

PART C – DECISION UNDER APPEAL

The decision under appeal is the Ministry of Children and Family Development's (the "ministry's") reconsideration decision dated January 11, 2019, which held that the appellant was ineligible for an amount of child care subsidy that she received for the month of January 2017 in respect of Child X, resulting in an overpayment of \$925.00 that the appellant is liable to repay under Section 7(1) of the *Child Care Subsidy Act* (the "Act"), because:

- There was no evidence of an eligible excuse for Child X's absences from daycare as per Section 16(1) and (2) of the *Child Care Subsidy Regulation* (the "Regulation");
- As Child X attended no days in January 2017, there was no basis to establish a prorated subsidy for the month of January under Section 16(3) of the Regulation; and
- The Ministry made no administrative error.

PART D – RELEVANT LEGISLATION

Child Care Subsidy Act, ss. 5, 7

Child Care Subsidy Regulation, ss. 14, 15, 16

PART E – SUMMARY OF FACTS

Information before the ministry at reconsideration

The ministry had the following information before it at reconsideration:

- The appellant is the director of licenced daycare facility (the "Daycare");
- Child X's last day of attendance at the Daycare was December 23, 2016;
- On January 4, 2017, the Daycare submitted a claim for a child care subsidy for 20 full days of daycare for Child X in the month of January 2017, totalling \$925;
- The Daycare provided zero days of daycare to Child X after December 23, 2016;
- After being unable to contact Child X's parent, the appellant withdrew Child X from the Daycare at the end of January 2017.

Documents before the ministry included the following:

- A "Child Care Subsidy Overpayment Calculation" completed by an audit officer on November 22, 2018, noting a service discrepancy and that an overpayment of \$925 had been made to the Daycare in respect of Child X for January 2017;
- A Child Care Subsidy Claim for \$925, completed by the appellant and signed January 4, 2017, including the statement by the appellant that "I acknowledge I may be submitting this claim in advance of child care provided and I am liable to repay any overpayment arising from this claim";
- A letter from the appellant, dated December 7, 2018 and submitted to the reconsideration officer, stating that when Child X did not return to the daycare after the Christmas break, she tried calling the parent with no success. The Daycare's policy required a month's written notice of withdrawal, so the appellant considered Child X to be absent but not withdrawn. The appellant stated the daycare held the space open for a reasonable amount of time to support the family and did its due diligence in trying to contact the family. The appellant stated frustration with the scenario the Daycare is now faced with: after two years, trying to find the parent and collect daycare fees from her, knowing she is a "young mom attending a drug treatment program trying to better herself and her family";
- An email to the appellant from a family services social worker, dated November 30, 2018, expressing appreciation for the Daycare's flexibility in maintaining Child X's enrollment despite not hearing from the mother who was continuing in a treatment program, and noting the family was under significant stress and trying to adjust to varied supports being

introduced to them, and that through that process Child X's parent may have neglected to contact the Daycare and was also difficult to reach;

- A copy of Section 16 of the Regulation as amended by B.C. Reg. 148/2018, with a hand-written annotation made by the appellant concerning the "Young Parent Program";
- A single page setting out the appellant's expectations to keep the payment of \$925, or alternatively some lesser amount, and providing a definition of the word "preposterous";
- A letter to the appellant from the audit officer dated November 22, 2018, describing the overpayment of \$925 and attaching a copy of Section 16 of the Regulation as amended by B.C. Reg. 148/2018;
- A Ministry record of the \$925 payment made to the appellant by the Ministry in respect of Child X for January 2017, printed on November 22, 2018 by the audit officer; and
- The Request for Reconsideration form setting out the Ministry's decision, dated November 29, 2018.

Submissions on appeal

With her notice of appeal, the appellant provided a written statement dated January 29, 2019. In her statement, she accepts that she must abide by the Ministry's policies and regulation even if she does not agree with it. She seeks guidance from the appeal tribunal concerning what she should have done in the circumstances and seeks an explanation of the legislation. She also writes that it was not fair of the ministry to send her a copy of Section 16 of the Regulation (as amended by B.C. Reg. 148/2018) and then to say (in the reconsideration decision) that the version of the regulation provided was not in force at the relevant time.

At the hearing, the appellant added that she realizes now that the ministry works "on legislation, not people" and that the ministry's procedure is unfair because it would have required her to withdraw a child over the Christmas break. In January 2017, the appellant made attempts to call Child X's mom, but she either did not get through or the mother's voicemail was full. She could not recall exactly when or how she told the ministry of Child X's absences; she believed she just stopped billing for Child X at the beginning of February. In retrospect, the appellant said there were "red flags" about Child X in that she had heard the child had not been properly withdrawn from another daycare, and because the child effectively required a 1 to 1 staff ratio. She submitted that the ministry applies the legislation unfairly and that subsidies are often paid when a child leaves a program. She argued that, at a minimum, the Daycare should be paid for up to two weeks on the basis that Child X's mother was ill, which the appellant says was confirmed by a letter from the family's social worker indicating the mother was in a treatment program and the family was under significant stress.

The ministry representative apologized for the wrong legislation being enclosed with the ministry's letter of November 22, 2018. However, she said the reconsideration officer referred to and applied the correct legislation and explained why the "Young Parent Program" was not applicable. She explained the child care subsidy application is black and white: that child care must be provided to get the subsidy, with limited exceptions for vacation and illness. She said that, in this situation, when it became apparent the appellant could not reach Child X's mother, the appellant should have called the family's social worker and she should have told the ministry

that the child was not attending the Daycare. Neither action would have resulted in the appellant receiving the subsidy for January, but perhaps Child X's spot could have been filled with another child. The ministry representative also noted that a daycare's operations and policy may differ from the ministry's, but that does not change the fact that the ministry may only pay child care subsidies based on the legislation. In response to questions, the ministry representative explained that daycares are required to keep an attendance register—to provide some sort of verification in the event of absences. Also, with respect to what constitutes being "ill" under Section 16(1) of the Regulation, the ministry said that being in a treatment program could be considered being "ill" if it were something new and not the regular state of affairs during the course of a child's enrollment in daycare. Further, although the family's social worker said the family was going through a stressful time, she did not confirm that the parent was "ill". She said the ministry cannot make assumptions or guess that the parent was ill—that would not be an appropriate basis to pay a child care subsidy.

The Panel's findings of fact

In considering all the evidence above, the Panel makes the following findings of facts:

- Child X's last day of attendance at the Daycare was December 23, 2016;
- On January 4, 2017, the Daycare submitted a claim for a child care subsidy for 20 full days of daycare for Child X in the month of January 2017, totalling \$925;
- The Daycare provided zero days of daycare to Child X after December 23, 2016;
- After being unable to contact Child X's parent, the appellant withdrew Child X from the Daycare by not billing for Child X in February 2017;
- The Daycare had no recorded reasons for Child X's absences in January 2017 as the parent was not reachable; and
- During January 2017, the appellant did not call the family's social worker concerning Child X's absences or inform the ministry of the absences.

PART F – REASONS FOR PANEL DECISION

Issue on appeal

The issue is whether the Ministry's decision that the appellant was ineligible for a child care subsidy for the month of January 2017, resulting in an overpayment of \$925.00 that the appellant is liable to repay under Section 7(1) of the Act, is reasonably supported by the evidence or a reasonable application of the applicable legislation in the circumstances of the appellant.

The relevant legislation:

Child Care Subsidy Act, RSBC 1996 c. 26

Information and verification

5 (1) For the purpose of determining or auditing eligibility for child care subsidies, the minister may do one or more of the following:

- (a) direct a person who has applied for a child care subsidy, or to or for whom a child care subsidy is paid, to supply the minister with information within the time and in the manner specified by the minister;
- (b) seek verification of any information supplied by a person referred to in paragraph (a);
- (c) direct a person referred to in paragraph (a) to supply verification of any information supplied by that person or another person;
- (d) collect from a person information about another person if
 - (i) the information relates to the application for or payment of a child care subsidy, and
 - (ii) the minister has not solicited the information from the person who provides it.

(2) A person to or for whom a child care subsidy is paid must notify the minister, within the time and in the manner specified by regulation, of any change in circumstances affecting their eligibility under this Act.

(3) If a person fails to comply with a direction under subsection (1) (a) or (c) or with subsection (2), the minister may

- (a) declare the person ineligible for a child care subsidy until the person complies, or
- (b) reduce the person's child care subsidy.

(4) For the purpose of auditing child care subsidies, the minister may direct child care providers to supply the minister with information about any child care they provide that is subsidized under this Act.

Overpayments, repayments and assignments

7 (1) If a child care subsidy is paid to or for a person who is not entitled to it, that person is liable to repay to the government the amount to which the person was not entitled.

(2) Subject to the regulations, the minister may enter into an agreement, or may accept any right assigned, for the repayment of a child care subsidy.

(3) A repayment agreement may be entered into before or after a child care subsidy is paid.

(4) An amount that a person is liable to repay under subsection (1) or under an agreement entered into under subsection (2) is a debt due to the government and may

- (a) be recovered by it in a court of competent jurisdiction, or
- (b) be deducted by it from any subsequent child care subsidy or from an amount payable to that person by the government under a prescribed enactment.

(5) The minister's decision about the amount a person is liable to repay under subsection (1) or under an agreement entered into under subsection (2) is not open to appeal under section 6 (3).

Child Care Subsidy Regulation, B.C. Reg. 74/97 (As amended, prior to amendments on September 1, 2018)

Notifying the minister of change in circumstances

- 14** The notification required by section 5 (2) of the Act must be given in writing or by telephone,
- (a) as soon as possible after any change in circumstances affecting the eligibility of the parent, and
 - (b) to an employee in the Child Care Subsidy Service Centre.

[am. B.C. Regs. 337/2008, s. 5.]

Accounts and payment

15 (1) Child care providers must submit billing for child care subsidies to the minister in the manner and form specified by the minister.

(2) The minister must pay

- (a) child care subsidies for child care described in section 2 (c) directly to the parent, and
- (b) child care subsidies for child care described in section 2 (a), (b) or (b.1) directly to the child care provider.

(3) Despite subsections (1) and (2), a non-profit agency providing child care support services may pay the caregiver and submit accounts to the ministry for reimbursement.

(4) If a licence issued for a child care setting under the *Community Care and Assisted Living Act* is cancelled, the minister may accept, for up to 30 days after the date the licence is cancelled, billing for subsidized child care provided in that setting.

(5) No child care subsidy will be paid to a child care provider under subsection (2) (b) for a day on which the child care setting is closed, unless the day is a statutory holiday.

(6) In subsection (5), "**statutory holiday**" means any day, except Sunday, that is listed as a holiday in the *Interpretation Act*.

[am. B.C. Regs. 387/2004, s. 3; 281/2005, s. 10.]

If a child is absent or is withdrawn

16 (1) The minister may continue to pay a child care subsidy for a period of up to 2 weeks for child care provided in a licensed child care setting, a registered licence-not-required child care setting or a licence-not-required child care setting, if a child is absent because

- (a) the child is on vacation, or
- (b) the child or parent is ill.

(2) The child care provider must record the reason for the absence in an attendance register.

(3) If a child for whom a child subsidy is paid is withdrawn without notice from a child care setting, other than the child's own home, or at any time before the end of a month and the vacancy is not filled, the minister may pay the following to the operator of the setting:

- (a) the monthly child care subsidy, if during that month the child attended the setting for 1/2 or more of the month;
- (b) 1/2 of the monthly subsidy, if the child attended the setting for less than 1/2 of the month.

[am. B.C. Regs. 281/2005, s. 11.]

The Panel's decision

The appellant's position is that the legislation is not as black and white as the ministry portrays; that subsidies are often paid in respect of children who are withdrawn from care; that she should at least be paid for two weeks of January 2017 on the basis of illness or vacation; and that it is unreasonable for the ministry to have expected her to withdraw Child X and fill her position when she knew the family was facing difficulties and/or may have been on an extended Christmas vacation.

The ministry's position is that the reconsideration decision is reasonably supported by the evidence because there was evidence that Child X did not attend the Daycare in January 2017; the Daycare received a child care subsidy on the assumption that Child X was in full time attendance; and there was no evidence that Child X was absent from the Daycare for one of the allowable reasons in Section 16(1) of the Regulation.

Was there an administrative error?

Section 16 of the Regulation deals with absences and withdrawals. It appears that on November 22, 2018, the audit officer attached a copy of the regulation that was current at that time, including amendments that came into effect on September 1, 2018. Those amendments included what is now subsection 16 (1.1), which provides that, for a child whose parent is participating in the "Young Parent Program," the minister may continue to pay subsidies for any length of time for a child who is absent for any reason. At reconsideration, the Ministry noted that subsection (1.1) and the "Young Parent Program" were not part of the legislation in January 2017 and were therefore not factors in its decision. The Ministry then found that the evidence did not show that the Ministry made an administrative error. While the audit officer incorrectly attached the current legislation to her letter of November 22, 2018 (rather than the legislation that was in effect in January 2017), the correct legislation appears to have been attached to the Verification and Audit Request for Reconsideration Form, which summarizes the Ministry's decision. Further, attaching the wrong legislation to the November 22, 2018 letter had no effect on the decision-making process or the facts that were considered by the Ministry. For those reasons, the Panel finds that the Ministry, in its Reconsideration decision, reasonably determined that no administrative error had been made.

Was there an eligible excuse for absences or a basis for a prorated subsidy?

The crux of this appeal is whether the Ministry reasonably determined that there was no evidence of an eligible excuse for Child X's absences from daycare as per Section 16(1) and (2) of the Regulation and, as Child X attended no days in January 2017, whether there was no basis to establish a prorated subsidy for the month of January under Section 16(3) of the Regulation.

The operative version of Section 16 provides that the minister may continue to pay a child care subsidy during absences for up to two weeks if the child is on vacation or the child or parent is ill (s. 16(1)); and that the minister may pay half or all of the monthly subsidy for a child who is withdrawn from the program "if the child attended the setting" for less than half or more than half of the month respectively (s. 16(3)). Section 16(2) provides that the child care provider must

record the reason for the absence in an attendance register. Here, there is no evidence of an attendance register recording a reason for the absence. Indeed, the evidence is that the reason for the absence was unknown as the appellant was unable to contact Child X's parent. Accordingly, there is no basis in Section 16(1) on which the ministry could pay the child care subsidy during Child X's absence. While the evidence does show that the family was having difficulties and the parent was hard to reach, these are not eligible absences under Section 16(1). Without more details, a statement from a social worker that Child X's mother was "attending the same treatment program" is not sufficient to establish the mother was "ill" for the purposes of Section 16(1). Therefore, the panel finds that the ministry reasonably determined there was no evidence of an eligible excuse for Child X's absences from daycare as per Section 16(1) and (2) of the Regulation.

As well, there is no dispute that Child X did not attend "the setting" during any part of January 2017. Indeed, she did not return to Daycare after being picked up by her mother on December 23, 2016. Further, the Daycare did not treat Child X as withdrawn until the end of January. As Child X had neither attended nor been withdrawn in January, Section 16(3) of the Regulation does not apply to this situation and cannot form the basis for the ministry to pay a child care subsidy to the Daycare for January 2017. Accordingly, the panel finds the ministry reasonably determined there was no basis to establish a prorated subsidy for the month of January under Section 16(3) of the Regulation.

Is the appellant liable for an overpayment?

Section 5(2) of the Act provides that a person in receipt of a Child Care Subsidy must notify the Minister of any change in circumstance in eligibility for that subsidy. Section 14 of the Regulation provides that such notice must be given in writing or by telephone "as soon as possible after any change in circumstances affecting the eligibility of the parent." Section 7(1) of the Act provides that where "a child care subsidy is paid to or for a person who is not entitled to it, that person is liable to repay to the government the amount to which the person was not entitled." Section 15(1) of the Regulation states that "Child care providers must submit billing for child care subsidies to the minister in the manner and form specified by the minister". That "form" is exemplified by the Child Care Subsidy Claim, signed by the appellant on January 4, 2017, and includes a statement by the child care provider that, "I acknowledge I may be submitting this claim in advance of child care provided and I am liable to repay any overpayment arising from this claim".

Here, on January 4, 2017, the appellant claimed a child care subsidy for Child X for the whole month of January in the amount of \$925, and the ministry paid that amount. The ministry's audit in November 2018 revealed that Child X had not attended the Daycare after December 23, 2016. Section 14 of the Regulation and Section 5 of the Act together provide that a person to or for whom a child care subsidy is paid must notify the minister in writing or by telephone *as soon as possible after any change in circumstances* affecting the eligibility of the parent for the subsidy. The appellant knew near the beginning of January 2017 that Child X was not attending Daycare and that the Daycare was unable to contact Child X's mother. This constituted a change in circumstance that should have been reported to the ministry. Instead, the appellant waited until the end of the month to withdraw Child X from the Daycare by ceasing to bill for her in February. While acknowledging the appellant's noble intentions to hold a child care spot for a

family that faced challenging circumstances, and the daycare's policy to require one month's notice to withdraw a child (or fees in lieu of notice), child care subsidies may only be paid by the ministry in accordance with the legislation. In light of all the evidence that was before the ministry at reconsideration and on appeal, the ministry reasonably determined there was an overpayment of \$925 that the appellant is liable to repay in accordance with Section 7 of the Act.

Conclusion

The Ministry reasonably determined that the appellant was ineligible for a child care subsidy for the month of January 2017, resulting in an overpayment of \$925 that the appellant is liable to repay under Section 7(1) of the Act. The panel finds the ministry's decision is reasonably supported by the evidence and a reasonable application of the applicable legislation in the circumstances of the appellant. The panel confirms the Ministry's reconsideration decision. The appellant is not successful in her appeal.

PART G – ORDER

THE PANEL DECISION IS: (Check one) UNANIMOUS BY MAJORITY

THE PANEL CONFIRMS THE MINISTRY DECISION RESCINDS THE MINISTRY DECISION

If the ministry decision is rescinded, is the panel decision referred back to the Minister
for a decision as to amount? Yes No

LEGISLATIVE AUTHORITY FOR THE DECISION:

Employment and Assistance Act

Section 24(1)(a) or Section 24(1)(b)

and

Section 24(2)(a) or Section 24(2)(b)

PART H – SIGNATURES

PRINT NAME

Kathy Grant

SIGNATURE OF CHAIR

DATE (YEAR/MONTH/DAY)

2019/02/26

PRINT NAME

Kulwant Bal

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2019/02/26

PRINT NAME

Robert McDowell

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2019/02/26