



Board review of decisions made under delegation

In accordance with Administrative Law, any person whose interests have been adversely affected by a decision made by the Board (or by a Board delegate¹) 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).^{2 3}

The Board 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 Board interprets the word “review” according to its ordinary and natural meaning, which is to “view again”; to look at what was done⁴ 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 does not or if the delegate was required to assess the credibility of oral evidence which the Board did not hear. But, otherwise, if the Board’s opinion is different from the delegate’s conclusion, 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 any submissions made by the parties regarding the review and, having done that, it will decide whether the delegate’s decision was correct 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

¹ A “Board delegate” means the Registrar or any committee appointed by the Board, when performing functions, carrying out duties or exercising powers of the Board, under written delegation from the Board. The P3&4 and Accreditation Committees are examples of Board delegates (refer to Schedule 3 clause 17 of the HPCA Act).

² If on review the Board confirm the delegate’s decision, the matter may in some circumstances still be submitted to the Court.

³ 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.)

⁴ 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.

exercising a discretion, but is not generally permitted to apply that policy so rigidly as to exclude the merits of an individual case.)

- 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

Requests for Board review must be lodged within 20 working days of the delegate's decision being communicated. The applicant (i.e., the person requesting a review) can make submissions to the Board in support of his or her request. In the case of a complaint or competence notification, the other party will be given the opportunity to see those submissions, and to make submissions as well. This response will then be provided to the applicant to give them an opportunity to respond to any matters raised by the other party that have not already been addressed. The applicant's final submission is the end point in the submissions process. A copy of that final submission will be sent to the other party once the review process has been completed, along with the Board's decision and reasons for that decision. 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). To avoid delays the Board strongly encourages all parties to ensure that all relevant arguments, allegations, and comments are made at appropriate points in the submission process.

Application Fee

The (non-refundable) fee for an application for the Board to review a delegate's decision is currently NZ\$300.⁵ The fee may be waived (in whole or in part) in exceptional circumstances.

Version: 02/10/17

⁵ 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.