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War Pensions Number

## VETERANS' ENTITLEMENTS APPEAL BOARD

**Name:** Tā Harawira Tiri GARDINER (deceased)

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**Service Number and Rank:** G30780, Lieutenant Colonel, New Zealand Army

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**Address:** [REDACTED]

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**Grounds of appeal:** Appeal against the 4 February 2022 decision of the Review Officer to uphold the decision of the Decision Officer dated 20 September 2021 and decline to accept Malignant Neoplasm of the Brain (Glioblastoma) as a service-related condition under the Veterans' Support Act 2014 (**the Act**).

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**Preliminary hearing held:** via Zoom on 11 April 2022

**Parties:**

The Appellant, the Estate of Tā Harawira Gardiner, represented by Mr Ross Himona, The Honourable Hekia Parata (Lady Gardiner), Mr Robert Todman, Senior Support Advisor RNZRSA and Ms Janet Castell, District Support Manager Wairarapa/HB/EC RNZRSA.

The Respondent, Veterans' Affairs New Zealand, represented by Ms Tracy Lamb Assistant Director Legal Services Veterans' Affairs, Ms Marti Eller, Deputy Head Veteran's Affairs, Dr Mike O'Reilly, Principal Clinical Advisor, Ms Ann-Marie Tribe, Manager Decisions and Entitlements and Ms Paula Carr, Team Leader Decisions Team

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**Outcome of preliminary hearing:**

The Appeal Board finds that the Review Officer acted in breach of section 220(2) of the Act when he conducted the review after having had previous involvement with the Appellant's claim for Malignant Neoplasm of the Brain (Glioblastoma) as a service-related condition under the Act.

That was a jurisdictional error, so the Review Officer's 4 February 2022 decision is revoked pursuant to section 237(1)(c) of the Act.

The matter cannot be remitted to the Respondent to make the decision again as the Respondent has indicated through counsel that it has predetermined the matter. Therefore the substantive matter will proceed to a hearing before the Appeal Board for decision pursuant to section 237(2)(a) of the Act.

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# PRELIMINARY DECISION

This is an appeal on behalf of the late Lieutenant Colonel Tā Harawira Tiri GARDINER against the 4 February 2022 decision of the Review Officer to uphold the decision of the Decision Officer dated 27 September 2021 and decline to accept Malignant Neoplasm of the Brain (Glioblastoma) as service-related under the Veterans' Support Act 2014 (**the Act**).

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## Background relevant to the preliminary hearing

### Qualifying service

The Appellant served in the New Zealand Army between 11 January 1963 and 12 July 1983.

He has qualifying routine service from 11 January 1963 to 3 June 1969 and from 9 May 1970 to 31 March 1974.

He has qualifying operational service in the Viet Nam War from 4 June 1969 to 8 May 1970.

The Appeal Board thanks the Appellant for his service.

### Diagnosis

The Appellant was diagnosed with glioblastoma on 28 July 2021.

### Involvement of case manager

On 5 August 2021 Veterans' Affairs contacted the Appellant and advised that [REDACTED] had been appointed as the Appellant's case manager.

On 9 September 2021 Ms Janet Castell emailed the Appellant's case manager [REDACTED] about the *Kenyon* decision, made under War Pensions Act 1954, which accepted glioblastoma as related to service in Viet Nam. She asked:

If the opportunity exists I request that this successful Appeal be brought to the attention of the appropriate persons within VA.

That did not occur.

### Decision Officer's decision

On 20 September 2021 the Decision Officer declined to accept the Appellant's claim for glioblastoma as a service-related condition because

- He was not diagnosed during his operational service
- Glioblastoma is not a presumptive condition for Viet Nam
- No factor in the SOP Malignant Neoplasm of the Brain No 85 of 2016 was met.

### Dr O'Reilly becomes involved at Veterans' Affairs request

On 21 September 2021 staff at Veterans' Affairs discussed how to inform the Appellant of the Decision Officer's decision

In giving evidence at the hearing, Dr Mike O'Reilly, Principal Clinical Advisor said that on 24 September 2021 Ms Marti Eller, Deputy Head Veterans' Affairs, emailed him suggesting a process for communicating the decision to the Appellant, given his profile.

On 27 September 2021 Dr O'Reilly rang the Appellant's general practitioner Dr Thompson with a view to seeing whether any other conditions could be accepted as service-related.

On 27 September 2021 Dr O'Reilly emailed Ms Sharon Cavanagh, Rehabilitation Officer [REDACTED] and copied the email to the Appellant's case manager [REDACTED], Mr Dave Williamson and Ms Eller. The email stated:

Ref – Phone call to Dr Thompson (Sir Wira Gardiner) Sharon C

WRT our chat

- I have rung Dr Thompson and will assess the likelihood of other claimed conditions.
- Principal concerns for HP [Hekia Parata] are
  - Access to home modifications etc for palliative care
    - o Hospital bed
    - o Wheelchair
    - o Temporary ramp and rails
  - Hospital bed and wheelchair are not being provided by DHB because for the moment he is mobilising
  - We can provide support through the VIP framework to mitigate some of the whanau's burden in a similar manner to that provided in a recent case.

Actions to follow

- Appellant's case manager [REDACTED] to contact Hekia Parata and explain what we can do while awaiting the decision ASAP
  - o Access or funding of hospital bed / comfy chair / wheelchair etc
- Appellant's case manager [REDACTED] can I talk to you tomorrow morning? You could talk to Mel about what we did for Mr \*\*\* as well.
- Link with Rehabilitation Officer [REDACTED] to cover off what they require.

On 28 September 2021 Ms Cavanagh emailed the Appellant's case manager [REDACTED] and copied in Dr O'Reilly as follows:

I have meetings scheduled and the intention is to have me and Mike O'Reilly on the call as well so that where we are up to at this point with the claim can be communicated. Mike is the very best person to explain the SOP but we are also looking at what else we can do and/or suggest. I don't think we are quite ready to have this meeting apopo and Mike is going on leave from Thursday so I need to check with him first as to availability. I am also going on leave from Tuesday afternoon and will be unavailable from then until the 12 October inclusive. Once I know what Mike's thoughts are [REDACTED] I will come back to you and also communicate directly with Hekia as I am keen to front up to have the conversation with her so either MS Teams or Zoom if she can otherwise phone will do. We can provide VIP services; we can meet the cost of the hospital bed, wheelchair, and any other aids and

appliances that may be required at home. Under normal circumstances we would obtain an OT assessment however we don't have the luxury of time around that and Mike as a clinician knows from another case that needing to move on these things is critical assuming Hekia and Sir Wira would like this level of support. Time is clearly of the essence here although I know Hekia has said he is responding well to treatment which is fabulous. Thanks [REDACTED] – I will come back to you as soon as I am able but meantime between 10-12 tomorrow won't work for me as I am already committed. Mike – I am in the office tomorrow although I do have meetings scheduled so maybe we can connect first thing?

### **Decision Officer's decision conveyed to Lady Gardiner by Zoom**

On 4 October 2021 Dr O'Reilly and Ms Cavanagh attended a meeting by Zoom with Lady Gardiner to enable the Respondent to communicate the decision "face to face".

An email from Ms Cavanagh to the Appellant's case manager [REDACTED] and Dr O'Reilly dated 5 October 2021, copied to Ms Eller and Ms Ann-Marie Tribe contained Ms Cavanagh's record of the meeting. It stated in part:

Kia ora [REDACTED] and Mike

Please find below in italics the summary of our Zoom hui with Lady Hekia Parata. I had made contact directly with Lady Hekia providing options for me to get in front of her as close to kanohi ki te kanohi as possible at this time to provide her with an update and the claim decision, including by phone call, Zoom or MST along with suggested dates and times and the choice was hers and I would then set up and send her the details. I had advised her Sir Wira's SCM [REDACTED] would be present on the call along with Dr Mike O'Reilly VA Principal Medical Officer who was best placed to explain the SOPs and any related clinical questions she may have.

[REDACTED] SCM, Dr Mike O'Reilly and I met via a prearranged Zoom hui (Monday 4/10/21) with Lady Hekia to enable me to communicate the claim decision to her kanohi ki te kanohi (face to face). Introductions took place. I advised her of the claim decision and that the VSA 2014 contained 3 avenues for consideration and the SOP 3 factors for consideration, none of which Sir Wira's service met in relation to Malignant Neoplasm of the Brain. Mike then explained some of the detail however Lady Hekia advised us she had undertaken her own review of the VA website information, SOPs and interrogated various clinicians so was not surprised at all at the decision. Mike explained that he had also communicated with Sir Wira's GP Dr Rachel Thompson to understand if there were any other conditions or information not indicated in current medical reports or on the AMA application and there were not.

Lady Hekia advised Sir Wira had contracted hepatitis B during his service and there was a link to a hospitalisation he had in 2013. For some years approximately 30 she thinks he was under the care of Dr Tony Crutchley of the Thorndon Medical Centre and Dr Thompson is a more recent primary care provider.

Lady Hekia wanted to express her gratitude and appreciation for VA and in particular the way in which introductions were made to her and her husband by VA, the framework and process we adopt all of which she was able to review herself on the website. She wanted us to know that today's hui personified for her our approach including information and the interactions she had had with VA and she was very grateful for the offer to hui kanohi ki te kanohi.

She confirmed she would korero with Sir Wira and provide additional information regarding his contracting hepatitis B.'

Since our hui as you both know Lady Hekia provided the additional information yesterday and this is now with Mike to progress next steps. Marti or Ann-Marie if either of you have any questions please don't hesitate to korero with any of the 3 of us who attended the Zoom hui. [REDACTED] and Mike will be across this from here.

From apopo I will be on AL for a week. [REDACTED] and Mike – as indicated post the zoom hui, thank you both again for your mahi and attendance yesterday it was obvious Lady Hekia appreciated this as did I. These are never easy conversations to have particularly with people who have devoted their lives to public service including Sir Wira's military service and who also understand public service, systems and bureaucracy all of which they have undertaken applying Te Ao Maori (a Maori world view) which is no easy task in and of itself.

### **Application for cover for Pancreatic Cysts Not Otherwise Specified**

On 4 October 2021 Lady Gardiner emailed the Respondent with information about the Appellant contracting hepatitis prior to deployment to Viet Nam. The Respondent treated that information as an Application for cover for hepatitis.

### **The Respondent conveys the Decision Officer's decision to the Appellant in writing**

On 5 October 2021 the Respondent informed the Appellant of the Decision Officer's decision that glioblastoma could not be linked to his service and the claim for a Disablement Pension for Malignant Neoplasm of the Brain had been declined.

That letter did not refer to the Decision Officer by name or include a copy of the Decision Officer's decision as an attachment.<sup>1</sup>

### **Dr O'Reilly as Decision Officer accepts the claim for Pancreatic Cysts**

On 5 October 2021 Dr O'Reilly acting in the capacity of Decision Officer considered the claim for Pancreatic Cysts under section 15 of the Act and decided the condition was service-related.

On 28 October 2021 the Respondent conveyed that decision to the Appellant.

### **Review filed**

On 6 January 2022 the Respondent received an application for review of the Decision Officer's decision from the Appellant's representative. There were three grounds of review:

- Equal treatment of equal claims – In 2013 the War Pensions Appeal Board in the case of William "Pancho" Kenyon found that it was possible glioblastoma resulted from Agent Orange exposure. That precedent, as well as US precedents, should apply.
- Reverse onus of proof – The 2006 Memorandum of Understanding continues to speak through the Act, specifically in relation to the reverse onus of proof evidential standard, which is given effect through section 15 and through the reasonable hypothesis evidential standard. Interpreting the Act in the light of its context and purpose means the reverse onus underlies the whole Act.
- Reasonable hypothesis – This may be raised to support an application even through the condition is not a presumptively listed condition and does not meet the requirement

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<sup>1</sup> Ms Tribe's evidence at the hearing was that the decision would usually be sent as an attachment, but in this case it did not appear to have been attached.

of a relevant SOP. There is a reasonable hypothesis linking Tā Wira's glioblastoma to his service in Viet Nam.

### **Appeal against the Review Officer's decision received**

The Appellant lodged an appeal on 4 February 2022 in anticipation of the Review Officer's decision.

### **Review Officer's decision about glioblastoma**

On 4 February 2022 the Review Officer Dr O'Reilly upheld the Decision Officer's decision. In summary, his grounds for that decision were as follows:

- The Appellant was not diagnosed during his operational service.
- Glioblastoma is not a presumptive condition for Viet Nam.
- No factor in the SOP Malignant Neoplasm of the Brain No 85 of 2016 was met.
- The Review Officer was not able to consider whether a reasonable hypothesis of service causation existed outside the Act.

The Respondent advised the Appellant of that draft decision in writing on 4 February 2022.

### **Grounds of appeal advised**

On 23 February 2022 the Appellant's representative lodged grounds of appeal. In summary the Appellant challenged the Review Officer's decision on the basis of:

- Failure to address the legal issues raised in the application for review.
- The qualifications and competence of the Review Officer to address the questions.
- The competence of the Respondent to address the issues of statutory interpretation raised in the application and its failure to appoint a Review Officer with the required qualifications and competence.
- The process by which the review was conducted, in that it only considered clinical matters only.
- The unlawful appointment of a Review Officer who had previously been involved with the claim.

### **The hearing**

By directions issued on 7 April 2022, the Appeal Board decided to conduct a preliminary hearing on 11 April 2022 to hear evidence and submissions on the following questions:

- Whether or not the review was properly conducted;
- Whether or not the review was in breach of section 220(2) of the Act; and
- Whether or not the Review Officer's decision should be revoked.

This decision is confined to addressing those questions.

## **Appellant's case**

### **Lady Gardiner's evidence**

Lady Gardiner understood that the purpose of the Zoom meeting on 4 October 2021 was to inform her on behalf of Tā Harawira as to what the decision was. Information about the decision was shared by both Ms Cavanagh and Dr O'Reilly. In advising that the claim was declined, Dr O'Reilly referred to the Statement of Principles and how the decision had been arrived at. Until Mr Himona did a literature review in relation to the appeal, she had understood that Dr O'Reilly was the decision maker, because he was the person explaining the decision. She had not heard of Mr O'Brien. The meeting itself had been characterised as an opportunity to convey the decision that had been made, in person.

Dr O'Reilly helpfully set out the approach, and acknowledged the delay between the decision and the communication of the decision.

Given the Appellant's case manager [REDACTED] had the *Kenyon* decision within three days of the claim being lodged, she does not understand why the Decision Officer did not take it into account.

### **Mr O'Brien's evidence**

Mr Hayden O'Brien was subpoenaed as a witness for the Appellant. Mr O'Brien confirmed that he was the Decision Officer and held the appropriate delegation. He is not medically qualified. He has a degree in history. If he requires medical advice he goes to the Chief Medical Officer of the New Zealand Defence Force.

Mr O'Brien finalised the decision on 20 September 2021. He understood a round table meeting was then held to ensure support was available to the veteran before the decision was conveyed to him.

He did not have any interaction with Dr O'Reilly about the glioblastoma claim.

The Appellant's case manager [REDACTED] brought the *Kenyon* precedent to his attention, after he had made his decision. The first he was made aware that the Appellant's case manager [REDACTED] had a precedent was on 23 September 2021, when he talked to him. At no point during his decision making did the Appellant's case manager [REDACTED] come to him with the precedent. A decision maker does not go to a case manager looking for information. A case manager goes to the decision maker bringing information.

## **Submissions**

Mr Himona lodged written submissions and spoke to those. He made the following main points:

- The review and appeal was undertaken at Tā Harawira's instructions to establish a precedent to help other veterans.
- The purposive approach to statutory interpretation now applies. However, if the text is not unclear or ambiguous, the text is the law.
- His view is that the scope of a review is not limited to medical matters. The Act does not exclude legal matters being considered, and they should have been considered.

- There is no limitation in the Act as to the Review Officer's qualifications. If a review is about legal interpretation, then the Review Officer should have legal qualifications.
- The Review Officer must act independently and must not have had any previous involvement with the claim other than as a Review Officer. That statutory text is clear and unambiguous. Dr O'Reilly was involved from 24 September 2021 until 4 October 2021. That amounts to "previous involvement". The Respondent cannot add extra meaning to that provision. Therefore section 220 of the Act was breached.
- Bias is just one reason why section 220 precludes a Review Officer having "any previous involvement".
- If the decision is returned to the Respondent to make the decision again they have indicated (through counsel at the hearing) that they would make the same decision, therefore the Appeal Board should make the substantive decision.

## **The Respondent's case**

### **Dr O'Reilly's evidence**

Dr O'Reilly said the delay in communicating the decision was not atypical, especially when the veteran has a terminal illness. Veterans' Affairs provides a personal call and then the letter so it is approachable for the client.

Dr O'Reilly had no record of any discussion of any precedent about glioblastoma up until his meeting with Lady Gardiner.

He did not have any discussion about the glioblastoma claim with Mr O'Brien or the case management team. He did not have any involvement with Mr O'Brien about his decision. His only role was after the decision.

The purpose of his involvement in the Zoom meeting was to explain the decision made, to Lady Gardiner.

Dr O'Reilly was first engaged on 24 September as an addressee of an email from Ms Eller suggesting a process for communicating the decision to Lady Gardiner. Ms Eller suggested he become involved because of the nature of the claimant.

He did not phone the Appellant's GP about this claim; he rang to see whether there were any other medical conditions that could be accepted as service-related. Glioblastoma was the only claim he was aware of. He had no involvement with the glioblastoma decision beyond communicating it.

He got information from the GP and determined that there was a claim for pancreatic cysts that was related to service, and he provided a decision accepting pancreatic cysts as service-related. His aim in doing so was to provide end of life care to the Appellant.

He is aware of section 220 of the Act and is satisfied that he had no previous involvement with the decision about glioblastoma, he only communicated that decision, and made the pancreatic cyst decision. His involvement with the pancreatic cyst decision was separate to the case about glioblastoma.

He was not aware that the Respondent had been advised of the *Kenyon* precedent on 12 September 2021.

## **Ms Eller's evidence**

Ms Eller acknowledged Tā Harawira and paid tribute to his service. She said that Veterans' Affairs tried to go the extra mile for him.

## **Submissions**

Ms Lamb spoke to written submissions. She made the following main points:

- The review was properly conducted. The Review Officer followed the correct approach procedurally and substantively, and complied with the Act.
- The Review Officer acted independently and had no bias or appearance of bias. He followed the usual process.
- The Review Officer considered the submissions made by the Appellant on the papers.
- The Review Officer could not take into account outside instruments or cases under the War Pensions Act 1954. Parliament has prescribed a process. The Act is prescriptive. The Appellant's application is wholly about legal issues. She gave legal advice on the decision made by the Review Officer.
- The Review Officer was not in breach of section 220(2). The interpretation of that section is influenced by the statutory context. Subsection (1) provides that the Review Officer must act independently, which means impartially or free from the views and interference of others in conducting a review. The decision must be based on the evidence. Subsection (3)(c) provides that the Review Officer must comply with the principles of natural justice.
- It follows from this context that the purpose of section 220(2) is to protect against bias.
- Dr O'Reilly had no previous involvement in making the decision about entitlement for the claimed condition, or the process leading up to the decision by the Decision Officer.
- The principle of *de minimis* applies. Section 220(2) is not about minimal peripheral involvement which does not affect decision making. Dr O'Reilly's involvement was minimal. It was case management support where Dr O'Reilly explained the Decision Officer's decision and sought health information from the general practitioner as part of his normal duties.
- The decision should not be revoked.
- If the decision were referred back to Veterans' Affairs to make again, its decision would be the same because the decision could not change.

## **Analysis**

### **Was the Review Officer in breach of section 220(2)?**

Section 220(2) of the Act provides that a Review Officer must not conduct a review if that Review Officer has had any previous involvement with the claim, other than as a Review Officer. The Appeal Board accepts the submission of Mr Himona that this provision is clear and unambiguous. It does not accept Ms Lamb's submission that a gloss should be placed on the provision, limiting it to situations where there might be an appearance of bias in the

decision-making itself. The provision is clearly broader in scope than that and it speaks for itself.

The Appeal Board finds that the relevant claim is the claim for glioblastoma as a service-related condition. It was the duty of Dr O'Reilly, when he was appointed to be the Review Officer for that claim in January 2022, to consider whether he had had any previous involvement with the claim before accepting appointment. "Claim" and "involvement" are not defined by the Act. The Appeal Board finds that they include any involvement, not only with the application and the Decision Officer's decision, but with any advice relating to or input into the claim and any communication or explanation of the decision to the Appellant or his whānau on behalf of Veterans' Affairs. Section 220(2) is phrased in very broad terms and needs to be interpreted consistently with that.

The Appeal Board finds that Dr O'Reilly had had previous involvement with the claim before being appointed the Review Officer.

The Appeal Board accepts that Dr O'Reilly did not play any part in the Decision Officer declining the claim on 20 September 2021. However, he was involved in conveying the decision to Lady Gardiner and that was done in such a way that Lady Gardiner understandably thought Dr O'Reilly was the Decision Officer. We observe that the Respondent did not disclose the Decision Officer's written decision to Lady Gardiner, which was not optimal.

The Appeal Board entirely accepts that the Respondent's decision to involve Dr O'Reilly and his agreement to become involved, was motivated by the best of intentions. He was well qualified to explain the nature of the Decision Officer's decision, and has the communication skills to do so in a delicate situation. Having done so, however, he was disqualified from appointment as the Review Officer by section 220(2) because the steps he had taken amounted to previous involvement with the claim.

### **What is the effect of the breach?**

The effect of the breach of section 220(2) is that the Review Officer lacked jurisdiction to make the review decision and his decision was therefore a nullity.<sup>2</sup> In these circumstances, the Appeal Board has no alternative but to exercise its remedial power to revoke the decision under section 237(1)(c) of the Act. The Appeal Board accordingly revokes the review decision.

Having done so, section 237(2) of the Act requires the Appeal Board to either:

- (a) Substitute the Appeal Board's decision for that of the Review Officer; or
- (b) Require the Respondent to make the decision again in accordance with any directions that the Appeal Board might give.

Ordinarily the Appeal Board would remit such a decision to the Respondent as the primary decision maker.

However, in this case, the Respondent is bound by its counsel's representation at the hearing that the Respondent would make the same decision again.<sup>3</sup> This amounts to an admission that the Respondent has prejudged the matter. The Appeal Board expresses its concern at that admission. In the circumstances, it would not be appropriate for the decision to be remitted to the Respondent.

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<sup>2</sup> *Bulk Gas Users Group v Attorney-General* [1983] NZLR 129 (CA).

<sup>3</sup> *Carrell v Carrell* [1975] 2 NZLR 441 at 445.

The Appeal Board therefore directs that the appeal is to be set down for a substantive hearing before the Appeal Board.

In light of this decision, it is strictly unnecessary for the Appeal Board to consider the other submissions made concerning the process of making decisions under the Act and the necessary qualifications of decision-makers. However, the Appeal Board observes that decisions under the Act, whether initial decisions or reviews, are administrative decisions. They call for the application of the law and policy to the relevant claim. The Act does not require the decision-maker to hold any particular qualifications and we would not imply in any such requirement. That would run contrary to the manner in which equivalent decisions have been made in many parts of the public sector for many years. However, the nature of the decisions to be made under the Act may sometimes call for particular clinical, legal or other expertise. If that is the case, the decision-maker would be expected to obtain such expertise, if he or she does not possess it, from suitably qualified advisors, while maintaining the independence of approach to decision-making which is required by, *inter alia*, section 220(1) of the Act.

### Outcome

The Review Officer's decision of 4 February 2022 is revoked pursuant to section 237(1)(c) of the Act. The Appeal Board directs that the appeal is to be set down for a substantive hearing for the purposes of section 237(2)(a) of the Act.



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Ms Raewyn Anderson, Chairperson



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Mr Christopher Griggs, Member



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Dr Chris Holdaway, Member

Date: 27 April 2022