

February 21, 2017

Veterinary Practice Owners Association of Ontario
2078 Upper Middle Road E
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VIA EMAIL

Attention: James McCleary DVM – President

Dear Dr. McCleary,

RE: College of Veterinarians Ontario Discipline Process Meeting

Background:

The VPOA has received increasing numbers of what can be described as anecdotal evidence of the CVO investigation and discipline process lacking consistency, fairness and in some instances appearing as a star chamber.

In response to this information the VPOA retained this writer to attend at a meeting with CVO Registrar and counsel to query the investigation and discipline process.

The Administrative Law Process:

The investigation and discipline process in this and many other professions falls under the heading of Administrative Law. The area of Administrative Law in Ontario is governed by Common Law (which is law made as a result of court decisions) and the Statutory Powers Procedure Act. The CVO operates under both.

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As there is one fundamental and overriding element covering much of Administrative Law. This is the concept of Procedural Fairness (or Natural Justice). For reference, Procedural Fairness is defined hereunder.

Procedural Fairness:

Procedural fairness is concerned with the procedures used by a decision-maker, rather than the actual outcome reached. It requires a fair and proper procedure be used when making a decision.

The rules of procedural fairness do not need to be followed in all government decision-making. They mainly apply to decisions that negatively affect an existing interest of a person or corporation. For instance, procedural fairness would apply to a decision to cancel a licence or benefit; to discipline an employee; to impose a penalty; or to publish a report that damages a person's reputation.

Procedural fairness also applies where a person has a legitimate expectation with respect to their participation in an administrative process. The rules of procedural fairness require:

- a hearing appropriate to the circumstances;
- lack of bias;
- evidence to support a decision; and
- inquiry into matters in dispute.

A critical part of procedural fairness is 'the hearing rule'. Fairness demands that a person be told the case to be met and given the chance to reply before a government agency makes a decision that negatively affects a right, an existing interest or a legitimate expectation which they hold. Put simply, hearing the other side of the story is critical to good decision-making. In line with procedural fairness, the person concerned has a right:



- to an opportunity to reply in a way that is appropriate for the circumstances;
- for their reply to be received and considered before the decision is made;
- to receive all relevant information before preparing their reply.

The case to be met must include a description of the possible decision, the criteria for making that decision and information on which any such decision would be based. It is most important that any negative information the agency has about the person is disclosed to that person. A summary of the information is sufficient; original documents and the identity of confidential sources do not have to be provided.

It was through this context that this writer prepared a series of questions to pose to the CVO Registrar as spokesperson for the regulator. An analysis of our findings are set out below.

Findings:

In general, there are 2 sites for complaints to be screened. The Complaints Committee and the Executive Committee. The Complaints Committee are able to undertake investigation and refer matters for prosecution. For more complex matters the Executive Committee can be called upon to investigate and screen complaints where its deemed necessary and with the consent of the complainant. The Registrar has certain unilateral ability to request investigations. Those investigating the complaint will not sit as members of the Discipline Committee on the panel hearing the complaint. There seems an amorphous area where the Registrar can unilaterally investigate a regulatory 'concern'. There is nothing in any of the materials this writer has reviewed or in the answers given by the CVO to support this additional regulatory approach and power.

Our findings with respect to the discipline processes were that aside from the general empowering language set out in the Veterinarians Act, very little guidance existed with respect to the following:



1. Selection process for Complaints and Discipline Committee members.

Governance policy in this area seems to exist only with respect to non-council membership and does not speak to anything related to discipline and is general in nature. It appears that selection criteria for Complaints and Discipline Committees are ad hoc and undertaken through a highly subjective evaluation process. Without formalization of this process ensuring the quality of Complaints and Discipline Committee members cannot be ensured or supported with data.

2. Process of factors to determine the genesis of an investigation (Registrar, Executive Committee, Complaints Committee)

There are general empowering provisions dealing with composition and authority. There are no objective guidelines, scoping language or process indications. In the absence of this language (which is not unusual in legislation) one would look to policy and procedure documents for process. Here the guidelines are wanting to say the least. It is an open book with no limitation on what form of investigation is warranted in what situation, the timelines for the investigation, steps to be taken in the investigation and triggering standards for next steps.

3. Discipline Committee proceedings authorization.

Upon the decision of the Complaints or Executive Committee, discipline matters are referred to lawyers to assess the case for prosecution. This is called a prosecutorial viability assessment (PVA). The prosecutor who will undertake the case undertakes the assessment. It is counter intuitive to suggest that with no separation between the PVA and prosecuting lawyer, there wouldn't be some self-interest. If they approve for prosecution in PVA they have just approved work for themselves.



4. Adjudicator training and evaluation.

Currently there is an informal anecdotal review of adjudicators. Formal adjudicator evaluation is a must for the consistency and reliability of the process. There are self-assessments and peer assessments done in other regulatory bodies. These are robust and regular. In order to ensure the competency of an adjudicator these reviews must be standardized, formalized and made part of the process

5. Availability of counsel for the member under investigation or acknowledgement by the CVO as to the need to consult counsel.

In administrative law, there is a clear legitimate expectation of counsel being involved in a formal discipline process. To proceed without counsel would put a member at a serious and potentially fatal disadvantage when going up against trained prosecutors. Given the quasi-criminal nature of the discipline process, clear guidance to counsel and perhaps access to a free brief advice lawyer should be part of the process.

6. Standards of legitimate expectation with regard to process, and participatory rights such as disclosure of the investigation's findings.

The common-law imposes a minimum duty of fairness in certain administrative proceedings. The duty can only be invoked where the circumstances satisfy a threshold based on three factors. First, the nature of the decision must be sufficiently administrative or quasi-judicial. Decisions that are of a "legislative or general nature" which are based on broad policy issues rather than points of law are not likely to warrant a duty of fairness. Furthermore, the decisions must be final in nature, not preliminary or interlocutory. Second, the relationship between the (public) body and the individual must be based on an exercise of power pursuant to a statute (or prerogative power). Third, the decision must affect the claimant's rights, privileges or interests.



Where the circumstances satisfy the threshold test to invoke a duty of fairness a claimant will be entitled to certain participatory rights including pre-hearing rights, such as rights related notice, disclosure, discovery, and delay, as well as hearing rights, such as rights related to the form of hearing, counsel, examinations, and reasons for judgment.

Clearly the duty of fairness exists in the present context and certain minimum procedural expectations must exist and be known to the person subject to the proceedings, investigation etc. Many of these are set out in the Discipline Committee Guidelines & Rules of Procedure.

7. Consistency of decisions across similar offences with similar facts.

While the concept of a 'case by case' analysis is ubiquitous in the common-law and administrative process, the notion that there would not be clear trends of fact pattern, elements of alleged offences and severity of conduct, giving rise to consistent outcomes, is not logical. A process of decision audit to ensure fairness and consistency is a must and without it, fairness cannot be said to have been a part of the process.

Conclusions:

In sum, while the processes in place are not without some reasonable form and structure, given the nature and potential consequence of the investigation and discipline process, much is needed in the area of adjudicator appointment and review as well as the proceedings authorization process at its inception (investigation) and through actual discipline hearings. Finally, an audit of outcomes to ensure that there is consistency in application of regulatory power and the outcomes that result.

There are two potential avenues of approach to the weaknesses in the process as set out above. First is lobbying to seek legislative change or putting pressure on the CVO to



improve its processes internally. Second is to undertake a judicial review of a 'test case', the facts of which support testing the mentioned problems before the courts. The detailed steps to these approaches will not be discussed in this memo.

In this writer's opinion, where legislative or policy guidance does exist, it makes for an overly complex, multi-tiered process which is difficult for a member to navigate or even understand. It allows for a high level of procedural subjectivity which regardless of good intentions invariably leads to patent inconsistency across members experiencing the processes. Where objective guidance doesn't exist, it allows for a member subject to process to feel without recourse or understanding and lacks the appearance of fairness, which appearance is the cornerstone of the Administrative Law process.

Please don't hesitate to contact me should you have any questions or require further clarification.

Yours very truly,

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Per:



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