DECISION NO.  2009-HPA-0039(b)

In the matter of an application for review under section 50.54 of the Health Professions Act, R.S.B.C. 1996, c. 183, as amended, of a Registration decision

BETWEEN: The Applicant  
APPLICANT

AND: The College of Denturists of BC  
COLLEGE

BEFORE: A Panel of the Health Professions Review Board  
David A. Hobbs, Panel Chair  
Victoria Kuhl, Member  
Marilyn Clark, Member

HEARING DATE: January 18, 2011

PLACE: Vancouver, British Columbia

APPEARING: For the Applicant: Self-represented  
For the College: Donald B. Lebans, Counsel

REVIEW OF REGISTRATION DECISION

I DECISION

[1] Upon reviewing the decision of the Registration Committee of the College of Denturists of B.C. (the “College”) in this matter, it is the decision of the Health Professions Review Board (the “Review Board”) to send the matter back to the Registration Committee for reconsideration with the directions set out in the conclusion of this decision.

II INTRODUCTION

[2] This matter is about the Applicant’s request for review of the decision of the Registration Committee to deny the Applicant a license to practice as an active full denturist.
[3] Part of the requirements under the College’s By-laws to be registered in the active full category is successful completion of the examinations required by the Registration Committee.


[5] The CDE is comprised of three sections: laboratory; clinical; and treatment planning and patient records.

[6] A passing score of 65% is required for each section of the OSCE and CDE or the candidate is deemed to have failed, subject to the discretion of the Registration Committee to pass the candidate.

[7] The Registration Committee approved the Applicant’s score as 100% for the clinical portion of the CDE but issued a fail achievement resulting in an overall fail notwithstanding that the Applicant passed all other aspects of the examination process.

[8] The Registration Committee advised the Applicant in its letter dated August 13, 2009:

The members of the exam team considered your case presentation and agreed that you did not correctly assess the situation. Both examiners noted that you described the bite/centric occlusion to be off (incorrect) during your case presentation. However, the examiner’s assessment did not agree with your findings and found the bite/centric occlusion to be on (correct).

Given this, the members of the exam team recommended that the Registration Committee attribute a failing score to the Clinical section. The members of the Registration Committee accepted the recommendation of the examiners and have assigned you a failing score for this examination.

III ISSUES

[9] The Applicant, as a person applying for and refused registration, may apply to the Review Board for review of the registration decision. The Review Board must conduct a review under s.50.54 of the Health Professions Act (the “Act”). The review is on the record.

[10] The Review Board may hear further evidence that is not part of the record, as reasonably required by the Review Board for a full and fair disclosure of all matters related to the issues under review, s.50.54(8).

[11] On completion of the review the Review Board may make an order as specified in s.50.54(9):

(a) confirming the registration decision,

(b) directing the Registration Committee to make a decision that could have been made by the Registration Committee in the matter, or
(c) sending the matter back to the Registration Committee for reconsideration with directions.

[12] If the Review Board is considering making a decision to grant registration with or without limits or conditions, or certification, as the case may be, the standard of review is very strict and statutorily prescribed under s.50.54 (10) of the Act.

[13] This matter clearly does not meet the strict standard of review for the Review Board to direct registration of the Applicant so the issues to be determined are:

(a) should the Review Board confirm the Registration Committee’s decision or send the matter back for reconsideration with directions; and

(b) if the matter is sent back for reconsideration, what directions should be given.

[14] The Review Board has not issued a decision yet on the standard of review for registration decisions where the Review Board may make an order under s.50.54 (9)(a) or (c) of the Act so this issue will be addressed below.

IV BACKGROUND

[15] The Applicant made application to the Registration Committee for registration in the student Class on May 14, 2007 and the Registration Committee accepted his application as a student on June 21, 2007 following their meeting on June 1, 2007. The approved minutes of that meeting are succinct noting approvals of dates for exams, status of negotiations, approval of internship portfolios, approval of student applications such as the Applicant, review of correspondence, discussion of next semester and setting the next meeting date.

[16] There was testimony given at the hearing of this matter regarding the expense and need of the College to schedule and make arrangements with the University of British Columbia (“UBC”) or Vancouver Community College (“VCC”) for appropriate clinical settings at UBC or VCC to conduct parts of the examination process during summer months, thereby, restricting somewhat the flexibility of arranging and conducting the examination process.


[18] The Applicant entered a Mentor Contract on January 21, 2008 which was sent in late.

[19] In early 2008 various correspondence was exchanged between the Applicant and College regarding numerous procedures, deadlines and requirements to be met leading to the Applicant attending the Clinical Examination held July 14-17, 2008.

[20] On May 28, 2008 the Registration Committee met and did not approve the internship portfolio of the Applicant. The Registration Committee resolved to give the
Applicant an opportunity to provide missing information as set out in their meeting approved minutes.

[21] The College sent the Applicant the 2008 Clinical Examination Information Package by letter dated June 12, 2008. The cost of the exam is $1,680.00 (GST included).

The examination package states “Personal Information”

**The role of the Exam Co-ordinator** – The Exam Co-ordinator acts as a resource to the examining team and Candidates. The Exam Co-ordinator is not an examiner, but facilitates the smooth operation of the examination. S/he may observe Candidates during the entire examination and may conduct security checks at any time during the examination.

**The role of the examining team** – The examiners are active full Denturists who are selected to participate in the process of licensure. They are qualified practitioners and professionals. Generally, the examiners do not interact with Candidates; however, due to the nature of the examination they do see Candidates and patients, and they may observe portions of the examination. Attempts to communicate with the examiners are strongly discouraged. Interfering with an examiner may result in the termination of the Candidate’s eligibility. All Candidates are treated equally.

**The role of UBC staff** – UBC staff are a resource for the Exam Co-ordinator and examining team. Candidates should not communicate with UBC staff. Please discuss any needs with the Exam Co-ordinator.

**The role of Registration Committee** – The Registration Committee is responsible for approving the final scores of the examination. After the completion of the exam, there are hundreds of score data points that must be tabulated, assessed and reported to the Committee. The College appreciates this is a stressful time for Candidates and endeavours to complete the analysis as quickly as possible. Please be aware that reporting may take 6 – 8 weeks.

[22] The information package explains to the reader that for the clinical evaluation a majority examiner system is used. If one examiner scores below 65% and one scores above a third examiner conducts an evaluation using the clinical criteria. If the third examiner scores above 65% the candidate is successful. If the third examiner scores below 65% the candidate is unsuccessful.

[23] The information package states:

Once the examiners have completed their clinical assessment, the Candidate must complete their (sic) case presentation. This provides an opportunity for Candidates to explain problems or issues that may have occurred during the exam.

[24] During the hearing the Applicant stated that he had never spoken with the third examiner and none of the three examiners were called as witnesses. The College had no notice the Applicant would say this or opportunity to cross-examine or call rebuttal evidence nor were such rights sought. It is not necessary to this decision to make a finding of fact on this specific factual issue.
[25] It is interesting to note that, notwithstanding the above, the information package specifically warns and strongly discourages candidates from making attempts to communicate with examiners. The package states generally examiners do not interact with candidates.

[26] The information package states:

16. All wax try-ins must be stabilized and of materials which will withstand clinical evaluation. Examiners will be diligent in quickly evaluating the intra-oral requirements.

[27] On August 25, 2008 the Registration Committee wrote the Applicant and advised that the Applicant had passed the Clinical and Treatment Planning and Patient Records but, failed the laboratory section of the CDE, and therefore, failed the CDE overall. The Applicant also failed the OSCE with a total score of 49.25%.

[28] On September 19, 2008 the Applicant wrote the College seeking more detailed exam result feedback. On October 21, 2008 the Registration Committee wrote the Applicant declining to provide additional information as release of certain material might jeopardize future examinations. The Registrar did provide an overview of the OSCE.

[29] By letter dated May 6, 2009 the College invited the Applicant to attend the Clinical Examination on July 21-24, 2009. The Applicant submitted a Clinical Examination Declaration dated June 19, 2009. The College sent the Applicant a Clinical Examination Information Package. The cost was the same as 2008, $1,680.00. The wording of the Clinical Examination Package, as discussed above, was the same.


[31] The matters in issue in this review are the facts surrounding the Applicant’s assessment of the bite (occlusion) of the wax try-in denture he had prepared for his patient. The Applicant concluded the wax denture’s bite was off whereas two of the three examiners concluded differently though their precise conclusions must be examined in more detail. The bite, in simple terms, is how the teeth come together in the closed position. An off bite means the teeth are not coming together in a desirable manner. In technical terminology this involves centric occlusion defined in part as the simultaneous bilateral contact of the posterior occluding surfaces.

[32] In his marking materials the First Examiner wrote a circled zero and circled the words “Any premature contact of any tooth”. This explained in detail why the First Examiner agreed with the Applicant’s assessment the bite was off with a record of the Examiner’s detailed observation as set out in Table L of the Examination record. I conclude Table L has descriptive terminology available for checking or circling for this very reason.

[33] The Clinical Evaluation Criteria form containing the First Examiner’s recommendation for a pass states in large black bold letters with a fully capitalized word “MUST”:

Examiners MUST make notes explaining the reasons for not recommending a passing score.
[34] The First Examiner wrote under Notes:

Re: Centric Occlusion is off, bite appears ______ in 14-15 area, candidate appears aware of this problem (discussed in presentation).

[35] The Second Examiner circled a one on the Table L indicating the bite was on.

[36] On the Clinical Evaluation Criteria the Second Examiner circled a zero in the left hand column but ticked a one in the right hand column. On the final page of the Clinical Evaluation Criteria the Second Examiner did not circle a zero or a one in the left hand columns but ticked a zero in the right hand column.

[37] Under Notes the Second Examiner wrote:

Candidate indicated that Centric bite/relation is off “unbalanced” looking at Centric Occlusion is on. He indicated that it was off. Pt has contact during speaking. Pt is over open after measuring rest.

[38] The Third Examiner circled the one on Table L indicating simultaneous, bilateral contact (bite was on). Beneath Table L the Third Examiner wrote:

Bite is OK (Centric Occlusion).

Denture teeth are not secured in wax.

[39] On the Clinical Evaluation Criteria the Third Examiner circled the one indicating the Applicant had completed the Clinical Evaluation correctly or had prescribed appropriate corrective action. In the right hand column the Third Examiner did not tick the zero or the one and wrote the word “yes”.

[40] On the next page of the Clinical Evaluation Criteria the Third Examiner crossed over the circling of the zero, circled the one and in the right hand column ticked the zero for the Applicant and wrote the word “yes”. It is noted the redaction on this page makes interpretation of the page uncertain without further explanation from the Third Examiner who did not testify.

[41] Under Notes the Third Examiner wrote:

Denture teeth are not secured in wax. Centric Occlusion seems to be O.K.!!! Student said it is off.

[42] During the hearing the Applicant brought the actual patient and the College brought the wax try-in denture used during the 2009 Clinical Examination. The Applicant demonstrated the taking out, putting in and positioning of the teeth. The Panel indicated during the hearing the Review Board would consider the College’s objection to the admissibility and weight of such demonstrative evidence and provide its ruling on this admissibility issue in this decision.

[43] In its written submission the College objected to the admissibility of the demonstrative evidence on the bases that: the Applicant was not qualified to assess the bite; the Applicant was biased; the Applicant was invited to but did not tender expert
evidence; no notice had been given to the College; the Review Board has no ability to assess such evidence as this would require appropriate skill and training; and the College’s expert opinion evidence provides the demonstrative evidence is not reliable and has no value for reasons including changes to the wax try-in denture over the passage of time.

[44] The Applicant was not represented by legal counsel at the hearing and was simply attempting to demonstrate that he was correct that the bite was off, not on. The patient had little to add in his testimony.

[45] The College tendered the expert report of a denturist, Mr. N dated October 7, 2010, whose opinions supported the College’s submission regarding the demonstrative evidence.

[46] Mr. N’s opinions, which this Panel accepts, include:

(a) Centric Occlusion is not a definitive position on every patient;

(b) a try-in denture is formed in wax which is a very unstable material when compared to basic acrylic. It is much softer and molded by hand. The accuracy of the centric can be altered in a very short time if the wax is subjected to any change in air temperature. The try-in procedure itself invites accuracy problems. The patient’s oral cavity is very warm and can cause issues of tooth movement. The same can be caused by how much force a patient uses to occlude the try-in. If a wax try-in denture is not fastidiously reviewed by the denturist, a case can often fail.

[47] The Panel finds that notwithstanding the Registration Committee did not have Mr. N’s report when the Registration Committee considered the Applicant’s 2009 examination results and examiners’ recommendations, the Registration Committee was or ought to have been aware of the facts Mr. N has expressed in his opinions, as two of the three members of the Registration Committee are experienced denturists like Mr. N.

[48] The Panel also finds that the wax try-in denture assessed by the Applicant and three examiners was removed, re-inserted and assessed on at least four separate occasions during the examination process.

[49] The Panel agrees with the College and finds that the demonstrative evidence and opinion of the Applicant as to the status of the bite as tendered at the hearing is not admissible, and if admissible, could not be given virtually any weight.

[50] The Registration Committee meeting on August 10, 2009 was attended by two members in person and one member by teleconference. The minutes of that meeting state:

5. Approval of Clinical Examination Scores – The members of the committee reviewed the Clinical Examination scores as recorded by the College’s examiners. The motions passed assigning a passing mark to a particular candidate and approving the Clinical Examination scores as amended.
[51] Nothing else is said in the minutes of the Registration Committee that would shed any light on any discussion or consideration, if any, of the three examiner’s markings and notes regarding the Applicant. None of the Registration Committee members testified at the hearing. By letter dated August 13, 2009 the Registration Committee advised the Applicant, as noted previously, of his failing score.

[52] The Applicant and his patient signed and submitted a confirmation statement dated September 2, 2009, that the bite was off. This confirmation statement was attached to the Application for Review submitted to the Review Board on September 14, 2009.


[54] The College brought a preliminary application for summary dismissal pursuant to s. 31(1) of the Administrative Tribunals Act S.B.C. 2004 c. 45 which was dismissed on April 27, 2010. See Decision No. 2009-HPA-0039(a).

[55] The parties exchanged Statements of Points and a one day hearing was held on January 18, 2011 at which the Applicant, his patient, and two employees of the College gave testimony. The decision in this matter is factually based on the Record produced by the College and the expert opinions of Mr. N tendered by the College at the hearing. Accordingly, we have considered the testimony given at the hearing but, will not review same in detail in this decision as this decision is based on a review of the Record. We reiterate that the Examiners and Registration Committee Members were not called as witnesses by either the Applicant or College.

V DISCUSSION AND ANALYSIS

[56] In the Review Board’s decision no. 2009-HPA-0001(a)-0004(a) the Review Board noted the use of the word “reasonableness” as discussed in Canada (Citizenship and Immigration) v. Khosa, 2009 S.C.C. 12 at paragraph 59 and the passages discussing “reasonableness” in Dunsmuir v. New Brunswick 2008 S.C.C. 9 at paragraphs 47 and 49. These decisions recognize reasonableness is a deferential standard as certain questions that come before administrative tribunals do not lend themselves to one particular solution and the tribunals have “a margin of appreciation” within a range of possible solutions.

[57] As stated in Dunsmuir:

A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But, it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law....

[58] Registration decisions by their very nature will always fall within a range of reasonable outcomes; pass, fail or conditional pass.
If the registration decision follows a very simple and straightforward examination process the expression of the registration decision should be a relatively simple exercise.

Conversely, where the registration decision is discretionary and involves a complex examination process with conflicting, and in some instances, potentially confusing examination markings and notes, as is the case here, a reasonable decision will in our view require a more careful and detailed explanation of the process and consideration given as to how the decision was arrived at to meet the legal requirement that the decision, to be reasonable demonstrates “justification, transparency and intelligibility within the decision-making process.”

It is not the role of the Review Board to tell the Registration Committee what things it should consider in making its decision to register or not register the Applicant but, upon review of the Record the Review Board should be able to determine that some consideration has been given to discrepancies, inconsistent findings and possible explanation for outcomes where more than one explanation may exist.

While maintaining deference to the experience of the College and Registration Committee to the subject of dentures and registration requirements to practice as a denturist, one might expect the minutes of the Registration Committee’s meeting on August 10, 2009, in the circumstances of the Applicant to state words explaining that:

(a) the discrepancies in the three Examiner’s markings and notes had been considered and investigated for clarification, if necessary;

(b) some explanation had been sought of the Examiners for their different opinions on the bite being off or on as expressed by them in different degrees of precision and certainty;

(c) some consideration of whether there was another explanation for why these inconsistent Examiner opinions arose such as a change occurring to the wax try-in denture as the denturists know may occur; and

(d) the Registration Committee had carefully reviewed not just the scores but, the markings, notes and examination circumstances given it was the Applicant’s second attempt and the Applicant’s outstanding scores as itemized in the Registrar’s letter of August 13, 2009.

The Registration Committee may have considered the above matters or other matters concerning the Applicant’s examination results and Examiner’s notes and markings but, the minutes of the Registration Committee meeting on August 10, 2009, do not demonstrate the existence of justification, transparency and intelligibility in the circumstances of what appears to be a not straightforward result or process.

The Applicant has spent $1,680.00 twice now and must wait at least one year to retake the examination. Given all the circumstances the Record should explain in some detail how and why the exercise of discretion by the Registration Committee was exercised in a justifiable, transparent manner. The Record does not meet this standard.
The letter to the Applicant dated August 13, 2009 is not accurate. The Record does not support the statement “The members of the exam team considered your case presentation and agreed that you did not correctly assess the situation”. There is no evidence on the Record that the First Examiner changed his mind after his initial conclusion of agreement with the Applicant’s assessment. The letter from the Registration Committee does not justify in a transparent and intelligible fashion how the Registration Committee arrived at its decision in the circumstances of the Examiner’s markings and notes. The Third Examiner’s remark that the denture “occlusion seems to be O.K.” is equivocal language compared to the precise findings of the First Examiner. In the Panel’s view a reasonable decision would articulate some justification for the Registration Committee’s decision exercising its discretion against the application in a transparent and intelligible fashion faced with conflicting facts from Examiners.

The Panel concludes the standard of review for inquiry decisions as developed by the Supreme Court of Canada in Dunsmuir is also the test for registration decisions under the Act, but that the focus with registration decisions will be more on the existence of justification, transparency and intelligibility in the decision-making process. As stated later in the same passages of Dunsmuir:

It will suffice to say that while we do not expect Inquiry Committees to give detailed reasons one would expect of a court, Inquiry Committees are well advised to explain themselves and their key findings in sufficient detail so that the complainant and the Review Board will understand the key findings of fact, law and discretion that give rise to the decision on the complaint.

The above passage expresses advice to Inquiry Committees dealing with decisions on complaints and must be appropriately applied to registration decisions, but, where the registration decision involves an exercise of discretion faced with discrepancies in the examination materials and conflicting Examiner opinions, some intelligible, transparent explanation to justify the exercise of discretion is required, commensurate with the circumstances. In our view such obligation has not been met by the Registration Committee in this instance.

VI CONCLUSION

In making this decision, the Panel has carefully considered all the information and submissions before it, whether or not specifically reiterated here.

The disposition of the review is that the matter of the performance of the Applicant at the July 21, 2009 Clinical Examinations and the Registration Committee’s decision on the Applicant’s score will be sent back to the Registration Committee for reconsideration at its next meeting with directions that:

(a) the Registration Committee consider and investigate as it deems appropriate any discrepancies in the Examiners’ notes or markings;

(b) the Registration Committee interview the Examiners as it deems necessary to better understand any discrepancies in their notes or markings and further to consider whether there are any probable explanations for any change in the wax try-in denture during the examination process that would bring into
question the consistency of the observations and opinions of the Applicant and Examiners as to the centric occlusion (bite on or off) assessment process; and

(c) the Registration Committee then render its decision before its next subsequent meeting either confirming or altering its decision of August 10, 2009 regarding the Applicant’s score as it sees fit with a written explanation of its decision that justifies the decision in a transparent and intelligible manner to be delivered to the Applicant and Review Board.

“David A. Hobbs”

David A. Hobbs, Panel Chair
Health Professions Review Board

“Marilyn Clark”

Marilyn Clark, Member
Health Professions Review Board

“Victoria Kuhl”

Victoria Kuhl, Member
Health Professions Review Board

March 7, 2011