

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

HOLM PHARM LTD, 12-28 LOCHFIELD ROAD, DUMFRIES, DG2 9BH

Appellant and Applicant: Jennifer Weir Ahmed/Holm Pharm Ltd

Pharmacy Practices Committee: Dumfries & Galloway

PPC Decision Issued: 7th January 2013

Panel Case Number: 20 (2013)

Decision of the Chairman of the National Appeal Panel

1. Background

- 1.1 The Appellant has appealed against the Decision of the Pharmacy Practices Committee of Dumfries & Galloway Health Board ("the PPC") which refused her application for inclusion in the Pharmaceutical List of Dumfries & Galloway Health Board which decision of the PPC was taken at their meeting, after a hearing, on 11th December 2012.

2. Summary of Grounds of Appeal

- 2.1 The Appellant asserts that Mr Ivor Hyslop, the Chair of the PPC, ought to have declared a conflict of interest and recused himself on the basis that his presence would have prejudiced the impartiality of the proceedings. Mr Hyslop is a non executive member of NHS Dumfries & Galloway Health Board and the Board is the landlord of the medical centre of which the pharmacy which is the subject of the application would have been part.
- 2.2 A Board representative, Mrs Lynda Bunney, Head of Primary Care Development, was present during the deliberations of the PPC and that this had resulted in a procedural irregularity.
- 2.3 The PPC have allowed one of the Interested Parties (Mr J Curry – Dalhart Pharmacy Limited, t/a William Murray Chemist) to cross examine the Appellant at great length and to make further extensive submissions on his own behalf. It was not disclosed to the PPC that Mr Curry had only a matter of weeks earlier (October 2012) completed the sale of one of his pharmacies to a Mr Gordon Winter, a contractor member of the PPC at its hearing.
- 2.4 The PPC failed to consider information available to the Board which was relevant to the consideration of the application in that the Board through its property agents sent unsolicited letters to all pharmacy providers in Dumfries & Galloway relating to a unit with potential for development as a new community pharmacy at the premises and inviting bids for a lease thereof. This was a breach of Schedule 3 Paragraph 3(d) which provides that "any information available to the Board which, in its opinion, is relevant to the consideration of the Application" the Board shall have regard to.
- 2.5 The Appellant made reference to the Scottish Government's Guidance on the Regulations and that in this connection the PPC should have adopted a flexible approach and that it was her view that it adopted a narrow and rigid approach to the application and failed to pay heed to the objectives in providing the local population with reasonable and adequate access to a full range of NHS Pharmaceutical Services.
- 2.6 The Appellant states that she did not obtain a fair hearing and which was in breach of Article 6 of the European Convention of Human Rights and Section 6 of the Human Rights Act 1998 in that:
- 2.6.1 The procedure in having her present her case and then to be cross examined at length by four other Interested Parties and then by the PPC members was unfair. Once this process had been concluded, each of the Interested Parties was then allowed to give further "presentations" restating their grounds of opposition and the adequacy of the existing pharmacy provision within the vicinity of the Health Centre.
- 2.6.2 The Interested Parties were unsuccessful bidders and the Appellant had beaten them to preferred bidder status in the tender process. They should not have been permitted to be present at the Hearing.
- 2.6.3 The Appellant was not allowed any legal representation at the PPC.

- 2.7 The Appellant generally states that the Decision taken by the PPC was irrational, unreasonable and procedurally unfair.

3. Discussion

- 3.1 The mere presence of a non-member whilst a Tribunal is deliberating is enough to invalidate the proceedings. Mrs Linda Bunney is an employee of the Health Board and Head of its Primary Care Development. Not only did she attend the private deliberations of the PPC she also contributed to them. This has resulted in a procedural irregularity.
- 3.2 The proper test for a finding of perceived or apparent bias is that a fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that the Tribunal was biased (Porter v McGill [2002] 2AC357). It is equally well established that the fair-minded observer is not unduly sensitive or suspicious (Johnstone v Johnstone 201CLR488). I do not consider that the Chair of the PPC who was a non executive member of the Health Board, notwithstanding that that Health Board was landlord of the premises which the proposed pharmacy formed part, could in any way be regarded as biased against the Application. He is not an executive member of the Health Board and, further, no objection was taken by the Appellant to his chairing the proceedings at the Hearing.
- 3.3 It is understood that the pharmacy to which the Appellant refers and which had been sold by Mr Curry to Mr Winter (a member of the PPC) lies approximately 50 miles furth of the neighbourhood. Whilst this cannot be fully established by the National Appeal Panel, if it is true there is certainly a relationship between Mr Curry and Mr Winter and, as such, raises a reasonable doubt as to whether the Applicant/Appellant was pleading her case before an impartial Tribunal. My view is that Mr Winter ought to have recused on the basis of his professional relationship with Mr Curry. I do not consider, however, that there is any obligation upon Mr Curry to declare an interest or withdraw as he, clearly, had an interest in the application as an Interested Party who may have been affected by the grant of the application.
- 3.4 I do not consider that the procedure adopted by the Chair in any way offends against Schedule 3 (5) in that the procedure by which representations are heard shall be such as the Board may determine. The procedure adopted is unobjectionable. Whether or not the Appellant was cross examined by unsuccessful bidders (if that is correct and not an assumption on a part of the Appellant) is irrelevant. They are still Interested Parties whose interest may be significantly affected if the application were to be granted and were so entitled to be heard. It is certainly usual in any PPC proceedings to hear the Applicant first, have them cross-examined by the Interested Parties, by the PPC members and the same process adopted for each Interested Party and thereafter for each party including the Applicant to sum up at the end of the proceedings.
- 3.5 Insofar as Schedule 3 Paragraph 3(1)(d) is concerned the Board, in considering an application shall have regard to any information available to it which in its opinion (my emphasis) is relevant to the consideration of the application. It is entirely a matter for the Board as to whether or not it apprises all members that the proposed pharmacy had been put out to tender by it. In any event, the Appellant was aware of it and one assumes the Interested Parties were aware of it. It is difficult to surmise what prejudice would attach to the Appellant in the Board's failure to mention it.
- 3.6 In terms of Schedule 3 Paragraph 3 (4) the Applicant or Interested Party who appears before the PPC may not be assisted by counsel, solicitor or paid advocate.

4. Decision

4.1 In view of the attendance of both Mrs Linda Bunney and Mr Gordon Winter during the course of the PPC hearing which has resulted in a procedural irregularity it is necessary to remit this application back to the Board for a re-hearing. This will require to be heard before a fresh PPC none of whose members shall have attended the Hearing held on 11th December 2012.

4.2 In the event that the Application is withdrawn it will be unnecessary to proceed to a hearing.



J. Michael D. Graham
Interim Chairman
National Appeal Panel
13th June 2013