

IN THE MATTER OF AN APPEAL  
TO THE HOSPITAL APPEAL BOARD

BETWEEN:

DR. MICHAL KABURDA

APPELLANT

AND:

FRASER HEALTH AUTHORITY/SURREY MEMORIAL HOSPITAL

RESPONDENT

**DECISION**

**BEFORE THE**

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**Hearing: July 26, 2005**

**HOSPITAL APPEAL BOARD**

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Appearing for the Appellant: A. Sweezey

Appearing for the Respondent: J. D. Ankenman

**A. INTRODUCTION**

This is an Appeal by Dr. Michal Kaburda, DDS, pursuant to his Notice of Appeal filed January 19, 2005 (further grounds of appeal dated February 4, 2005) from a decision of the Board of the Fraser Health Authority (FHA) on a hearing September 21, 2004, with written reasons delivered October 21, 2004.

Underlying the Appeal is a dispute as to whether Dr. Kaburda's privileges at the Surrey Memorial Hospital ("SMH") ought to have been renewed notwithstanding his continuing refusal to participate in an on-call rota for provision of dental surgical services at the SMH. His decision not to participate stems from his principled objection to being required to remain on-call for emergency dental surgical services without compensation therefor, whereas members of the College of Physicians and Surgeons were entitled to the payment for on-call availability. It is common ground that without being afforded privileges Dr. Kaburda does not have access to SMH resources for patient treatment.

In brief, upon Dr. Kaburda's annual application for a renewal of privileges at the SMH, the Chair of the Department of Surgery, Dr. Peter Doris, made a recommendation to the Credentials Committee of the SMH that Dr. Kaburda's

application for renewal of privileges be declined due to Dr. Kaburda's ongoing refusal to participate in the on-call rota for dental surgical treatment in the emergency department at SMH. The recommendation was accepted, and this, in turn, led to a hearing before the SMH Local Medical Advisory Committee ("LMAC") on March 29<sup>th</sup>, 2004, in which both Dr. Doris and Dr. Kaburda actively participated.

After due deliberation, the LMAC recommended to the FHA Board that Dr. Kaburda's privileges not be renewed, effective December 31, 2003. From that decision, Dr. Kaburda appealed to the FHA Board, which decided to accept the recommendations of the LMAC and refused to renew Dr. Kaburda's privileges, effective December 31, 2003. In the result his privileges were not renewed, and it is from the FHA Board that decision the within Appeal is taken. Dr. Kaburda seeks renewal of his privileges.

## **B. GROUNDS OF APPEAL**

On the Appeal, Dr. Kaburda advances the following grounds:

1. The requirement of Surrey Memorial Hospital ("SMH") and the Respondent that Dr. Kaburda, as a condition of privileges for performing elective surgery, provide on-call availability to the Emergency Department without compensation is unreasonable and unfair, and is biased and discriminatory when compared to their treatment of physicians.
2. The said requirement for SMH is discriminatory among hospitals within the Fraser Health Authority, and there was no evidence justifying such inconsistency.
3. Dr. Doris, the Head of the Department of Surgery in SMH, improperly, and with bias, intervened in the process of renewal of Dr. Kaburda's privileges in the Division of Dentistry at SMH, and the Respondent improperly, or unduly, gave weight to such intervention.
4. The Respondent's presumption that Dr. Kaburda's patients are not prejudiced by the non-renewal of Dr. Kaburda's privileges was unsupported by any evidence.
5. The Respondent has failed to apply, or comply, or to give any regard to the Model Medical Staff Bylaws for Health Authorities in British Columbia, particularly Article 4.4 including Article 4.4.5, which, while not formally adopted by the Respondent until 2004, were circulated and generally followed prior the events herein.

Although the grounds of appeal are couched in terms of errors in the decisions below, the parties are agreed that an appeal to this Board is a "new hearing" pursuant to s.46 (2.3) of the *Hospital Act*, RSBC 1996, c. 200, and that the

Hospital Appeal Board ("Board") may affirm, vary, reverse or substitute its own decision for that of a FHA Board on terms and conditions it considers appropriate: s. 46 (2) *Hospital Act*.

It is the Respondent's position, on this Appeal, that Dr. Kaburda's refusal to provide on-call services in accordance with an on-call rota properly established by the SMH Department of Surgery, Division of Dentistry, is in breach of the SMH Bylaws and Rules and contrary to his commitment to do so contained in his application for renewal of privileges. As such, the Respondent's position is that the FHA Board was correct in declining to renew Dr. Kaburda's privileges following his refusal to participate in the on-call rota. Further, the Respondent says that it was permissible within the regulatory and administrative scheme, that Dr. Doris, as Head of Surgery responsible for making recommendations to the LMAC and ensuring compliance with the Hospital Bylaws and Rules, make recommendations as to the non-renewal of Dr. Kaburda's privileges and no bias or discrimination is shown to exist.

### **C. REGULATIONS AND ADMINISTRATIVE CONTEXT**

The actions of the parties and their submissions on Appeal must be considered in the context of the applicable regulatory and administrative scheme governing the relationship between the parties. The relevant hierarchy of legislation, regulation, Bylaws and Rules which applies to the parties may be briefly summarized as set out below.

The *Hospital Act*, s. 2(1) provides that the SMH shall have a properly constituted Board of Management, and bylaws or rules for the administration of hospital affairs and the provision of a high standard of care and treatment for patients. That Board is, in turn, required to promulgate bylaws governing the hospital's medical staff: *Hospital Act Regulation* s. 4(2). The SMH medical staff is represented by Heads of Departments, who are required to act in an advisory capacity and, where appropriate, to recommend the non-renewal of any medical staff member's permit to practice in the hospital if the circumstances so warrant: *Hospital Act Regulation* s. 4(3).

The *Hospital Act Regulations* s. 6, provide that the Board of Management has the power to exclude a member of the medical staff from privileges at the hospital if he or she refuses to comply with medical staff bylaws after due notice in writing is given.

At the hearing of this Appeal, the parties agreed that the only medical staff bylaws in existence respecting the SMH medical staff were the Medical Staff of the South Fraser Health Region Bylaws ("*Medical Staff Bylaws*"). Those Bylaws were adopted by resolution of the FHA on December 12, 2001 for application upon the formation

of the FHA (by amalgamation under the provisions of the *Health Authorities Act*, R.S.B.C. 1996, c. 180).. They applied, *mutatis mutandis*, to the FHA prior to being supplanted in June 2004 by the *Medical Staff Bylaws of the Fraser Health Authority*.

The *Medical Staff Bylaws* describe, *inter alia*, the responsibilities of members of the medical staff to serve SMH and provide patient care. They apply to dentists on staff. A "dentist" is defined as a member of the medical staff who is duly registered with the College of Dental Surgeons of British Columbia.. The "medical staff" is defined as including physicians and dentists who hold a permit to practice medicine and dentistry, respectively, in the hospital.

The Board of Management of SMH has a full authority over, *inter alia*, the appointment and non-renewal of privileges to the medical staff. Requirements for applicants for membership in the medical staff are addressed in the *Medical Staff Bylaws*. The applicant must be willing to participate in the discharge of appropriate staff obligations, appropriate to the membership category: Bylaw 4.2.2 (e).

An application for membership on medical staff requires the applicant to provide an undertaking that, if appointed to the medical staff, he or she will be governed by the requirements set out in the Bylaws and Rules: *Bylaw* s. 4.2.3. It is further provided that each member of the medical staff "shall have his/her privileges reviewed on an annual basis or as otherwise determined by the Board": *Bylaw* s. 4.5.1.

As to responsibility for patient care, the *Medical Staff Bylaws* provide that all members of the medical staff are expected to provide emergency services to patients in accordance with hospital or departmental policies": *Bylaw* s. 5.3.1. They further provide that in the event the Regional Medical Advisory Committee (here, the LMAC) recommends the non-renewal of privileges, the applicant will be given an opportunity to appear before that Committee within 60 days, and further, that if the RHA Board decides "not to renew the privileges of a member for other than disciplinary issues, patient safety concerns or quality of medical care, 12 months' notice must be given": *Bylaw* s. 4.5.5.

The Board of Management may organize the medical staff into departments and divisions and each department is required to have a Department Head who is appointed by that Board to, *inter alia*, review and make recommendations on all annual re-appointments to the Department: *Bylaws* ss. 7.2, 7.3.3 and 7.3.4.

Lastly, the *Medical Staff Bylaws* set out a discipline and appeal process. They provide that "violation of the requirements set out in these Bylaws and Rules of the Medical Staff ... by a member of the Medical Staff are grounds for...non-renewal of privileges" ... Appeal procedures provide for an appeal to the FHA Board and

ultimately to this Board: *Bylaw* s. 10.1.1. and 10.5.

The applicable SMH *Rules of the Division of Dentistry*, provide as follows:

## 1. Membership

1.1 Members are dentists who are on the Medical Staff at Surrey Memorial Hospital.

1.2 Members of the Division will be members of the Department of Surgery.

## 2. Responsibility

2.1 *Members will provide 24 hour on-call coverage to the Emergency Room.*

.....

2.3 *Members will abide by the Bylaws of the Hospital, the Rules of the Department of Surgery, and the Rules and Regulations of the Division of Dentistry.*

[Emphasis added]

The SMH *Rules of the Department of Surgery* also apply. They provide for the appointment of a Department Chief whose responsibility is to carry out the duties assigned to him or her by the *Hospital Staff Bylaws*: They provide that each Division within the Department "will ensure 24 hour coverage in their discipline". *Rule 2.6*, and further that:

3.1 Each department chief will submit a call roster to the Chief of Staff providing 24 hour coverage and a 24 hour on-call rota for the department and each division within the department.

3.2 *Each member will take part in the staffing of the on-call rota on an equal basis.*

[Emphasis added]

The Department Chief, according to the *Rules of the SMH Department of Surgery*, "at the time of the member's application for re-appointment may make any recommendation the Department Chief deems appropriate to the Medical Advisory Committee regarding the member's privileges...": *Rule 6.2*.

Under Rule 5 "Resources" the SMH *Rules, Division of Dentistry*, provide that "each

active and associate member will provide equal on-call coverage" *Rule 5.2*. Under certain circumstances with the approval of the Department Chief, a member of the medical staff may be fully or partially exempted from the call obligation. No approval or exemption was granted in Dr. Kaburda's case.

None of the above rules or bylaws touch on the matter of compensation for services or for on-call availability by medical staff.

#### **D. THE FACTS**

Dr. Kaburda is a member of the College of Dental Surgeons of British Columbia, is licensed to practice dentistry and has a specialty extension in oral maxillofacial surgery. He has practiced that specialty since 1967. In the early 1970's he organized the Division of Dentistry at SMH. Although, as a dentist, Dr. Kaburda has not had admitting privileges at the SMH, nevertheless, he, by virtue of a "special permit" was entitled to utilize the hospital's resources as a surgeon until December 21, 2003 when those privileges were not renewed. He currently enjoys privileges in his specialty at the Royal Columbia Hospital, the Burnaby General Hospital and at several other private hospitals.

On October 10, 2002, in usual course, Dr. Kaburda applied in writing for annual re-appointment to the SMH Medical Staff for 2003. The application form signed by him requires the nomination of alternate dentists, in the event that he is "not available" for on-call duties relating to patient emergencies. In accordance with its printed form content, in his signed application, Dr. Kaburda certified and agreed "to abide by the Bylaws, Rules and Regulations of the Medical Staff at the SMH." His privileges were accordingly renewed for 2003.

Historically, in what Dr. Peter Doris, Head of Surgery at SMH, described as the *quid pro quo* for hospital privileges, members of the Medical Staff are required to be "on-call" for emergencies requiring patient care. The "on-call" requirement is a divisional and individual responsibility according to the Bylaws and Rules governing the Medical Staff and the Division of Dentistry at the SMH. The purpose of the on-call rota is to ensure coverage by medical staff in the event his or her services are required on an emergency or other basis.

The matter of principle, which ultimately led Dr. Kaburda to withdraw his on-call availability for services was the subject of testimony by him and two witnesses for the Respondent, Dr. Aidelbaum and Dr. Doris. Essentially, whereas physicians and surgeons became entitled to receive compensation for their remaining available for "on-call" services through an agreement between the British Columbia Medical Association and the Provincial Government, styled the Medical On-Call Availability Program ("MOCAP"), January 22, 2003, the Association of Dental Surgeons of British Columbia has not obtained for its members a similar arrangement.

Accordingly its members, including Dr. Kaburda, are not compensated for their remaining available for "on-call" services. Nevertheless oral and maxillofacial surgeons at the SMH are, by virtue of on-call rotas adopted within the SMH's Division of Dentistry, required to be "on-call" for the emergency treatment of, *inter alia*, mandibular fractures. This was a requirement which applied to Dr. Kaburda under the Bylaws and Rules governing the SMH medical staff.

Dr. Kaburda testified that he had submitted a claim through Dr. Aidelbaum, to the BC Medical Association, for retroactive compensation for stand-by time in respect of provision of "on-call" services by him for the period April 1, 2001 – March 31, 2002. Dr. Aidelbaum had sent Dr. Kaburda's claim to the BCMA as a "disputed claim" on the basis that it remained "questionable if your oral and maxillofacial call group will qualify as part of the BCMA Agreement". Dr. Aidelbaum's position, throughout a lengthy dispute, was that the claim for retroactive payment for 2001 – 2002, or payment under MOCAP for 2002 – 2003, does not apply to members of the Medical Staff of the Fraser Health Authority who provide specialist services in the capacity of a certified oral and maxillofacial surgeon.

Dr. Kaburda felt this view to be manifestly unfair. While members of the College of Physicians and Surgeons, who provided services similar to those provided by oral and maxillofacial surgeons in emergency treatment of mandibular fractures, were compensated under the provisions of MOCAP for remaining available for on-call services, oral and maxillofacial surgeons were not. This asymmetry in compensation for essentially the same thing, was objectionable to Dr. Kaburda

On November 8, 2002, Dr. Kaburda wrote to Dr. Aidelbaum with respect to a proposed on-call schedule circulated by Dr. Aidelbaum for the period December 31, 2002 – January 5, 2004, which included Dr. Kaburda. He said in his letter, in part:

"I do not feel it is appropriate for you to place my name on the proposed schedule. Nor should my name be included in any, voluntarily staff rosters for Surrey Memorial Hospital for the purpose of providing the services of Oral and Maxillofacial Surgery for Emergency Services.

I am not prepared to provide a *gratis* service in any shape or form, especially when said service is insurable and in place for members of the Plastics and or ENT Department. They are being compensated for being on-call for the service I am asked to provide.

Please continue to exclude my name from the so-called schedule of Surrey Memorial Hospital On-Call Coverage for Oral and Maxillofacial Surgeons until Fraser Health

Authority institutes a 'fair wage' policy."

[Emphasis added]

As a result of Dr. Kaburda's declining to remain on-call from September 3, 2002, the SMH was required to grant privileges to a substitute oral and maxillofacial surgeon so that the Division of Dentistry could fulfill its on-call obligations by providing "24/7" emergency on-call services. No other member of the Medical Staff, Division of Dentistry, refused to participate in "the on-call rota". After much back and forth communication in 2002 and 2003 during which time Dr. Kaburda retained his privileges, Dr. Kaburda was advised that his declining to provide on-call services on the emergency call roster, would be brought to the attention of the Medical Advisory Committee of SMH.

On October 15, 2003, Dr. Kaburda, as a part of the annual review process, again applied for re-appointment of the Medical Staff of SMH for 2004. In his application form he failed to nominate alternates for on-call coverage "in the event you are not available...who will be called for patient emergencies". Nevertheless, by his signing and delivering his application he confirmed, according to its printed terms, that he agreed to abide by the bylaws and rules of the SMH Medical Staff. This commitment was clearly inconsistent with the reality that since September 2002 he had in fact declined to be available for on-call services insofar as he was not being compensated therefor.

That application was, in the usual course, reviewed by the Chair of the Department of Surgery, Dr. Peter Doris, as provided for under the SMH *Rules of the Department of Surgery*. He made a written recommendation to the Credentials Committee of the SMH, on November 4, 2003, that Dr. Kaburda's application for renewal of privileges be refused on the basis that Dr. Kaburda had withdrawn from participation in the on-call schedule for emergency treatment. His view was, and remains, that Dr. Kaburda had declined to provide on-call services which were the very *quid pro quo* for hospital privileges, and that in doing so was in breach of the relevant SMH bylaws and rules.

On November 5, 2003, the Chair of the Credentials Committee of the SMH wrote and advised Dr. Kaburda that, having regard to the fact that Dr. Doris had not recommended his re-appointment "...due to your withdrawal from the on-call schedule for the Division of Dentistry (copy of Rules of Division of Dentistry enclosed), the Credentials Committee of Surrey Memorial Hospital is unable to act upon your request and your privileges at SMH will lapse in 2003, December 31."

Dr. Martin Aidelbaum testified as Head of the Division of Dentistry at SMH. In that Division are three oral and maxillofacial surgeons and four general dentists who enjoy privileges and who provide on-call services at the SMH pursuant to the on-call rota. He has been the Head of the Division of Dentistry since 1992. He



testified that the Division of Dentistry requires two persons available "24/7" for on-call services, one dentist and one oral and maxillofacial surgeon. He testified that there was a vacancy in the on-call schedule created upon Dr. Kaburda's withdrawal, and that neither the Division nor its individual members supported Dr. Kaburda's decision to withdraw his on-call services. He testified that the Division of Dentistry functions as a unit within the Department of Surgery and that the Rules require a member to participate in the provision of on-call services, in exchange for the grant of hospital privileges. According to the Rules, each member must equally share in the Divisional on-call rota.

Dr. Aidelbaum was cross-examined at length on what was described as a historical "turf war" between the Division of Dentistry and the plastic surgeons at SMH with respect to the requirement for on-call services to deal with the treatment of emergency mandibular fractures. The core of the dispute was that both plastic surgeons, who are members of the College of Physicians and Surgeons, and oral and maxillofacial surgeons were required to remain on-call for the provision of emergency services for treatment of mandibular fractures at SMH, yet under MOCAP, only the plastic surgeons would receive compensation for their stand-by time, and dentists in Dr. Kaburda's position, would not.

Dr. Aidelbaum gave evidence that this different treatment stems from the fact that whereas the B.C. Medical Association, representing physicians and surgeons, (but not dentists) was able to successfully negotiate the MOCAP, that agreement did not apply to members of the College of Dental Surgeons of British Columbia. Apparently, no similar negotiations involving the Association of Dental Surgeons of British Columbia and the Provincial Government had yielded a similar agreement for dentists. It is the role and responsibility of the Provincial Government to provide for matters of compensation, and the SMH plays no role, in establishing compensation schemes for on-call services.

He further testified that while the Division of Dentistry generally supported the concerns which animated Dr. Kaburda's views that the asymmetry in compensation for on-call availability was unfair, the Division did not support Dr. Kaburda's decision to refuse on-call services because he was not compensated therefor.

Dr. Doris, Head of the Department of Surgery at SMH, also testified for the Respondent. He holds a post-graduate degree in surgery, having graduated from medicine from Queen's University in 1968 where he remained on staff from 1974 – 1987, until joining the SMH. He has practiced surgery and been Head of Surgery at SMH since 1993.

He testified that, within the Department of Surgery, there were twelve surgical divisions involving 75 surgeons as members. The Department of Surgery interacts with other parts of SMH on personnel allocation and emergency service coverage.

He testified that each Division within his Department has specific responsibilities, and one of them is to provide "24/7" comprehensive on-call coverage. In turn, the Divisions compete for allocation of resources, including operating room time. The Department of Surgery assigns operating room time to each division based on a formula which is developed at least twice yearly.

Dr. Doris testified to the "turf issues" described by Dr. Aidelbaum and Dr. Kaburda. As Chief of Surgery, it was not unusual for him to have to deal with interdivisional disputes such as these. He recalls that when the difference arose respecting the treatment of mandibular fractures by members of the Dental Division, on the one hand, and physicians practicing the specialty of plastic surgery, on the other, there was an incident in which a patient spent 3-5 days without treatment, having apparently fallen through the cracks when one of those groups declined to provide coverage. It was this that led Dr. Doris to seek and obtain a commitment from Dr. Aidelbaum for on-call coverage by members of his Division. There are at least half a dozen mandibular fractures treated in the SMH Emergency Department annually, and that department is the fifth busiest Emergency Department in Canada.

Dr. Doris testified that, as Chief Head of Surgery, he played no role in the matter of compensation of medical practitioners or dentists, and that the Rules of the Department of Surgery do not refer to compensation matters. When asked, in effect, if Dr. Kaburda was allowed to retain privileges notwithstanding his refusal to participate in on-call duties what the broader implications might be, he said that the consequence would be "a large number of persons who would cease to provide services". He described a situation in 1990 when two members of the Orthopaedic Division decided that, given their advanced age, they should not have to participate in the on-call rota and wanted to "relinquish their call". As Chief of Surgery, he had agreed in that case that so long as those surgeons relinquished their privileges, they could be relieved from on-call responsibilities. He then referred to a more recent instance in which an arrangement was worked out by him with two other specialists who, due to advanced age, wished to withdraw from the on-call rota, by which they were permitted to do so, but only in exchange for relinquishing their privileges in respect of newly admitted patients. As to the rule requiring on-call availability in exchange for privileges, he testified that "if we did not have the rule I predict that we would have no surgeons on call."

Significantly, Dr. Doris testified that the effect of Dr. Kaburda's withdrawal from the on-call rota was not only in breach of the Rules of the Division of Dentistry and the SMH *Bylaws*, but his withdrawal raised patient safety concerns. His attention was drawn to *Medical Staff Bylaw* s. 4.5.5 which provides for 12 months notice of the non-renewal of privileges "for other than ... patient safety concerns". He testified that, as a member of the committee that drafted the *Bylaws*, he understood that *Bylaw* s. 4.5.5 was intended only to apply to situations which flowed out of the termination of a program or area of medical service at large.

While the Board is not, of course, bound by Dr. Doris' interpretation of this Bylaw, nevertheless, it is readily apparent that the 12 month notice provision applies only absent "patient safety concerns".

While no disciplinary issue arose out of Dr. Kaburda's withdrawal of on-call services, insofar as no individual patient was adversely impacted, nevertheless it was Dr. Doris' opinion as Chief of Surgery that Dr. Kaburda's decision, unsupported by the Division of Dentistry and which left a "gap" in the on-call emergency service rota, raised "patient safety concerns".

Dr. Kaburda gave evidence that on the issue of "prejudice" arising out of the non-renewal of his privileges at SMH. His evidence was wanting on whether his patients, who might otherwise be treated by him at the Burnaby General Hospital were prejudiced at all. His evidence appeared more directed to the "prejudice" he suffered by virtue of increased traveling time from his residence in attending alternate hospitals to treat his patients. Apparently the Burnaby General Hospital, and two other private hospitals, have "accommodated" his position that he not provide on-call services without compensation. The evidence fell far short of demonstrating that this apparently differing treatment was unjustified or that the needs of the SMH in delivering emergency services was not so sufficiently different that the Bylaws and Rules requiring on-call service were "discriminatory" in the sense alleged by Dr. Kaburda. Indeed, the regulatory scheme contemplates different Bylaws and Rules for differing hospitals within the FHA.

## **E. FINDINGS**

The Board prefaces its findings by observing that Dr. Kaburda has a lengthy and apparently distinguished career as a dental surgeon, having made a significant contribution to the SMH in providing a high standard of care and treatment for his patients. Dr. Doris quite properly conceded that he was unaware of any particular patient whose health and care was adversely impacted by Dr. Kaburda's decision to withdraw his on-call services. This was due in large part, to the hospital administration's ability to cover the "gap" in the rota through alternative provisional resources. Dr. Kaburda's decision, which has given rise to the non-renewal of his privileges at SMH, was motivated by principle. He looked to the SMH to provide a compensation system which otherwise is only obtainable through a properly negotiated agreement, similar to MOCAP, which would cover members of the College of Dental Surgeons. It is indeed unfortunate that his views led him to a decision to withdraw on-call coverage and at the same time insist on a renewal of his privileges, a decision which resulted in his loss of those privileges.

Having carefully considered the evidence of Dr. Kaburda, and witnesses called for the Respondent, and upon hearing the able submissions of counsel, this Board finds as follows:

1. The requirement for the provision of on-call services, which applies equally to all members of the medical staff at SMH, is reasonable and consistent with the obligation of the Board of Management of SMH to ensure, through its bylaws and rules, the proper administration of hospital affairs and the provision of a high standard of care and treatment for patients. The bylaws and rules are complementary. They required Dr. Kaburda, as a member of the medical staff, to participate in the discharge of medical staff obligations, as defined by the bylaws and rules, including those requiring a Member's provision of 24 hour on-call coverage to the emergency room and equal participation with others in the staffing of the on-call rota.

Simply put, the fact that members of the College of Physicians and Surgeons who maintain similar on-call availability are compensated therefor under MOCAP, does not make the SMH bylaws and rules, or their application to Dr. Kaburda in this instance, unreasonable, unfair, biased or discriminatory. They apply equally to all members of the medical staff. Compensation, is collateral to and beyond the purview of the bylaws and rules. If members of the College of Dental Surgeons are to be compensated for on-call availability, then this properly falls to negotiations and an agreement between the association representing members of the College of Dental Surgeons and the Provincial Government. The existence of an agreed compensation scheme, negotiated by the College of Physicians and Surgeons on behalf of its members, does not invalidate or impair the application of those bylaws and rules to Dr. Kaburda and other members of the Division of Dentistry seeking privileges at SMH.

2. The bylaws and rules of the SMH apply only to the SMH. There was no evidence that the equivalent bylaws and rules of any other hospital within the FHA were inconsistent with those at SMH. There is simply insufficient evidence on which to conclude, as submitted on behalf of Dr. Kaburda, that the requirements of the SMH were discriminatory among hospitals within the FHA, or were inconsistent. There was a paucity of evidence on this issue although it appears that some accommodation was afforded him at the Burnaby General Hospital. Even if the individual hospitals bylaws and rules were different, this does not render them invalid as discriminatory or inconsistent.
3. Dr. Doris, as Head of the Department of Surgery, acted within his authority in making his recommendation to the Credentials Committee. His recommendation was made having regard to the requirements of the bylaws and rules and in the interests of ensuring that, through a properly maintained system of on-call medical coverage, the SMH continued to provide a high standard of care and treatment for patients. The evidence

falls far short of demonstrating that Dr. Doris acted with any legal "bias" or that he "improperly" intervened in the process by which a decision was ultimately made by the LMAC that his privileges not be renewed effective December 31, 2003. At all material times Dr. Doris acted in accordance with his role and responsibilities and not improperly or with any oblique motive.

4. There was a paucity of any evidence upon which this Board could conclude that there was prejudice to Dr. Kaburda's patients which resulted from the non-renewal of his privileges. Indeed, Dr. Kaburda retains privileges at the Burnaby General Hospital. Even if there was sufficient evidence of some prejudice, which there was not, it flowed from Dr. Kaburda's decision to refuse to provide on-call services in breach of the Bylaws and Rules which he undertook to abide by in his application for renewal of privileges.
5. The Bylaws, in effect prior to June 2004, were the *Medical Staff of the South Fraser Health Region Bylaws* as adopted by resolution of the FHA on December 12, 2001. These Bylaws were supplanted in or about June 2004 by the *Medical Staff Bylaws for the Fraser Health Authority*. Dr. Kaburda's fifth ground of appeal concerns the application of Article 4.4.5 of the *Medical Staff Bylaws for Fraser Health Authority* which, although not adopted and in effect at times material to this Appeal, nevertheless were said to have been "circulated and generally followed prior to the events herein", presumably by the FHA.
6. Article 4.4.5 of the *Medical Staff Bylaws for the Fraser Health Authority*, provides that: "If the Board of Directors decides to *terminate* the appointment or *alter* the privileges of a Member for other than a disciplinary issue, patient safety concerns or quality of medical care, that Member of the Medical Staff must be given 12 months notice before privileges are modified or appointment is terminated." [Emphasis added]

Even if these Bylaws did apply, which they did not, the question posed is whether, in failing to give "12 months notice" of the decision not to renew Dr. Kaburda's privileges, that decision could be said to have "altered" his privileges or that in declining to renew his privileges his appointment was "terminated". The annual renewal requirement for privileges reflects the fact that, as here, unless otherwise renewed, privileges merely lapse with the effluxion of time. The decision to not renew is not a decision to "alter" privileges or "terminate" an appointment within the meaning of s. 4.4.5.

*The Medical Staff Bylaws* applied *mutatis mutandis* upon the formation of the FHA by amalgamation under the provisions of the *Health Authorities Act*, R.S.B.C. 1996, c. 180. By extension of the Appellant's grounds of appeal, Dr. Kaburda's position might be taken to be that the non-renewal of his privileges was unlawful in the

absence of his receiving 12 months notice as required by Article 4.5.5 of the *Medical Staff Bylaws*.

Any proper interpretation of *Medical Staff Bylaw 4.5.5* requires that consideration be given not only to individual patient safety concerns, but broader considerations affecting the scheme put in place by SMH for ensuring adequate and fair coverage by on-call medical staff for treatment of emergencies involving patient safety concerns in one of the busiest emergency departments in Canada. *Medical Staff Bylaw 4.5.5* provides, in effect, that 12 months' notice is not required to be given where there are "patient safety concerns"

It is common ground that no "disciplinary issues" or "quality of medical care" issues respecting an individual patient, arose as a result of Dr. Kaburda's decision to withdraw his on-call services. However, on the whole of the evidence this Board finds that Dr. Kaburda's refusal to participate in the on-call rota did result in "patient safety concerns" as described by the Head of the Department of Surgery, Dr. Doris, whose responsibility included the maintenance of appropriate levels of Emergency Department coverage. The Board finds that the provision of on-call coverage is essential to the ability of the SMH to provide quality of emergency medical care in circumstances involving patient safety. The treatment of traumatic mandibular fractures, for example, can hardly be said to be unconnected with patient safety concerns. Dr. Kaburda's refusal to be on-call created a "gap" in the rota which was only filled when an additional medical staff member was provisionally given privileges for on-call coverage.

The Board finds that Dr. Kaburda's refusal to provide on-call services did raise "patient safety concerns" within the meaning of *Medical Staff Bylaw 4.5.5*, as a result of which, 12 months notice of the non-renewal of privileges was not required to be given. His decision was not supported by other members of the Division of Dentistry and it caused a "gap" in the on-call rota which could only be filled by engaging the provisional services of another oral and maxillofacial surgeon. Dr. Doris' testified, that allowing hospital privileges to members of the Medical Staff who decline to provide on-call services would lead to a collapse of on-call coverage by the Division of Dentistry. This reflects the patient safety concerns which underlie the requirement for the hospital's provision of appropriate levels of on-call emergency service by trained specialists. Equal participation by medical staff in the on-call rota ensures and enhances the ability of the SMH to provide safe and timely emergency patient care. If a member of the medical staff, particularly with a specialty, and contrary to the agreed Rules, unilaterally refuses to participate, in on-call coverage, then the scheme designed to ensure patient safety is adversely affected if not wholly undermined.

Acceding to this "argument" would result in the unintended and adverse effect described by Dr. Doris that, upon renewing Dr. Kaburda's privileges for a further

12 month "notice" his declining to provide on-call services would wholly undermine the integrity of the bylaws and rules of the SMH, and undercut the integrity of the on-call system by which the SMH strives to satisfy patient safety concerns.

With respect to the Appellant's submissions that the Bylaws and Rules requiring the provision of on-call availability, without compensation, is contrary to the *Canada Health Act*, insofar as it defines "insured health services" as including "hospital services, physician services and *surgical-dental* services provided to insured persons", this argument cannot assist Dr. Kaburda. Maintaining on-call availability cannot be equated with "surgical-dental services" as defined by the *Canada Health Act* as "any medically or dentally required surgical-dental procedures performed by a dentist in a hospital, where a hospital is required for the proper performance of the procedures". The Board does not accept his argument that the *Canada Health Act* mandates that, in the context of hospitals, physicians and dental surgeons are to be treated the same, and that this prevents the application to Dr. Kaburda of the Bylaws and Rules requiring his on-call availability. The payments under the *Canada Health Act* insurance scheme for "insured health services", applies equally to physicians and to members of the College of Dental Surgeons in British Columbia.

#### **F. DECISION**

The decision of the Board of the Fraser Health Authority dated October 21, 2004, is affirmed, and Dr. Kaburda's appeal is dismissed.

Dated the 23rd day of September, 2005.

**DEREK BRINDLE, Chair**

**LORI MESSER, Member**

**WILLIAM HOPKINS, Member**