DECISION NO. 2012-HPA-020(a)

In the matter of an application under section 50.6 of the Health Professions Act, R.S.B.C. 1996, c. 183, as amended, (the “Act”) for review of a complaint disposition made by an inquiry committee

BETWEEN: The Complainant

AND: The College of Occupational Therapists of BC

AND: An Occupational Therapist

BEFORE: John O’Fee, Panel Chair

APPEARING: For the Complainant: Amber Prince, Advocate

For the College: Angela Westmacott, Counsel

For the Registrant: Lindsay Johnston, Counsel

DATE: Conducted by way of written submissions concluding on February 25, 2013

APPEARING:

I INTRODUCTION

[1] The Complainant applied under s. 50.6 of the Act to review a December 13, 2011 disposition of the Inquiry Committee of the College.

[2] The initial complaint against the Registrant was that he professed opinions in areas where the Complainant felt the Registrant was not properly qualified, made inappropriate assumptions about the Complainant, lacked empathy towards the Complainant and made some factual errors in his report assessing the Complainant.

[3] In her application for review, the Complainant asserts that the Inquiry Committee’s investigation was inadequate because it did not directly and completely address the Complainants concerns regarding the Registrant’s behavior towards her, and further asserts that the College lacks impartiality when dealing with her concerns.
II BACKGROUND

[4] The Complainant met with the registrant for six sessions between August and November of 2010 to assess and assist the Complainant regarding any prospects for employment she might have. The Complainant suffers from severe rheumatoid arthritis, fatigue and depression. The Registrant was treating the Complainant in his capacity as a Disability Management Occupational Therapist.

[5] The initial complaint detailed the issues of concern of the Complainant. The complaint centers around the approach taken by the Registrant towards the Complainant whereby the Complainant stated that she had to be defensive towards what she felt was an aggressive approach taken by the Registrant. She asserted that the Registrant was not qualified to deal with her issues related to depression and that there were factual errors in his assessment report.

[6] For his part, the Registrant acknowledges that the initial sessions were difficult but asserts that the Complainant’s guarded communication style was the reason for this difficulty. The Registrant felt that progress was being made and further stated that he had many years of experience in counseling people suffering from depression and how that relates to chronic pain, work and overall wellness.

[7] The record indicates that the issue relating to factual errors in the assessment report is resolved and no decision in this regard is required by me.

[8] The Inquiry Committee found that the Registrant’s statements and conduct were not inappropriate in the context in which they occurred. The Complainant had also raised concerns about the manner in which the Registrant had responded to her initial complaint. She felt that her character had been attacked and that the Registrant had deflected her concerns by making statements about what other people had said to the Registrant about the Complainant’s conduct towards them. The Inquiry Committee found that the detailed responses of the Registrant and his willingness to further amend his report to address the Complainant’s concerns over factual accuracy underscored the Registrant’s concern for the welfare of the Complainant.

[9] In her application for review, the Complainant expresses a general dissatisfaction with the process and seeks clarification on a number of points. She restates her concern regarding the use of statements attributed to undisclosed third parties regarding her conduct but also seeks to engage some form of “Appropriate Dispute Resolution (ADR)” by which I believe the Complainant meant to state Alternate Dispute Resolution as she then refers to mediation and negotiation as possible avenues for resolution.

[10] The Complainant also raises a number of issues regarding the potential bias of the College including the fact that the College is supported by its fee paying registrants and the fact that the head of the College’s Discipline Committee works at the same facility as the Registrant.
III JURISDICTIONAL ISSUES

[11] This application is brought pursuant to s.50.6(1) of the Act which provides for the Review Board to review the disposition of a matter by an Inquiry Committee of a college. Upon receipt of such an application the Review Board is to follow the directive set out in s.50.6(5) which reads as follows:

50.6 (5) On receipt of an application under subsection (1), the review board must conduct a review of the disposition and must consider one or both of the following:

(a) the adequacy of the investigation conducted respecting the complaint;
(b) the reasonableness of the disposition.

[12] The initial application for review filed by the Complainant does not directly address these two core elements for review. However, the statement of points filed by the Complainant’s advocate is well focused within these jurisdictional limits and has greatly assisted in addressing the areas within my jurisdiction.

IV ADEQUACY OF THE INVESTIGATION

[13] A starting point for considering the adequacy of an investigation is Review Board Decision No. 2009-HPA-0001(a) to 0004(a) at paragraph [98]:

A complainant is not entitled to a perfect investigation, but he or she is entitled to adequate investigation. Whether an investigation is adequate will depend on the facts. An investigation does not need to have been exhaustive in order to be adequate, provided that reasonable steps were taken to obtain the key information that would have affected the Inquiry Committee’s assessment of the complaint. The degree of diligence expected of the College—what degree of investigation was adequate in the circumstances—may well vary from complaint to complaint. Factors such as the nature of the complaint, the seriousness of the seriousness of the harm alleged, the complexity of the investigation, the availability of evidence and the resources available to the College will all be relevant factors in determining whether an investigation was adequate in the circumstances.

[14] Counsel for the College submits that adequate steps were taken to investigate this particular complaint in the context of the seriousness of the matter including reviewing the Complainant’s extensive submissions and the Registrant’s response. The College cites McKee v. Health Professions Appeal and Review Board [2009] O.J. No. 4112 (Ont. S.C.) as support for the assertion that I should give proper deference to the College’s investigation process.

[15] The Complainant’s advocate quite correctly points out that the McKee decision does not bind this panel. While I am well familiar with this decision and I am free to apply the reasoning it contains, I agree that an Inquiry Committee may at times have to assess the credibility of a party to a complaint and cannot simply abandon this issue for lack of direct evidence one way or the other. Review Board Decision No. 2011-HPA-
0036(b) considers McKee at some length and serves as guide for panel members. At paragraph [86] the three member panel concludes as follows:

….the Review Board must resist the temptation to receive evidence going to the merits of the complaint as if it was the first instance decision-maker. Where the Review Board considers “credibility” in the context of the merits of the complaint it can only be for the purpose of determining whether the Inquiry Committee adequately and reasonably exercised its role – whether the Inquiry Committee too easily dismissed a complaint because of “conflicting stories”, or whether it failed to attempt to resolve conflicts in the evidence by pursuing key and important lines of inquiry, which might well have changed the disposition from dismissal to one of the other options in s. 33(6).

[16] That stated, in this case I do not find that the investigation of the Inquiry Committee of the College hinged on credibility issues. It is clear that the College and the Registrant accepted that the Complainant was very upset by the conduct of the Registrant. The Complainant found the Registrant to be too aggressive in their initial sessions and wrote an email to the Registrant to that effect. The complainant lists a series of statements attributed to the Registrant such as “Your physical condition sucks”, “Just showing up isn’t enough”, or “You’re not engaged. You’re not making eye contact”. While the Registrant states that he has no specific recollection of some statements, there is no general denial of the Registrant in making such statements other than to state that they had to be viewed in the context of a therapy session.

[17] The factual narrative of the Complainant and the Registrant is fairly consistent. The Complainant asserts that the statements and conduct of the Registrant failed to meet an objective standard. Using largely the same facts, the College found that the Registrant did in fact meet the required standard.

[18] The Complainant’s advocate also raised the concern of the Registrant’s reply to the initial complaint. Specifically, the Registrant’s assertion that others had approached him concerning the Complainant’s alleged difficulties with other organizations and institutions in the area. The Registrant had stated “As noted, others have voiced to me that they have found her very negative and intimidating, and very difficult to talk to”. The Complainant’s advocate asserts that these comments serve to stigmatize the Complainant and the issues she faces rather than to properly serve the purposes of an adequate investigation.

[19] Counsel for the College asserts that the Registrant’s statements could not be construed as a breach of confidentiality as he was not the person who made the disclosure. Likewise, Counsel for the Registrant asserts that the Registrant cannot be held accountable for what third parties have disclosed to him about the Complainant. They submit that reciting of what others have stated in the context of a complaint investigation does not constitute a breach of privacy.

[20] While this issue is raised by the parties with respect to the adequacy of the investigation conducted by the Inquiry Committee, in my view it goes more to the reasonableness of the Committee’s disposition of this complaint. To assert that the College should have investigated the substance of these third party statements implies that the College should have attached some weight to their value. The investigation
should be centered around the facts of a given complaint rather than unsubstantiated assertions unrelated to the matter at hand.

[21] Given the nature of the complaint and my review of the record, I accept the submission of the College and the Registrant that the College took reasonable steps to obtain the key information to inform its assessment of the complaint. I find that the College sought out sufficient information for it to carry out its mandate and on a reasonableness standard its inquiries were adequate.

V THE REASONABLENESS OF THE DISPOSITION

[22] Review Board Decision No. 2009-HPA-0001(a) to 0004 (a) at paragraph [92] is also cited as the benchmark for the test of reasonableness:

While the Review Board’s application of the test will necessarily reflect its expertise as a specialized administrative tribunal rather than a court, the Review Board’s focus is nonetheless not to step into the shoes of the Inquiry Committee, but rather to determine whether the Inquiry Committee’s disposition falls within the range of acceptable and rational solutions, and is viewed in the context of the whole record, sufficiently justified, transparent and intelligible to be sustained.

[23] Clearly, the Complainant found the sessions with the Registrant upsetting and was not satisfied with his approach to her issues. She found his comments unacceptable and felt attacked by his approach. However, taken at face value, the Inquiry Committee found that the statements attributed to the Registrant were not out of the range of accepted practice for an Occupational Therapist.

[24] Review Board Decision No. 2011-HPA-151(a) at paragraph [37] states: “The College’s function is not to adjudicate the level of satisfaction in respect of their registrant’s service, but rather whether their members have met appropriate standards of practice”. I agree that the Inquiry Committee’s finding in this regard is reasonable.

[25] While not a direct breach of confidentiality, the Registrant’s actions in relaying unattributed comments about the Complainant’s conduct towards others is neither helpful nor probative. As a professional therapist the Registrant should realize that no weight can be given to statements of this sort and they only serve to undermine perceptions of the complaint disposition process. This process is better served when the parties deal solely with the matters in dispute.

[26] While not raised in her advocate’s statement of points, the assertion of bias on the part of the Inquiry Committee is not supported by any evidence presented by the Complainant. All registrants pay dues to their college, partly to support the cost of investigating the conduct of members where required and responding to complaints. There is no basis to assert that this well established system is indicative of bias. The Complainant’s assertions in this regard are unsupported by any evidence.

[27] The findings of the Inquiry Committee are largely supported by the facts. I note that the Committee found that the Registrant and the Complainant had a challenging relationship and that the statements attributed to the Registrant by the Complainant
were not considered to be beyond the scope of proper professional boundaries. This was further underscored by the Complainant wanting to keep the option open of continuing to work with the Registrant. This position was considered by the Inquiry Committee as inconsistent with the Complainant’s assertion that she was treated inappropriately by the Registrant.

[28] Ideally, the College would have indicated to the Complainant that they attached no weight to the assertions by unnamed third parties as to her conduct that was unrelated to the facts concerning her complaint. That stated, the record indicates that the Inquiry Committee did not rely on these statements as a basis for disposing of this complaint. I find that the record indicates that the disposition of this complaint by the College was reasonable in the circumstances, and that the disposition of this complaint by the Inquiry Committee of the College falls within a range of acceptable and rational outcomes that are defensible in respect of the facts and the law.

VI DECISION

[29] My review of the record causes me to conclude that the criteria of the Act have been met. I find that there was an adequate investigation of the facts concerning the complaint and that the disposition of the complaint was reasonable. Pursuant to Section 50.6(8)(a) of the Act I confirm the disposition of the Inquiry Committee of the College.

[30] In making this decision, I have considered all of the information and submissions before me, whether or not they are specifically referred to in these reasons.

“John O’Fee”

______________________________
John H. O’Fee, Panel Chair
Health Professions Review Board

July 10, 2013