

## Scottish Parliament Region: Central Scotland

### Case 200402200: Scottish Executive Health Department

#### Introduction

1. On 23 December 2004 the Ombudsman received a complaint from a group of patients (referred to in this report as the Group) representing the former patients of a general practitioner (GP A). The Group complained that the Scottish Executive Health Department (SEHD) failed to properly manage and advise them on the application process for the replacement of GP A or the appeal against appointment by another GP (GP B).

2. The complaints from the Group which I have investigated concerned the alleged failure of the SEHD to:

- (a) properly handle GP B's notification of appeal;
- (b) notify patients of the outcome of GP B's appeal;
- (c) advise precisely which regulations applied to the re-running of the application process.

3. Following the investigation of all aspects of this complaint I came to the following conclusions:

- (a) not upheld, see paragraphs 13 to 14;
- (b) not upheld, see paragraph 18;
- (c) not upheld, see paragraphs 24 to 26;

4. In the light of these findings, the Ombudsman has no recommendation to make.

#### Background to complaint

5. The complaint concerns the retiral of GP A and the consequent process for appointment of his replacement. GP A operated as a sole practitioner and he

was ultimately replaced by a GP who was part of a multi-GP practice (GP Practice D).

6. There were two reappointment processes leading up to the new appointment. Following the first application process for a replacement there was an appeal to SEHD by the unsuccessful applicant (GP B). The appeal was on the grounds that the position had been awarded illegally to a multi-GP practice not an individual GP. Prior to the introduction of the new GMS contract (see paragraph 9) this was not legally possible as contracts could only exist between an individual GP and a Health Board. The appeal was, therefore, successful and a second appointment process was initiated. The Group complained that SEHD did not properly administer the appeal or the consequent re-running of the application process.

7. The Group also raised a complaint with this office against Lanarkshire NHS Board (Report 200401800) concerning some of these matters. A brief chronology of events appears at Annex 1, a list of names used appears at Annex 2 and a summary of the background regulation and legislation appears at Annex 3.

### **Regulatory Background**

8. Much of this complaint relates to the process of appointing a replacement GP for GP A's patients. The Scottish Public Services Ombudsman Act 2002, Schedule 4, paragraph 8 excludes this office from investigating:

*'Action taken in respect of appointments or removals, pay, discipline, superannuation or other personnel matters'.*

While this has not precluded my consideration of all the matters raised by the Group, it has limited the scope of any findings or recommendations. Where this is the case, I have mentioned it in my findings.

9. In April 2004 a new General Medical Services (GMS) contract came into force. This established a new basis for the relationship between a GP and the local area Health Board. The new contract exists between the Health Board and the GP practice as opposed to the previous situation where a contract existed with each individual GP. This was a major change with the intention of giving practices greater freedom to decide how to design their services to best meet local needs. This change was implemented during the time of the events

of this complaint.

### **Investigation and Findings of Fact**

10. The investigation of this case involved reading all the documentation supplied to me by the Group and the SEHD. This included letters sent by the Group and the SEHD, correspondence with a Member of the Scottish Parliament (MSP 1) and extracts from Scottish Parliamentary questions. In particular I have seen copies of all letters referred to unless stated otherwise. I also made written enquiries of the SEHD and met with representatives of the Group on two occasions. I also considered current legislation and guidelines. I have referred to several Regulations – these are detailed in Annex 3. The Group and SEHD have had the opportunity to comment on a draft of this report.

#### **(a) The Scottish Executive Health Department failed to properly handle GP B's notification of appeal**

11. The Group told me that GP B lodged an appeal with the SEHD on 7 February 2004. I am advised by the Group that GP B sent his letter of appeal by recorded delivery. The Group complained that when their representative called the SEHD shortly before the deadline for the appeal (approximately mid-February) to confirm that the appeal had been received, no trace of the original letter could be found and a copy had to be faxed through.

12. The SEHD commented that the copy of the letter of appeal retained on their file did not indicate whether it was sent by fax or recorded delivery. They cannot, therefore, confirm how it was received. They told me that, however it was received, it was acknowledged in writing on 19 February 2004.

#### *(a) The Scottish Executive Health Department failed to properly handle GP B's notification of appeal: Conclusion*

13. Based on the evidence available to me I am unable to conclude whether or not the SEHD received GP B's original recorded delivery letter and subsequently followed appropriate administrative procedures. I have received no evidence that this letter was ever sent – but have no reason to doubt that it was.

14. I cannot identify when the appeal was received and I cannot usefully comment on whether or not SEHD responded to this promptly. I do not uphold this aspect of the complaint.

**(b) The Scottish Executive Health Department failed to notify patients of the outcome of GP B's appeal**

15. The Group advised me that they were informed by a Member of the Scottish Parliament (MSP 2) on 13 May 2004 that the appeal had been successful but that they received no official notification until 24 May 2004. The delayed notification was sent to all former patients by Lanarkshire NHS Board.

16. The SEHD said that the notification of appeal was posted to GP B on 14 May 2004. Letters were sent to other interested parties (this included the Group) on 18 May 2004 – this delay was deliberate to ensure the parties directly involved ie the applicants, received notification of the outcome first.

17. The SEHD also advised me that there was no requirement for the Board to notify the patients, although they consider it a reasonable course of action.

*(b) The Scottish Executive Health Department failed to notify patients of the outcome of GP B's appeal: Conclusion*

18. I accept the SEHD's explanation and reasons for the difference in time between notifying those subject to the appeal and the interested parties. I accept that it was necessary to ensure that the parties to the appeal received official notification first and do not find any failure in administration in this regard. I do not uphold this aspect of the complaint.

**(c) The Scottish Executive Health Department failed to advise precisely which regulations applied to the re-running of the application process**

19. Following GP B's successful appeal against the original appointment, the Group were informed in writing by the SEHD that Lanarkshire NHS had been directed to re-advertise the post. On 25 May 2004 all patients received a letter from Lanarkshire NHS to this effect. The Group received a further letter from Lanarkshire NHS dated 16 June 2004 specifying that the vacancy was to be filled with due regard to The National Health Service (General Medical Services) (Scotland) Regulations 1995.

20. At a meeting with the Chief Executive of Lanarkshire NHS on 6 July 2004, the Group told me that the Chief Executive confirmed the re-run would be in the same format as before - a fact confirmed in his letter to the Group dated 12 July 2004. The Group complained that it was not until a letter was received from the Board on 18 August 2004, informing patients that a new appointment had been made, that there was any indication that 'The General Medical

Services (Transitional and Other Ancillary Provisions) (Scotland) Order 2004' (the GMS order) applied to the vacancy. The letter also advised that there was apparently no facility for appeal. The GMS order came into effect on 1 April 2004 – during the time the appeal was being considered.

21. Several letters were exchanged between the SEHD and the Group (supported by MSP 1). These letters made reference to legal advice being sought by SEHD as to the application of the regulations.

22. The Group complained that the SEHD did not provide them with accurate or sufficient information regarding the regulations. They further complained that the right of appeal has been removed. They also contest the SEHD interpretation of the regulations.

23. The SEHD commented that all correspondence between the SEHD, Lanarkshire NHS and the Group on the matter of the appeal was accurate as to the provisions of the new regulations. They told me that they sought legal advice prior to issuing a response to the Group and the content of this advice is reflected in their response to the Group of 7 September 2004.

*(c) The Scottish Executive Health Department failed to advise precisely which regulations applied to the re-running of the application process: Conclusion*

24. The regulations governing the initial appointment, the appeal and the re-run are many and complex and changed significantly over the time of these events. The appeal and its subsequent re-run was a unique event that could not occur under the new regulations. It is not the role of this office to determine the correct legal interpretation of the regulations – that is a matter for the courts. I am satisfied that the SEHD acted appropriately in seeking legal advice on the regulations and that there was no deliberate attempt to mislead the members of the Group.

25. The new General Medical Services Contract for GPs introduced on 1 April 2004 empowered Health Boards rather than the SEHD to make GP appointments and thus removed the right of appeal to the Minister. The new contract and regulations were passed by the Scottish Parliament. It was a decision of the Scottish Parliament that removed the right of appeal. It is not the role of this office to investigate decisions taken by the Scottish Parliament.

26. I am satisfied that SEHD properly administered its interpretation of the regulations and do not uphold this aspect of the complaint.

30 May 2006

**Chronology of Events**

October 2003	GP A tenders his resignation
30 January 2004	GP B is unsuccessful in his application for the vacancy - he later lodges an appeal
10 March 2004	All patients received a letter of notification of GP A's retiral and arrangements for cover
1 April 2004	New General Medical Services (GMS) Contract comes into effect
13 May 2004	The Group advised by telephone that the appeal has been upheld
25 May 2004	All patients received a letter advising of the successful appeal
6 July 2004	Meeting between the Group and Board representatives
1 October 2004	GP Practice D formally take over responsibility for GP A's patients

## Annex 2

### List of persons referred to in the report

The Group	A group representing the patients of GP A
GP A	The GP whose retiral caused the vacancy to arise
GP B	The GP who was unsuccessful and whose appeal against the decision was upheld
GP Practice D	The group GP practice who took over responsibility for GP A's patients on a temporary and then permanent basis
MSP 1 & 2	Members of the Scottish Parliament representing constituents within the Board area



**List of Legislation and Regulation referred to in the Report**

National Health Service (Scotland) Act 1978

National Health Service (General Medical Services) (Scotland) Regulations 1995

National Health Service (GMS Supplementary Lists)(Scotland) Regulations 2003

The General Medical Services (Transitional and Other Ancillary Provisions) (Scotland) Order 2004