Ombudsman
SASKATCHEWAN

Recommendations 2011

First Quarter Update

January - March 2011

Written notification to an individual
Each recommendation is the
against whom an adverse decision
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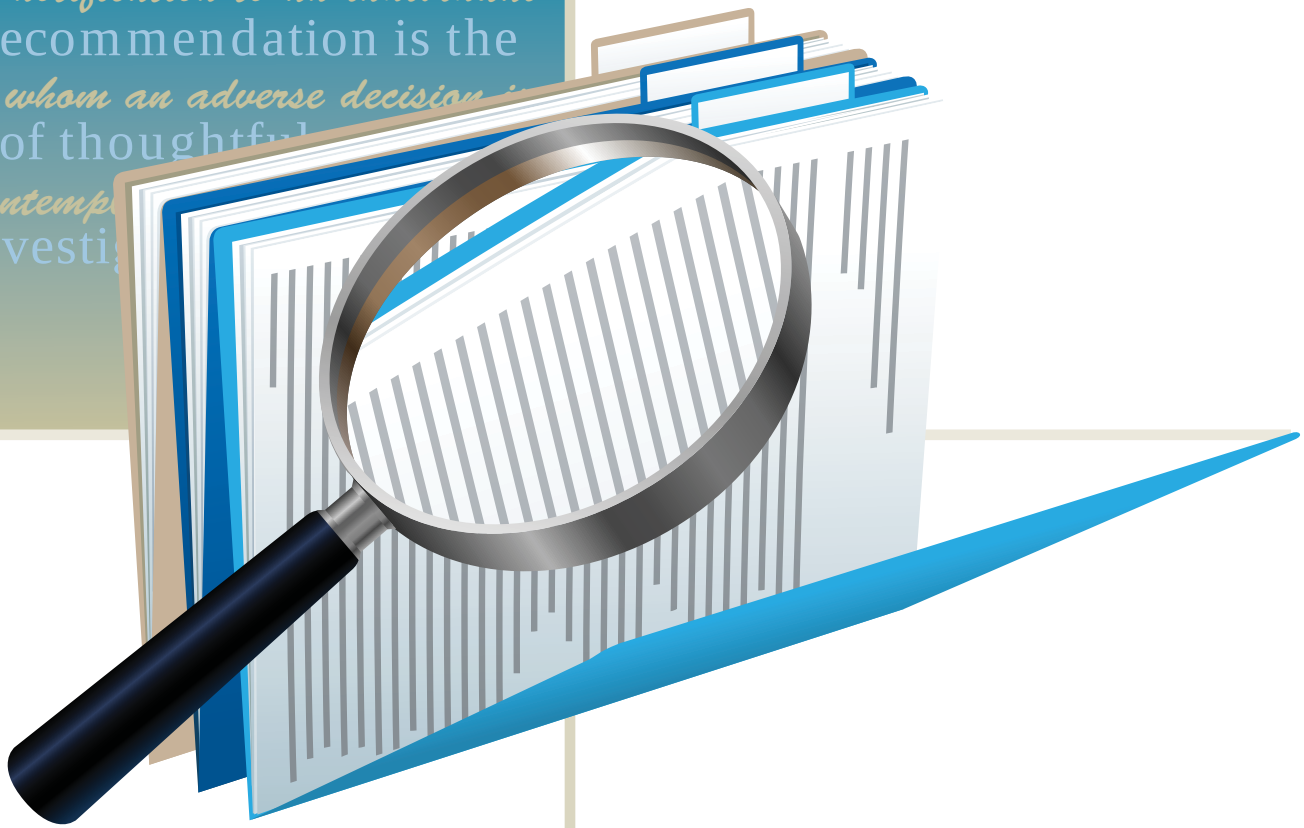

Overview

At Ombudsman Saskatchewan, we promote and protect fairness in the design and delivery of government services. One of the ways our office does this is by taking complaints from citizens about unfairness in government services.

We assess each complaint we receive to determine whether it is within our jurisdiction and if so, what is the most appropriate method of service: coaching, negotiation, mediation or investigation. For those complaints that require investigation, several outcomes are possible. For example:

- We may determine that the government office was fair and that no further action is needed.
- The government office may discover and voluntarily correct an error.
- We may recommend that the government office make a change or do something differently.

An Ombudsman recommendation is different from a suggestion and is a much more formalized process. Each recommendation is the result of thoughtful research and investigation. It may be specific to the individual that brought the complaint or it may be broader, impacting policy, processes and future interactions for many people.

Although government is not obligated to accept our recommendations, it usually does - and so it should. Recommendations are not made lightly and the applicable government office always has an opportunity to review and comment on a recommendation before it is finalized. This step, which is mandated by The Ombudsman and Children's Advocate Act, is part of a fair process and provides an opportunity for government to state any objections they may have or challenges they may face in implementing the recommendation.

Unless there is some good reason to withdraw or change the recommendation, it remains as it is. It is then up to the ministry or government agency to determine whether it will comply with the recommendation and respond accordingly.

For files that were closed in the first quarter of 2011, Ombudsman Saskatchewan's recommendations statistics are:

Recommendations Made: 7
Accepted: 7
Partially Accepted: 0
Not Accepted: 0

Recommendations

Following is a brief description ot the complaints that resulted in recommendations and were closed during the first quarter of 2011. The names of those involved have been changed to protect their privacy.

Trying to Succeed

Ministry of Social Services – Income Assistance and Disability Services

Dillon, a 20-year-old social assistance recipient, decided to go back to school and complete his grade 12. He had concerns for his safety in his home community so he moved to a city, where he registered for school and found a place to live. He applied for continued social assistance and began receiving partial benefits while attending school.

His social worker told him that he would have to attend 80% of classes in order to continue receiving benefits. He tried to stay with friends and relatives, but their lifestyles made it difficult for him to get a good night's rest and attend school. He had to move a couple of times and when he did, the worker held his benefits until he had a valid address, making it difficult when he could not pay rent.

By the end of the fall semester, his attendance was quite low and his social worker again held his benefits. She requested a case planning meeting where she reminded him that his attendance would need to improve, but did not offer any assistance in finding another place to live or making plans to improve attendance. He was left on his own to sort out his problems and stay in school. He tried to attend more regularly, but was still not achieving 80% attendance. At the end of January, his benefits were cancelled.

He wanted to appeal the decision and the school guidance counselor went with him to the Social Services office. The receptionist told them that he could not appeal the decision because he did not have an address. The guidance counselor offered the school's address, but they were told that this would not work; it had to be a residential address. He was not allowed to speak with his worker because he was now off benefits and therefore had no worker. The guidance counselor was not familiar with the social assistance policies, so did not insist.

Dillon was frustrated and the guidance counselor referred him to an advocate, but he was too upset to pursue the complaint and returned to his home community. The advocate thought it was a worthwhile concern and brought the issue to our attention, although she was not sure if Dillon would pursue the matter.

Our investigation focused on three issues:

1. **Dillon's urgent need for funding so he could complete school**

   Dillon did return to the city to restart classes. He re-applied for assistance and since he was expected to graduate in June (less than six months later) and get a job, he was eligible for the Transitional Employment Allowance (TEA) instead of the Social Assistance Program (SAP). He also found a new place to live which was a more supportive environment.

2. **The refusal to accept Dillon's appeal**

   The decision not to allow Dillon to appeal because he had no address seemed to be contrary to Social Services' policy. Dillon's social worker told us she did not know about his attempt to submit an appeal and that she would have agreed to see him if she had known he came in. Other officials at the Ministry confirmed that, even without an address, he should still have been able to appeal the decision and speak to a worker.

3. **Policies interpreted and applied to vulnerable students, which impact their success**

   Our investigation found that there is no policy requiring students to attend a certain percentage of classes in order to maintain benefits. Dillon's worker told us that this requirement was part of the plan she had set up with him, that other workers suggested 80% attendance as a good target, and that Dillon had signed his case plan, thereby agreeing to 80% attendance.

   While this may be a reasonable requirement in many cases, it is not policy. The worker did not ask Dillon what level of attendance he thought he could achieve, but took his signature as agreement to 80%. For a vulnerable young adult trying to cope with difficult living arrangements, his level of desperation may easily have outweighed his inclination to challenge her assumptions or explain his situation in greater detail. As a result, the matter was unexplored, he did not have a stable place to live, he failed to attend enough classes, he lost his benefits and then had no income to pay rent, so lost his ability to find another place to live

   In past cases, we have heard reference to a requirement for 80% attendance, so it was clear that this was not a unique target based on Dillon's needs. There was also no mention of the target in policy, so it was essentially an unwritten rule.

Recommendations

1. That the Ministry ensure its general reception staff have an understanding of the appeal process provided by *The Saskatchewan Assistance Act* and Regulations to allow them to provide accurate and factual information to the general public when required.

   Status: Accepted
   The Ministry confirmed that it will also ensure that all Income Assistance Service Delivery (IASD) staff are reminded of the appeal processes available to clients and that there are processes in place that clients can use to arrange for an appeal if they do not have an address.

2. That the Ministry review the current unwritten rule with respect to school attendance for the adult student receiving benefits while attending high school in consultation with the appropriate officials in the Ministry of Education and respective school divisions to determine if school attendance should be a factor in the continuation of income assistance benefits for the adult student attending a high school program.

   Status: Accepted
   The Ministry confirmed that the Saskatchewan Assistance Program manual's guidelines about case planning are flexible enough to ensure appropriate discretion be used on a case-by-case basis.

3. That the Ministry of Social Services ensures that all high schools across the province are aware of the supports available from the income assistance programs for adult students and that this includes information about the available appeal avenues.

   Status: Accepted
   The Ministry sent a letter to senior school board officials to ensure that all high schools across the province would be aware of the supports available from the Income Assistance Programs for adult students, including information about appeal processes.

How Was She to Know?

Office of Recidential Tenancies

Denise had a dispute with her landlord, who took the matter to the Office of Residential Tenancies. A hearing took place and Denise was told that she would receive a decision within 45 days. She was eagerly awaiting this information because of the potential impact on her finances and where she would live. It arrived 58 days after the hearing.

Denise disagreed with the decision and believed it contained factual errors. Instructions at the bottom of the decision indicated that:

"Any person who is aggrieved by a decision or order of a hearing officer may appeal the decision or order on a question of law or of jurisdiction to a judge of the Court of Queen's Bench within 30 days after the date of the decision or order."

Based on this information, Denise believed that she should appeal the decision to the Court of Queen's Bench. The court dismissed her appeal because it was not based on a question of law or jurisdiction. She then discovered that the proper avenue of recourse would have been to take the matter back to the Office of Residential Tenancies within 15 days of the decision and request a review. By now, more than 15 days had passed and although Denise tried to convince the Office of Residential Tenancies to consider her information, it would not make an exception to the deadline.

Frustrated, she contacted our office with three complaints:

- that the decision took too long
- that the Office of Residential Tenancies did not specify that she could not take a question of factual error to the Court of Queen's Bench
- that the Office of Residential Tenancies did not inform her of the review process for errors set out in Section 76 of *The Residential Tenancies Act*

During the course of our investigation, we turned to *Hearing Back: Piecing together Timeliness in Saskatchewan's Administrative Tribunals*. *Hearing Back* was a report we issued in 2007 that dealt with matters of timeliness and best practices for administrative tribunals such as the Office of Residential Tenancies. The report recommended that tribunals establish timelines for decision-making after a hearing and in circumstances where those timelines cannot be met, the tribunal should notify the consumer, providing reasons for the delay and a date when the decision will be ready.

In reviewing Denise's situation, we found that the Office of Residential Tenancies had an unwritten guideline that hearing officers would complete decisions within 40 days of a hearing. This was a step in the right direction, but it was not part of written policy and there was nothing in the policy to say that the parties should be contacted in the event of a delay and provided with reasons and a new timeline.

We found that, based on best practices, the Office of Residential Tenancies should have specified where to take a question of factual error and should have informed Denise of the review process available and the 15-day deadline to request a review. The Office acknowledged that there was merit to Denise's complaint and allowed her to apply for a review under Section 76 of *The Residential Tenancies Act*, even though the deadline was past.

The Office of Residential Tenancies took steps to remedy this complaint, devised a plan and made changes to the appearance and contents of decisions. These changes would ensure that tenants and landlords would be aware of the appropriate steps for handling concerns on decisions when they disagree on fact, law or jurisdiction. Our office was provided an opportunity to offer feedback on the wording of the new forms and the changes are now in effect.

These voluntary changes addressed almost all of Denise's concerns, leaving us with only one recommendation to make.

Recommendation

1. That the Office of the Residential Tenancies implements Recommendation 13 made in the report *Hearing Back: Piecing Together Timeliness in Saskatchewan's Administration Tribunals.*

   Recommendation 13 from *Hearing Back*: Government and tribunals work together to implement policy timelines within which hearings must be held and decisions must be made. The timelines must be readily available to consumers. In the event a timeline is breached, the decision-maker must provide the parties with the reason for the breach and a new timeline for rendering the decision.

   Status: Accepted

Notice Needed

Office of Residential Tenancies

Doug attended a hearing at the Office of Residential Tenancies Office and it was decided that the hearing should continue on subsequent dates to allow for the evidence and arguments to be presented. A few weeks later, Doug received a letter banning him from the Office of Residential Tenancies. It said that he could have someone represent him or he could attend by telephone. Doug did not think this was fair and contacted our office.

Our investigation found that, based on Doug's behaviour, the decision itself was not unreasonable, but the Office of Residential Tenancies did not use a fair process. With situations like this in mind, Ombudsman Saskatchewan produced a guide in 2009 titled Practice Essentials for Administrative Tribunals, which was shared with tribunals across the province.

As noted in the guide, those who will be directly affected by a decision must be given adequate notice that a decision is going to be made. The notice should include brief information about who is involved, what the issues are, what decisions may be made and what may be the potential consequences or outcomes. Notice has to be provided in sufficient time to allow the affected person to have a reasonable opportunity to respond.

In order that they can prepare a proper reply, persons directly affected by a decision have to be given all the relevant information about the case. This generally means that a decision maker must disclose any relevant information about the case that is in the decision maker's possession.

In this case, Doug did not know that a decision was going to be made and he was not provided with the information that led to the decision. He was not informed of the potential consequences or outcomes nor was he given an opportunity to be heard. He was simply told via a letter that he was not allowed to enter the premises of the Office of Residential Tenancies.

Recommendation

1. That where the Office of Residential Tenancies intends to make a decision adverse in interest to a particular individual, that individual is to be given adequate notice that a decision is going to be made, information as to the issues and consequences and be provided with an opportunity to reply.

   Status: Accepted

How is That Search Going?

Public Guardian and Trustee

When Dan passed away, he had some money, but left no will. It was now the job of the Public Trustee's Office to collect a list of beneficiaries and establish distribution of the funds. To ensure a complete and accurate list of beneficiaries, the Public Trustee hired an heir locator.

A few years later, the heir locator contacted Dorothy and she was informed that she was one of the beneficiaries. About five years after that, no funds had been distributed and Dorothy, who was quite elderly, wondered whether she would survive to receive her portion. She contacted our office.

We investigated the matter found that there is no time limit stated in *The Intestate Succession Act, 1996,* and in some cases, the search may take considerable time. The administrator cannot pay out funds to the wrong persons, and will not pay out the funds until the heir locator has exhausted his or her search. Our research found that this practice is similar to other jurisdictions in Canada.

While the work of the heir locator had to follow its due course, we noted that Public Trustee's Office did not require the heir locator to provide regular reports on his progress. As a result, sometimes as much as six months or more passed between reports. Nor did the Public Trustee's Office have a process for reporting back to the known beneficiaries. Without knowledge of the progress being made towards completing the search for other heirs, Dorothy could only wonder how much longer she would have to wait.

We made two recommendations to improve reporting. While this would not necessarily speed up the heir location process, it would make that process more open and accountable.

Dorothy's matter was also concluded at the Public Trustee's Office. During the course of our investigation, the heir locator for Dan's estate completed his search and the Public Trustee's Office made preparations to pay out the funds to the beneficiaries.

Recommendations

1. That the Public trustee develop and implement policy that outlines the contractual obligations of the heir locator and the responsibilities of the Public Trustee and includes the reporting obligations of the heir locator to the Ministry and the Ministry to the heir locator in instances where the Public Trustee engages an heir locator to locate beneficiaries of an estate.

   Status: Accepted

2. That the Public Trustee develop and implement policy that outlines the reporting obligations of the Public Trustee to beneficiaries in instances where the Public Trustee has engaged an heir locator to locate beneficiaries of an estate.

   Status: Accepted

Recommendation Update: Ease the Pain

Workers' Compensation Board

In our *Annual Report 2008*, we reported on a complaint from "August" who wanted the Workers' Compensation Board to cover the use of prescribed medical marijuana or Marinol (a synthetic form of marijuana) for the pain he was experiencing. The recommendation we made on this case was not accepted by the WCB, but the Board did indicate that it was prepared to study the issue. A study has now been completed and shared with our office. Following is a reprint of the original case story with the addition of the study results.

August injured his back more than 20 years ago and has had numerous surgeries on his spine. He receives full compensation from WCB and is considered unemployable. Over the years, his doctors have prescribed various ways to manage the pain, including very potent pain relievers with limited success. Eventually, a neurosurgeon recommended marijuana, which August began using in 1998.

In 2003, August applied to Health Canada for approval to use marijuana for medical purposes. His application included medical declarations from two neurologists that the marijuana was meant to help him deal with the pain from his surgeries, that other conventional treatments were not appropriate, and that the benefits would outweigh the risks. The application was approved.

In addition to the medical marijuana, August was also prescribed Marinol which is a synthetic form of marijuana. For about two and a half years, the WCB covered August's use of Marinol. They then decided to cease coverage retroactively, leaving him with an unpaid pharmaceutical bill of $2,000. Later, they reviewed this decision and decided to pay the bill and continue coverage for a short time so he and his doctor could find alternate treatment.

During this time, August made repeated requests and filed a number of appeals about the WCB's decisions to deny coverage for his medical marijuana and his prescription for Marinol. His doctor affirmed that the Marinol helped August manage his pain and control the nausea he experienced when taking certain other pain medications. The WCB, when making its decisions, referred to the "indications" listing in the Saskatchewan Health Drug Formulary Plan or the Compendium of Pharmaceuticals and Specialties. Based on this information, the WCB said that Marinol was really only indicated for severe nausea and vomiting associated with cancer chemotherapy and for Aids-related anorexia. It was not indicated for other types of pain management or nausea control.

August contacted us and we investigated. We reviewed the WCB's policy on reimbursement for medications. It states that approval be based on the following criteria:

a. it is prescribed by the treating physician
b. it is appropriate and needed to treat the compensable injury and/or
c. the use of the medication corresponds to the indications listing in the Saskatchewan Health Drug Formulary Plan or the Compendium of Pharmaceuticals and Specialties, or
d. it is approved by the Workers' Compensation Board (WCB) Medical Consultant.

While we could understand that WCB's usual preference is to follow the Formulary Plan or Compendium, we also saw some room in their policy to weigh the options and approve coverage for August's use of Marinol. We were aware that the College of Physicians and Surgeons supports evidence-based medicine and was not certain of the safety and efficacy of the use of medical marijuana. However, they still permit licenced physicians to prescribe Marinol and medical mari-

juana, the latter with Health Canada approval. Two specialists, as well as August's family doctor, supported his use of Marinol and confirmed that it was successfully treating his pain.

As a result of our findings, we recommended that the WCB approve payment to August for his use of Marinol. WCB did not accept our recommendation and continued to be of the view that its use for the condition August suffered was not in keeping with the College's position supporting evidence-based medicine. In particular, they told us that they do not approve any medications that are not in the formulary. While they did not accept our recommendation, they were prepared to seek other evidence on the treatment. We were unable to find a remedy for August but we were hopeful that the Board was prepared to study the issue, which leaves the door open to reconsidering our recommendation.

We followed up with the WCB and learned that the Board had conducted its study with a group of 20 patients, performed a literature review and consulted with other jurisdictions. Based on this research, the WCB decided to continue its practice of not covering use of medical marijuana or Marinol for alleviation of chronic pain.

Our office thanks the WCB for reviewing this matter. Given the small sample size, we are not satisfied that the WCB's study is scientifically valid, and we agree with the need to supplement these results with other research. From the perspective of general approach and practices, we understand WCB's rationale for this decision. It is still our view, however, that WCB's existing policy provides room for the Board to weigh the options and approve coverage in special situations, particularly in a case such as August's where two specialists prescribed the treatment.