appeal I remitted the matter back to the PPC to consider certain issues, including the CAR and PCSP. The PPC reconvened on 15 May 2018 and issued a further decision on 30 August 2018. The decision was again appealed by the Appellant and by decision dated 29 November 2018 I again remitted the matter back to the PPC with instructions that they properly address the CAR. The present decision was issued on 10 September 2019.
- 1.3 A further appeal has been lodged against the third iteration of the decision of the PPC by the Appellant. The letter of appeal is dated 27 September 2019.

2. Grounds of Appeal

- 2.1 The Appellant’s letter dated 27 September 2019 sets out the grounds of appeal relied upon.
- 2.2 The grounds of appeal can be summarised as follows:
 - 2.2.1 Ground of Appeal 1: the members of the PPC had changed between the 2018 and 2019 decisions, without any opportunity being given to the Appellant (or other interested parties) to make further representations, including in relation to the CAR which is now some 3 years old;
 - 2.2.2 Ground of Appeal 2: the PPC considered legal advice in relation to the proper process for considering the application without giving the Appellant the opportunity to consider the legal advice;
 - 2.2.3 Ground of Appeal 3: the explanation of the consideration given to the CAR is inadequate;

3. Decision

- 3.1 Under the National Health Service (Pharmaceutical Services) (Scotland) Regulations 2009, as amended, (“the Regulations”), the available grounds of appeal against a decision of the Board are limited to circumstances in which there has been:
 - 3.1.1 an error in law by the Board in its application of the Regulations;
 - 3.1.2 a procedural defect in the way the application has been considered by the Board;
 - 3.1.3 a failure by the Board to properly narrate the facts and reasons upon which their determination of the application was based (“Schedule 3 para 5 (2B)(b)"); or,
 - 3.1.4 a failure to explain the application by the Board of the provisions of these Regulations to those facts (“Schedule 3 para 5 (2B)(c)").

- 3.2 I am required to consider the notice of appeal and:
- 3.2.1 to dismiss the appeal if I consider that it discloses no reasonable ground of appeal or is otherwise frivolous or vexatious;
 - 3.2.2 remit the decision back to the Board for reconsideration if I consider that any of the circumstances set out at points 3.1.2 to 3.1.4 above have occurred; or
 - 3.2.3 in any other case, convene the National Appeal Panel to determine the appeal.

4. Consideration of Points of Appeal

- 4.1 Following the remit back to the PPC in November 2018, it appears that an attempt was made to reconvene the PPC with the same members as had dealt with the October 2017 decision . However, one of the original lay members, Mr Ian Melville, had since resigned and the original Chairman, Mr Derek Milligan, was unavailable. As a result, the PPC was missing two of the original members.
- 4.2 In the circumstances, the PPC sought legal advice as to whether they ought to issue an updated decision or consider the matter afresh. I consider that this was the correct approach. I further consider that this was an internal procedural matter for the PPC and that they were free to take and consider legal advice without consulting with the interested parties, including the Appellant.
- 4.3 After consideration of the legal advice received, the PPC decided that it required to consider the application afresh. Again, I consider this to be the correct approach in circumstances where the original members of the PPC are unavailable and the PPC is required to consider issues not addressed in its original decision.
- 4.4 The PPC then proceeded to consider the application afresh. However, in doing so it took into account not only the material available to the original PPC but also considered (i) the earlier decisions of the PPC in relation to this matter; and (ii) the views of the members present at the original hearing of the application. The Chair further noted that the advice and recollections of the committee members in attendance at the original hearing were important to the accurate appreciation of the original discussion surrounding the CAR and PCSP.
- 4.5 It is this point at which I am afraid I consider that the PPC fell into error. Having decided to take the decision afresh the PPC was required to do just that, consider the application afresh. It was not entitled to take into account the previous deliberations of the PPC, as set out in the previous decisions or the recollections of the original members of the hearing. Put simply, the PPC is not considering the application of new if it is taking into account its previous deliberations. On a practical level, this approach would also effectively amount to certain members of the PPC giving evidence to other members of the PPC in order to assist them in considering the application. This evidence would be undisclosed, untested and unchallengeable. This constitutes a significant procedural defect.

Disposal

- 5.1 For the reasons set out above, I have concluded that there has been a procedural defect. As such, I shall remit the decision back to the PPC for further consideration as I am required to do.
- 5.2 I do this with regret as I am acutely aware that the application was made over 3 years ago. It is plainly unacceptable that the Applicant has been left in limbo for such a significant period of

time, particularly when that delay is caused by the errors of the Board in considering the application.

- 5.3 In terms of how the PPC should proceed in considering this matter, I consider that it has two options (a) it may reconvene the original members of the PPC and issue a revised decision addressing the issues set out in my decision of 29 November 2018; or (b) it may consider the application of new.
- 5.5 Should the PPC require to consider the application of new, it should disregard the previous deliberations of the PPC in relation to this matter. Should it consider that there is sufficient evidence available to determine the matter without a hearing it may do so. However, in considering this issue, I would encourage it to have regard to the passage of time since the application was made and whether the evidence available to it is sufficiently current. If it concludes that the information is not sufficiently current, it should have regard to what procedural mechanisms can be adopted to ensure that parties have the opportunity to present relevant information to the PPC and that the PPC has sufficient information before it to make its decision. It may require to seek further legal advice in order to do so.

(sgd) J Michael D Graham

Interim Chair

30th December 2019