



Board review of decisions made under delegation

In accordance with Administrative Law, persons whose interests have been adversely affected by a decision made by the Board (or by a Board delegate) may seek a judicial review or (in some cases only) may appeal to the District Court. The Health Practitioners Competence Assurance (HPCA) Act also offers the very sensible alternative of having a delegate's decision reviewed by the full Board (*ref* HPCA Act Schedule 3, clause 18).^{1 2}

The review process

When a request is made under clause 18 of the HPCA Act the Board must “review the delegate's decision, and must either confirm or revoke that decision”.

The word “review” has been interpreted by the Board according to its ordinary and natural meaning, which is to “view again”; to look at what was done³ and to decide whether, from the Board's point of view, the process used was fair and the conclusions reached were correct.

The Board has the responsibility of arriving at its own assessment of the merits of a case. It might defer to the delegate's assessment if the delegate possessed expertise that the Board did not or if the delegate was required to assess the credibility of oral evidence. But, otherwise, if the Board's opinion is different from the conclusion of the delegate, then it may come to a different result. Equally, it might agree entirely with the delegate, or agree but for different reasons.

In this sense, then, the Board will review all of the relevant documents that were before the delegate itself and, having done that, it will decide whether the delegate's decision was a correct one or was wrong (i.e., whether it should confirm the decision or revoke it).

As part of the review, the Board should apply three basic tests;

Was the decision legally sound?

- Is the decision *ultra vires* – not authorised by legislation?
- Did the delegate interpret correctly the relevant statutory provisions?
- Was the decision motivated by an improper purpose?
- Did the delegate take into account irrelevant matters?
- Did the delegate fail to take into account relevant matters?
- Was the delegate influenced by wrong facts?
- Was the delegate applying a pre-determined policy without regard to the facts?
(Note: A decision maker is entitled to adopt a general policy as a guide to exercising a discretion, but is not generally permitted to apply that policy so rigidly as to exclude the merits of an individual case.)

¹ If on review the Board confirm the delegate's decision, the matter may in some circumstances still be submitted to the Court.

² Please note that the Act specifies that an appeal or a request for a review must be lodged within 20 working days after notice of the decision is communicated. (Refer section 106 and Schedule 3 section 18 of the HPCA Act.)

³ This means taking a fresh look only at the information that was before the delegate. New information will not usually be considered. This is not a *de novo* process, but rather a review.

- Did the delegate act under dictation from another? (E.g., a decision made by someone else is simply rubber stamped.)
- Was the decision made pursuant to an invalid delegation?

Were the procedures used fair?

- Were all parties affected by the decision given a proper opportunity to comment? (Especially where identifiable individual interests are affected this duty will require prior notice, disclosure of the information relied upon, and the reasons for the decision.)
- Was there bias or the appearance of bias? (Includes predetermination, before consideration of individual case.)
- Was there impartial and fair consideration?
- Did the delegate give each party the right to comment on any adverse information held, and the right to submit information?
- Did the delegate consistently, but not over-rigidly, apply policy and guidelines?
- Legitimate expectation: Did the delegate act consistently with previous representations, and in accordance with how other similar cases have been treated?

Was the ultimate decision a correct one?

- Does the Board agree, based upon the information the delegate had before it, with the conclusions reached by the delegate?
- Does the Board agree with the action the delegate decided to take under the Act, based upon those conclusions?

Review Submissions

The person requesting a review can make submissions to the Board in support of his or her request. The other party will be given the opportunity to see those submissions, and to make submissions of their own. Please note that if any new allegations or arguments are introduced at this late stage the process may need to be extended to allow an appropriate opportunity for consideration and response (i.e., for natural justice requirements to be met).

Application Fee

The (non-refundable) fee for an application for the Board to review a delegate's decision is currently NZ\$300.⁴ The fee may be waived (in whole or in part) in exceptional circumstances.

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⁴ The average cost of conducting a review is approximately NZ\$1,200. The Board have made a policy decision to recover only a portion of this cost from applicants.