

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

94 High Street, Burntisland, Fife

Applicant: Mohammed Ameen

Appellants: Mohammed Ameen and the Burntisland Community Council

(referred to as “the Appellants”)

Health Board: NHS Fife (“the Board”)

PPC Decision Issued On: 13 June 2022

Panel Case Number: NAP108(2022)

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 (“PPC”) of the Board, which was issued on 13 June 2022 in relation to the application of Mohammed Ameen (“the Applicant”).
- 1.2 The application was made on 1 December 2020. The application was considered at a meeting of the PPC on 30 May 2022. The decision of the PPC was issued on 13 June 2022 rejecting the application.
- 1.3 Appeals have been lodged against the revised decision of the PPC by the Appellants.

2. Grounds of Appeal

- 2.1 Two separate letters of appeal were sent by the Appellants, however, the grounds set out by each Appellant overlap sufficiently that I consider it possible to deal with them under the same outline grounds of appeal set out below. The grounds of appeal advanced may be summarised as follows:
 - 2.1.1 the PPC failed to summarise the CAR;
 - 2.1.2 the PPC failed to set out the reasons for its conclusion that the existing service is adequate; and
 - 2.1.3 that the sitting Contractor Pharmacist was conflicted. The conflict of interest is said to arise by virtue of the Contractor Pharmacist’s membership of the APC, which itself opposed the application.

3. Decision

- 3.1 Under 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 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

Ground of Appeal 1

- 4.1 In terms of paragraph 3(6) of Schedule 3 to the Regulations, the decision of the Board must contain a summary of the CAR. The decision of the PPC, on behalf of the Board, does not contain a summary of the CAR. It contains only a brief reference to the response to one question contained in the CAR. I shall, therefore, sustain this ground of appeal.

Ground of Appeal 2

- 4.2 The decision of the PPC narrates details of the discussions which took place between the members of the PPC in relation to the adequacy of the current services. It is evident that there were some shared concerns regarding the adequacy of the existing services. Equally, it is evident that there was some disagreement between the voting members in terms of what constituted adequacy and whether that threshold had been reached. The voting members ultimately disagreed on the question of adequacy and the deciding vote was cast by the Chair, resulting in the application being refused on the basis that the existing service was not inadequate.
- 4.3 No explanation for the decision of the Chair is provided. No reasoned decision is provided for the basis on which the majority (including the Chair) concluded that the existing service is not inadequate. The sole statement contained in the decision which may be considered to give any possible indication as to the reasoning of the majority of the voting members is the statement attributed to Mr Andrews that "he thought the current service was adequate but that the mechanism for providing it was not". This does not contain any insights into the reasoning of the majority. If anything, it raises the question of how a service can be considered to be functionally adequate if the mechanism for its delivery is not (is a pizza delivery service adequate when a pizza is adequately produced, but inadequately delivered?).
- 4.4 For these reasons, I shall sustain this ground of appeal.

Ground of Appeal 3

- 4.5 Both Appellants raise a concern that the Contractor Pharmacist sitting in the PPC (Mr Kelly) is a member of the APC and that the APC opposed the application. This is said to create, at the least, the perception of bias. This is particularly the case as, it is said, Mr Kelly strongly advocated for the refusal of the application, in line with the position of the APC.
- 4.6 In terms of the Regulations:
- 4.6.1 the Board is required to notify the APC of the application and the APC is entitled to make representations to the Board in respect of the application (para 1(1)(b) of Schedule 3 to the Regulations);
- 4.6.2 the PPC comprises a Contractor Pharmacist and two Non-Contractor Pharmacists, who are nominated by the APC (para 3(1)(b) of Schedule to the Regulations); and
- 4.6.3 for the PPC to be quorate, at least one Contractor Pharmacist and one Non-Contractor Pharmacist should be present (para 5 of Schedule 4 to the Regulations).
- 4.7 The interaction of the provisions of the Regulations set out above may be said to create an inherent conflict of interest in any case where the APC makes submissions on the application, in the sense that at least two members of the PPC considering the representations of the APC will be present by virtue of their nomination by the APC. That seems to me to be less than

desirable. However, it may equally be said that members of the PPC nominated by the APC are non-voting and acting simply in their professional capacity. Whatever the answer to that issue, it is an issue which is unavoidable given the terms of the Regulations.

- 4.8 I consider the present situation to be quite different. The Contractor Pharmacist in this case is not simply nominated by the APC, he is a member of the APC. He was copied into the correspondence from the APC notifying the PPC of the APC's opposition to the application. He is, therefore, inherently associated with the position of the APC, whether he was actively involved in the APC's decision to oppose the application or not. This creates the clear perception of bias.
- 4.9 The perception of bias is made stronger by the active role which Mr Kelly played during the PPC hearing in advocating against the application. The decision of the PPC narrates that Mr Kelly asserted to the other members of the PPC that he did not consider that the existing service was inadequate, that the legal test was not met if the existing service was simply poor, that a population of 6,000 did not justify two pharmacies and that it was the job of the Inspectorate to assess the standards of service. These statements seem to me not only to advocate the refusal of the application (in line with the submissions of the APC) but to strain the legal tests against which the application required to be considered in order to persuade the other members of the PPC of the adequacy of the existing service. This has exacerbated the already clear perception of bias.
- 4.10 For these reasons, I shall sustain this ground of appeal.

Disposal

- 5.1 For the reasons set out above, the appeals are successful in all respects. In light of my decision in relation to the third ground of appeal that the process has been tainted by the perception of bias, I shall require that the application be considered anew by a freshly constituted PPC. That PPC must contain no members of the APC.

J Michael D Graham

Interim Chair

24th August 2022