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IN THE MATTER OF AN APPEAL
TO THE HOSPITAL APPEAL BOARD

BETWEEN:

DR. DARREN BEHN

APPELLANT

AND:

VANCOUVER ISLAND HEALTH AUTHORITY

RESPONDENT

DECISION

BEFORE THE	)	Hearing: March 2-5, 2010
	)	
HOSPITAL APPEAL BOARD	)	

Appearing for the Appellant:	James McMaster Susan Precious
Appearing for the Respondent:	Penny Washington Heather Mathison (articled student)

A. INTRODUCTION

1. This is an appeal from the July 29, 2009 decision of the board of directors of the Vancouver Island Health Authority ("VIHA") rejecting Dr. Behn's application for appointment to the active medical staff of the division of ophthalmology.

2. Dr. Behn is a comprehensive ophthalmologist with subspecialty training in glaucoma surgery. He is currently practising in Victoria building his practice with Dr. D and performing *locum tenens* duties without having full hospital privileges or access to operating room ("OR") time.

3. The appeal is brought pursuant to s. 46 of the *Hospital Act*, R.S.B.C. 1996 c. 200, which provides for a *de novo* hearing in which the Hospital Appeal Board sits in

place of the VIHA's board of directors. Pursuant to s. 46(2) of the *Hospital Act* the Hospital Appeal Board may affirm, vary, reverse or substitute its own decision for that of a board of management on such terms and conditions as it considers appropriate.

4. VIHA submits that the Hospital Appeal Board should affirm the decision of VIHA's board of directors and refuse Dr. Behn's application for active medical staff membership because:

   i. there is no present need for another glaucoma subspecialist surgeon in VIHA South Island; and
   ii. even if there may be a need, VIHA does not currently have the resources to support appointing another ophthalmologist.

5. VIHA further submits that even if there is a need and VIHA has resources, that the appropriate process to fill this need is a formal selection process pursuant to VIHA's current physician recruitment policy in order to ensure that VIHA identifies the best candidate to fill the need.

B. BACKGROUND

Dr. Behn's application for privileges and VIHA's selection process

6. Dr. Behn completed a B. Sc. (McGill), an M. Sc. at the department of ophthalmology and neurology/neurosurgery (McGill), an M.D. (University of British Columbia), and residency in ophthalmology (Dalhousie). He completed his subspecialty fellowship training at Moorfields in the United Kingdom. Moorfields is one of the oldest and most prestigious hospitals for eye care, treatment and research in the world.

7. While this appeal is based on a December 31, 2008 application for hospital privileges at VIHA, the evidence is that Dr. Behn first indicated his intention to apply for privileges when he delivered his *curriculum vitae* to VIHA in August 2007.

8. In March 2008, Dr. Behn again sent his *curriculum vitae* to VIHA and advised that he would be finishing his fellowship in glaucoma in August 2008 and would be interested in practicing ophthalmology in Victoria.

9. In June 2008, Dr. Behn was invited by the division to present at Grand Rounds. At that time he was also interviewed by the division.

10. On July 23, 2008, Dr. Behn completed an application to do a locum for Dr. K from August 25 to September 30, 2008.

11. In the summer or fall of 2008, Dr. P, an ophthalmologist with VIHA privileges, announced that he would be retiring in the spring or fall of 2009. This created a vacancy in the division of opthalmology. Although some members of the division were of the view that the position should be offered directly to Dr. Behn there were others who did not agree.

12. Ultimately the division decided that other opthalmologists should be invited to apply and division advertised for a comprehensive ophthalmologist to fill the vacancy that would be created by Dr**.** P's retirement. The position was advertised and there were six applicants for the position, including Dr. Behn.

13. Although VIHA's practice with respect to physician recruitment had varied over the years, it was decided in the course of finding a replacement for Dr. P that the division should proceed with a search and selection process following the standardized process outlined in VIHA's draft special physician recruitment guidelines.

14. A selection committee was struck that included two non-ophthalmologists, an ophthalmologist from Sidney and five local opthalmologists.

15. On November 19, 2008, Dr. Hamza Khan, head of the division of ophthalmology, wrote an email to division members asking for suggestions for selection criteria and recommendations for members to sit on the selection committee. The

selection criteria were formalized to guide the selection committee to select the most suitable candidate.

16. Members of the selection committee personally contacted the references for the candidates. Because Dr. Behn's references were from England the selection committee substituted individuals they knew in the ophthalmology community within Canada to make enquiries about Dr. Behn. This was done without Dr. Behn's consent or direction.

17. On December 21, 2008, Dr. Khan telephoned Dr. Behn to tell him that he had not made the short list and would not be interviewed.

18. On December 31, 2008, Dr. Behn submitted a further application for privileges. This is the application that is the subject matter of this appeal.

19. In early January 2009, because there were allegations that Dr. Behn's application hadn't been fairly handled, Dr. Khan asked Dr. Owen Heisler, then Executive Vice President and Chief Medical Officer of VIHA, to review the selection process and provide his observations and suggestions.

20. After reviewing the selection process Dr. Heisler had concerns. First, he was concerned that there was a perception of bias with one of the selection committee's members and suggested that the member be removed from the committee. Second, Dr. Heisler had concerns with the fairness of not contacting Dr. Behn's United Kingdom references. As a result, Dr. Heisler felt that Dr. Behn should be included in the short list for the advertised position and offered an interview.

21. On February 12, 2009, Dr. Behn was interviewed by the selection committee.

22. On March 5, 2009, Dr. Khan telephoned Dr. Behn to advise that the selection committee had decided to recommend another candidate.

23. On March 9, 2009, Dr. Khan advised the division members that the selection committee had chosen Dr. A, a Calgary comprehensive ophthalmologist with a subspecialty in cornea and cataract, as the successful candidate.

24. On April 20, 2009, Dr. Behn sent an email to Dr. Heisler together with documentation suggesting the need for a glaucoma subspecialist in the VIHA community.

25. On April 22, 2009 Dr. Behn met with Dr Heisler. Following his meeting with Dr. Behn, Dr. Heisler prepared a briefing note for the VIHA Board, in which he set out the options available to the Board with respect to Dr. A and Dr. Behn and made the following recommendations:

> **OPTIONS:**
>
> Regarding Dr. A there are two options:
>
> 1. Confirm temporary privileges and institute provisional privileges. Dr. A is an 'innocent bystander' and should be given privileges. Not providing privileges at this point in time could potentially be challenged as a contract per the usual process has been instituted.
>
> 2. Deny Dr. A temporary privileges and ask for the process to begin anew. The process would have to be visioned [*sic*] and defined, most likely involving a series of external reviewers to determine both required need and suitability of all those who were interviewed against these criteria.
>
> Regarding Dr. Behn there are options:
>
> 1. Continue to grant temporary privileges as requested in the future when requested. This means every time the privileges are requested the Board would review.
>
> 2. Grant temporary privileges to be used in defined circumstances (documented absences of a minimum of five days) until 31 March 2010. The Board would then consider further applications for the following year as per usual annual process.

3. Decide that the process was unfair for Dr. Behn and grant Dr. Behn provisional privileges. His OR time would be allocated from amongst the current availability.

4. Agree with the suggestion of Dr. Behn for the three ophthalmologists to share the two OR spaces. Dr. Behn will be appointed when the next vacancy arises.

5. Deny Dr. Behn locum privileges indicating he can apply the next time a position becomes available.

RECOMMENDATION:

For Dr. A I suggest option 1. He is a very well qualified ophthalmologist and should be granted privileges.

For Dr. Behn I suggest option 4. I believe Dr. Behn is qualified and has a high likelihood of staying in VIHA for his career.

26. On July 29, 2009, the VIHA Board of Governors granted Dr. A active staff privileges and rejected Dr. Behn's application for appointment to the active medical staff. The board did however grant Dr. Behn locum privileges until March 31, 2010.

27. Pursuant to the VIHA Board's decision of July 29, 2009, Dr. Behn has done, or will do, fifteen locums in the division in each of the following months: August - September 2008, March 2009-2010.

Glaucoma Need and VIHA's manpower planning

28. Glaucoma is one of the leading causes of blindness and has in the past been identified by the division of ophthalmology as an area of need.

29. The Canadian population is significantly aging. VIHA, and Victoria in particular, has an older population than anywhere else in Canada. Victoria has Canada's highest proportion of residents over 80 years old. The risk of glaucoma increases with age.

30. VIHA's most current Physician Resource Plan 2007-2008, prepared by Dr. David Newsome, states that "over the next 5 years an additional 5 ophthalmologists will

need to be added just to keep up with aging and growth of the population within the VIHA catchment area".

31. The data compiled by Dr. Behn based in BC government statistics shows that VIHA-South Island has the full time equivalent (FTE) of 1.3 glaucoma specialists per million people, while Vancouver Coastal and the rest of British Columbia have nearly double that ratio with 3.7 glaucoma specialists per million people.

32. A poll taken at the October 14, 2008 meeting of the Victoria Optometric Association to determine the ophthalmology specialty to which their members most need access identified glaucoma as their top area of community need.

33. Dr. Crow, VIHA's Acting Executive Vice President and Chief Medical Officer, acknowledged in his evidence that based on VIHA's physician resource plans he expected that two new ophthalmologists are likely to be needed in South Island between 2008 and 2013.

34. VIHA submits that glaucoma is not an under-treated area in VIHA South Island. It has, according to VIHA the highest ratio of opthalmologists to population in Canada at about 1:15,000. However, Dr. T is the only comprehensive ophthalmic surgeon with glaucoma subspecialty training in VIHA south Island who has full privileges.

35. Dr. D, an ophthalmologist with VIHA medical staff privileges who practices with Dr. Behn, testified that he has referred patients to Dr. T in the past. His experience included a 9-month wait time for a non-urgent consultation appointment with Dr. T.

36. Dr. Behn testified that on one occasion in or about April 2009 his office contacted Dr. T's office to determine Dr. T's earliest consultation booking date and was advised that it was 10 months in the future.

37. Dr. D testified that he has also experienced access to care issues as a result of his patients being seen by Dr. T. He cited two examples. The first involved a case in

February 2010 in which a young patient had extremely high eye pressure and need surgery urgently. Dr. T performed the surgery and then left town within days thereafter. In the meantime, the patient experienced complications involving the collapse of his eye. Dr. T's office contacted Dr. JD to handle the case in Dr. T's absence. The second case involved a referral from Dr. D to Dr. T. Because Dr. T could not operate for 3 months Dr. D referred the patient to Dr. S in Vancouver for surgery.

38. Dr. K, an ophthalmologist with active medical staff privileges, also testified as to lengthy waits for referrals to see Dr. T.

39. Affidavit evidence about the need for an additional glaucoma subspecialist was given by Dr G, Dr. SS, and Dr. B, Victoria area ophthalmologists, and Dr. JP, a Victoria optometrist.

40. Dr. G is a general ophthalmologist who has been on full-time active staff at the Saanich Peninsula Hospital, which is part of VIHA, since 1983. He refers out approximately 6 to 12 patients per year to an ophthalmologist with a subspecialty in glaucoma. Dr. G gave evidence by way of affidavit that there is a need for an additional glaucoma subspecialist at VIHA based upon the fact that it takes four to six weeks for Dr. T to see the semi-urgent patients referred to him. Dr. G states that if an urgent case arose while Dr. T was on vacation or unavailable, the patient would have to be referred to Vancouver or Nanaimo.

41. Dr. SS, is a Victoria ophthalmologist with a retinal subspecialty who has been practicing for approximately 27 years. He has been on full time staff at VIHA since 1983. Dr. SS gave affidavit evidence that he has been advised by Dr. RP, a Nanaimo glaucoma subspecialist, that he is not able to accommodate referrals from Victoria for resource and patient care reasons, and that he is therefore restricted to referring to only Dr. T. Dr. SS is concerned that if there is only one glaucoma subspecialist to whom he can refer as there will inevitably be gaps in care coverage.

42. Dr. B is a Victoria ophthalmologist with a subspecialty in the area of cataract and refractive surgery. Dr. B's evidence is that there can be benefits to having more than one subspecialist in a community and was supportive of having an additional glaucoma subspecialist in the community.

43. Dr. JP is an optometrist who has been practicing for 9 years, seven of which have been in Victoria. He is presently the President of the Victoria Optometry Association. Dr. JP's evidence is that as an optometrist he refers patients he suspects of having glaucoma or a risk thereof to a glaucoma specialist. He referred a non-urgent glaucoma suspect to Dr. T in February 2010 and a booking was obtained for 7 months from the time of referral. It is Dr. JP's experience that referral times of 7 months or more are typical for Dr. T.

44. Dr. T also gave evidence by way of affidavit. Dr. T's evidence is that his office prioritizes patients based on the urgency of care required, that he often receives phone calls regarding new urgent patients, and that he attempts to accommodate new patients in the time frame requested by the referring ophthalmologist. He does not, however, deny that there are sometimes delays and admits that patient care must be managed by glaucoma subspecialists in Nanaimo and Vancouver when he is away.

Operating Room Time

45. Dr. Behn's evidence was that he would not require access to the main OR except in so far as may be necessary on evenings or weekends to deal with emergency cases while on call, and that if he were granted privileges it would not be necessary for the VIHA to purchase any additional equipment to accommodate his appointment.

46. The division of ophthalmology is unique in that in addition to sharing the main OR with other surgical specialties, Clinic 6 is designated specifically and only for the division. Clinic 6 runs two operating rooms from Tuesday to Friday which services cataract and glaucoma surgery.

47. The OR time in Clinic 6 is distributed amongst the surgeons in the division on an annual basis based upon several factors including surgical wait times, wait lists and utilization experience. If a surgeon cannot fully use their allocated Clinic 6 OR time, they return it 4 weeks in advance so that other surgeons may use it.

48. Although it is clear that not all of the ophthalmologists use their allocated OR time, the division does manage to reallocate OR time so that unused OR time is minimal. In this regard Dr. Kahn gave evidence that in the last six months, after unrequired OR time is redistributed among division members, only about 1 % of the OR time allocated to the division was unused.

49. Most of the OR time that is reallocated appears to have been taken up and used primarily for cataract surgery.

Sale of Dr. P's practice

50. Dr. Behn gave evidence that Dr. P offered to sell his practice to Dr. Behn for $100,000.

51. Although there was evidence to the effect that Dr. P may have met with Dr. A at some point prior to Dr. A being granted privileges, no evidence was given at the hearing by either Dr. A or Dr. P as to what was discussed.

52. Although the suggestion was made by counsel for Dr. Behn that an inference can be drawn that VIHA granted the ophthalmology position to Dr. A because he had entered into some sort of business arrangement with Dr. P in respect of Dr. P's practice, there is no evidence of this.

C. ISSUES

53. The issues in this hearing are:

a. Whether there is a need for another glaucoma subspecialist surgeon in VIHA South Island?

b. If there is a need, does VIHA have the resources, including funding and/or operating room time, to support the privileges of another subspecialist ophthalmologist?

c. If there is a need and VIHA has resources, should the need be filled following a formal selection process pursuant to VIHA's current physician recruitment policy?

D. DISCUSSION AND ANALYSIS

a. Is there need for another glaucoma subspecialist?

54. It is proper for hospitals to consider competing needs, and to make decisions based on the needs of the community and the hospitals' ability to meet those needs. This balancing of interests is reflected in the VIHA's Medical Staff Bylaws which provide as follows:

> 3.1.5 An appointment to the medical staff is dependent on the human resource requirements of the facilities and programs operated by the Vancouver Island Health Authority and on the needs of the population served by the health authority. Each appointment is contingent upon the ability of the Vancouver Island Health Authority's resources to accommodate the appointment.

55. We are satisfied that there is a need for another glaucoma subspecialist in VIHA South Island.

56. The Canadian population is significantly aging. VIHA, and Victoria in particular, has an older population than anywhere else in Canada. Victoria has Canada's highest proportion of residents over 80 years old. The risk of glaucoma increases with age.

57. VIHA's most current Physician Resource Plan 2007-2008 prepared by Dr. David Newsome states that "over the next 5 years an additional 5 ophthalmologists will need to be added just to keep up with aging and growth of the population within the VIHA catchment area".

58. A review of Dr. Newsome's Report and Dr. Weir's recruitment and retention recommendations, as well as the limited number of surgeons trained in glaucoma surgery, shows there is a clear advantage to the patient population and to the community for Dr Behn to be awarded full privileges now. This advantage will be increasingly obvious in the coming years given the regional demographics.

59. The data indicate VIHA south island has 1.3 FTE glaucoma specialists per million population while Vancouver Coastal has 3.7 FTEs per million. VIHA's most current Physician Resource Plan 2007-2008, prepared by Dr. David Newsome, indicates that over the next 5 years an additional 5 ophthalmologists will need to be added just to keep up with aging and growth of the population within the VIHA catchment area.

60. Notwithstanding criticisms of Dr. Newsome's methodology by Dr. Khan in evidence, the Newsome analysis is, together with the report of Dr. Weir regarding recruitment, the only information initiated, planned and used by VIHA currently. Dr. R. Crow confirmed this in evidence.

61. Currently, Dr. T is the only glaucoma subspecialist. Drs**.** K, D, G, SS, B, M and JP gave evidence of the need for an additional glaucoma subspecialist to reduce referral delays and to reduce or eliminate the current gaps in care coverage while Dr. T is away.

62. At present, if Dr. T is away on vacation or for continuing medical education there is no equivalently qualified glaucoma surgeon to respond to emergencies. We find this situation a concern in the circumstances of this case**.**

63. Dr. RP is the only other glaucoma surgeon on Vancouver Island. He practises in Nanaimo. He cannot deal with emergencies in Victoria at that distance and is unwilling to expand his practice to include Victoria patients.

64. The VIHA says that the South Island has the highest ratio of ophthalmologists to population (1:15,000) and that many of the ophthalmolgists are willing to take on glaucoma patients. Some have done at least one incisional glaucoma operation in the past 12 months. The question, however, is whether it is good practice to rely on opthalmologists who only occasionally perform surgery to undertake specialized surgery when Dr. Behn is available to assure good, safe results, especially on urgent and complex cases when Dr. T is not available.

65. There is every reason to have a high ratio of ophthalmologists and indeed subspecialists working with an aging population such as we have in Victoria where glaucoma is at higher incidence.

66. We are concerned that the needs of patients are not safely being met by the current arrangements with the availability of a single well-qualified surgeon, Dr. T. The ready availability of highly-skilled surgeons and adequate equivalently trained coverage, especially during periods of one surgeon's absence, is critical to safety and the preservation of ophthalmic health in Victoria.

67. In dealing with the eventuality of Dr. T being absent at times of acute need or crisis, the VIHA suggests a second surgeon is not required here and that many rural areas of BC have to fly patients out when emergencies may occur. Flying patients around the province from the capital of BC to other areas adequately supplied with the required surgeon, because the only Victoria-based surgeon is away sick or on vacation, seems to be both an expensive and primitive way to deal with this eventuality where populous sophisticated areas of BC are concerned, and of course is by no means a pleasant prospect if one is the patient. We recognize the general desirability of having at least the minimum number of such facilities available in major cities.

68. We believe that the current division of ophthalmology can show enough flexibility to allow this desirable concept to be achieved for the South Island if Dr Behn is granted privileges.

69. Finally but importantly, the hospitals of Victoria are now affiliated in many ways with the UBC Medical School and members of the division of ophthalmology have clinical university teaching appointments. We understand that the current physicians and Dr. Behn are involved in the teaching at some levels. This function and the concept of "role modelling" by comprehensive subspecialists and generalists are essential to progress and serve to underscore the importance of Dr. Behn's appointment at the hospital level, in order to preserve excellence.

70. Dr. Behn is established in the community and his practice is growing steadily. Approximately 17 other ophthalmologists, 156 family physicians and 51 optometrists have referred patients to Dr. Behn for specialist glaucoma opinions. However, with only the locum work currently allowed him, he will be unable to maintain the highly valued surgical skills he obtained in training in Canada and in the United Kingdom. These skills are needed in the VIHA South Island setting.

b. Does VIHA have the resources to support another glaucoma subspecialist?

71. The VIHA claims that it does not currently have the resources to support appointing another ophthalmologist.

72. Having made this claim, the VIHA in its evidence failed to demonstrate how granting Dr. Behn privileges would have a resources impact on the VIHA, particularly so given Dr. Behn’s evidence that he would not require the purchase of any additional equipment with his appointment.

73. Based on the evidence, the only impact associated with granting Dr. Behn privileges would appear to be that some doctors in the division would have less access to OR time.

74. The question of what is in the best interests of the hospitals and the community served by it does not mean what is in the best interests of the doctors presently in the division.

75. The evidence is that the current allowed OR times are not always needed by those individuals allotted them, and they are regularly reassigned to surgeons who already often have adequate OR times. This suggests to us that there is indeed flexibility in this OR arrangement, which would allow Dr. Behn to take up active privileges at the hospital without disruption to the system.

76. It is clear that not all of the ophthalmologists use their allocated OR time. Much of the unrequired OR time appears to be picked up by several opthalmologists and used for cataract surgery. The evidence indicates that given their respective special interests and wait lists, some of these surgeons could tolerate a small reduction in their utilization of the ORs without significant impact on their wait times, nor any significant financial impact to themselves.

77. This would facilitate the gradual assumption of OR activity by Dr. Behn as a full-time surgeon with privileges. Dr. Behn is well aware of the need for a graduated approach to full activity during this first year if privileges were to be granted. It is clear there will be further retirements and adjustments in the coming year or two in this division.

78. VIHA claims there is a risk that ophthalmology could have some of its OR time reallocated to other areas in greater need of OR time. As Clinic 6 is an OR facility devoted exclusively to ophthalmology and it is not institutionally or otherwise equipped to handle surgeries from other disciplines without the infusion of additional resources (something which according to VIHA it is not in a position to do), this is unlikely to occur. In any event, VIHA failed to adduce any evidence of impending reallocation of OR time away from the division of ophthalmology. Indeed, in order to sustain the ophthalmology service it is essential that Clinic 6 be maintained.

79. While the block utilization chart prepared by VIHA demonstrates that there is little unused OR time it is clear that when a member of the division does not require all of their allocated OR time the OR time is not reallocated according to any objective or quantifiable needs data. They are simply additional surgeon days which are offered to all members of the division with privileges and distributed on a first come first serve basis to surgeons who would like additional OR time.

80. Dr. Behn is not asking for any special treatment in relation to OR allocation. As a new member of the division he would expect that his allocation of time may be less than the division goal of two days per month while he continues to build up his practice. He indicated that in the longer term he expected that he may be able to justify one day per week (4 days per month). Whether more or less than that will be required will depend on the evolution of his practice.

c. Should the need for an additional glaucoma subspecialist be filled following a formal selection process?

81. The VIHA submits that in the event we find that there is a need for an additional glaucoma subspecialist in VIHA South Island, and that VIHA has the resources to support an additional appointment, that this need should be filled through VIHA's current physician recruitment policy in order to ensure that VIHA identifies the best candidate to fill the need.

82. We are of the view that given the need for an additional comprehensive ophthalmologist with a subspecialty in glaucoma, together with the availability of an excellent candidate, no useful purpose would be served by filling the need through following VIHA's formal selection process. We note that the need for an additional comprehensive ophthalmologist with subspecialty training was identified as far back as April 2008. We also note that there has not been any criticism of Dr. Behn's ability to fill this need. Given the time this has taken, together with the fact that we are entitled to make any decision that the VIHA board could make, we do not believe it would be in the public interest to remit the matter to the board with a direction that it follow the formal process.

E. DECISION

83. For the foregoing reasons, we allow Dr. Behn's appeal from the July 29, 2009 decision of the Board of the Vancouver Island Health Authority and order that VIHA grant Dr. Behn's application for appointment to the active medical staff of the division of opthalmology, effective this date.

Dated this 19th day of May, 2010.

"William G. Hopkins"
William G. Hopkins, Panel Chair

"Dr. Paul Champion"
Dr. Paul Champion, Member

"Dr. Victor Waymouth"
Dr. Victor Waymouth, Member