

IN THE MATTER OF: *The Medical Act, S.N.S. 2011, c. 38*

and

IN THE MATTER OF: The College of Physicians and Surgeons of Nova Scotia (“the College”)

and

IN THE MATTER OF: A Hearing conducted pursuant to s. 53 of the *Medical Act* concerning Dr. Enyinnaya Ezema

Hearing Committee Decision on Disposition

Date Heard: January 12, 2018
Last Submission: May 24, 2018
Location: Halifax, Nova Scotia
Hearing Committee: Mr. Raymond F. Larkin, Q.C.
Dr. Brian Moses
Dr. P. Scott Theriault
Dr. Ethel Cooper-Rosen
Ms. Gwen Haliburton

Counsel: Hector J. MacIsaac, Ms. Loretta M. Manning, Q.C. and Amy E. MacGregor, Counsel to Dr. Enyinnaya Ezema

Ms. Jane O’Neill, Q.C., and Ryan Baxter, Counsel for the College of Physicians and Surgeons of Nova Scotia

1. Introduction

1. In its decision of September 11, 2017, the Hearing Committee found that Dr. Enyinnaya Ezema was guilty of professional misconduct, having breached professional and sexual boundaries with colleagues in his workplace. He made inappropriate comments on a number of occasions in 2013 to one of his colleagues in the workplace. While discussing a mutual patient with another work colleague, he put his arms around her and ran his tongue around her lower lip while holding on to her. The Hearing Committee dismissed a third complaint against Dr. Ezema which related to charges that in January, 2014 he had asked questions of a professional colleague about her personal relationship status and had told her that he would be taking her out for a drink; the hearing committee found that this incident occurred but that it did not constitute professional misconduct in all of the circumstances.

2. The disposition of the two charges upon which Dr. Ezema has been found to be guilty of professional misconduct is governed by the *Medical Act*, SNS 2011 c. 38, Section 54(1) provides as follows:

54 (1) Where a hearing committee finds professional misconduct, conduct unbecoming, incompetence or incapacity, the committee shall dispose of the matter in accordance with the regulations.

3. Section 115 of the *Medical Practitioner Regulations* authorizes a hearing committee to dispose of a matter in which it finds professional misconduct in any manner it considers appropriate. Section 115 provides as follows:

Disposition by hearing committee

115 A hearing committee that finds professional misconduct, conduct unbecoming, incompetence or incapacity on the part of a respondent **may dispose of the matter in any manner it considers appropriate**, including doing one or more of the following, and must include orders for the action in the committee's disposition of the matter:

- (a) **revoke the respondent's registration or licence;**
- (b) for a respondent who held a temporary licence at the time of the incident giving rise to the complaint, revoke the respondent's ability to obtain registration or require the respondent to comply with any conditions or restrictions imposed by the committee if registration is granted;
- (c) authorize the respondent to resign their registration;
- (d) **suspend the respondent's licence for a specified period of time;**
- (e) suspend the respondent's ability to obtain a licence for a specified period of time;

- (f) suspend the respondent's licence pending the satisfaction and completion of any conditions a hearing committee orders;
- (g) impose any restrictions or conditions, or both, on the respondent's licence for a specified period of time;
- (h) reprimand the respondent and direct that the reprimand be recorded in the records of the College;
- (i) direct the respondent to pass a particular course of study or satisfy a hearing committee or any other committee established under the Act of the respondent's general competence to practise or competence in a particular field of practice;
- (j) refer the respondent to for a competence assessment as determined by the Registrar, and require the respondent to pay for any costs associated with the assessment;
- (k) direct the respondent to pay a fine in an amount determined by the hearing committee for findings that involve
 - (i) practising while not holding a valid licence to practise, or
 - (ii) professional misconduct or conduct unbecoming the profession;
- (l) **direct the respondent to pay any costs arising from compliance with an order under clause (g), (i) or (j);**
- (m) publish or disclose its findings in accordance with the Act and these regulations.

[emphasis added]

4. In considering the appropriate disposition of this matter, we must keep in mind the purpose of the College set forth in Section 5 of the *Medical Act*, which provides in part as follows:

Purpose and duties of College

5 In order to

- (a) serve and protect the public interest in the practice of medicine; and
- (b) subject to clause (a), preserve the integrity of the medical profession and maintain the confidence of the public and the profession in the ability of the College to regulate the practice of medicine, the College shall
- (c) regulate the practice of medicine and govern its members through
 - (i) the registration, licensing, professional conduct and other processes set out in this Act and the regulations,

- (ii) the approval and promotion of a code of ethics
 - (iii) the establishment and promotion of standards for the practice of medicine, and
 - (iv) the establishment and promotion of a continuing professional development program;
- and

(d) do such other lawful acts and things as are incidental to the attainment of the purpose and objects of the College.

5. The mandate of the College is to preserve and protect the public interest in the practice of medicine. Serving and protecting the public interest in the practice of medicine requires protection of the public, which itself includes protection of workplace Colleagues. The overriding consideration in fashioning an appropriate disposition of this case must be the public interest in protecting workplace colleagues from professional misconduct of a sexual nature by physicians in that workplace.

6. We must also consider the objective of maintaining the confidence of the public in the ability of the College to regulate the practice of medicine. The public is legitimately concerned about sexual misconduct in the workplace and expects the medical profession to take it seriously, not to minimize or excuse professional misconduct of a sexual nature.

7. Section 15 of the *Medical Practitioner Regulations* provides for “disposition” not “penalty”. It provides a wide range of options for disposition where there is a finding of professional misconduct. We have to assess these options in the circumstances of this case, primarily by considering whether they will protect the public and maintain the confidence of the public in the ability of the College to regulate the medical profession.

2. Positions of the Parties

8. The College requests the Hearing Committee to revoke Dr. Ezema’s license to practice. It argues that sexual harassment in the workplace, particularly when it involves a person in authority, is unacceptable and that society will no longer tolerate sexual harassment or assault. The College submits that the decisions of the College must reflect the seriousness of this conduct to deter it and to demonstrate that the College has the public interest at the forefront.

9. Dr. Ezema says that, given the findings of fact in this case, an appropriate penalty would be no suspension or a suspension of less than three months, with time served, and an order that he attend the boundaries course, which he has already completed.

3. Disposition Principles

10. The principles that should apply to the College’s request for revocation of Dr. Ezema’s license are discussed in the recent decision of the Ontario Court of Appeal in *College of Physicians and Surgeons of Ontario v Dr. Javad Peirovy*, 2018 ONCA 420. This decision was issued by the Ontario Court of Appeal on May 3, 2018 and was provided to the Hearing Committee shortly after that date. The parties were given an opportunity to make submissions on its application; these were completed on May 24, 2018.

11. In the *Peirovy* case, the Discipline Committee of the College of Physicians and Surgeons of Ontario found that Dr. Peirovy was guilty of sexual abuse in relation to four patients. The abusive conduct consisted of medically unnecessary touching of the breast or nipples of the patients during medically

required chest examinations conducted using a stethoscope. With respect to a fifth patient the Discipline Committee found that Dr. Peirovy had asked the patient for a date immediately after his medical examination of her during which her breasts were exposed. The Discipline Committee suspended Dr. Peirovy's license for 6 months, ordered him to submit to a reprimand and imposed conditions and restrictions on his return to practice. The Ontario Divisional Court reversed the decision of the Discipline Committee, finding that the Committee had improperly fettered its discretion by proceeding on the basis that "revocation of registration is reserved for egregious conduct or offenders with a high risk to reoffend". The Ontario Court of Appeal commented favourably on the approach taken by the Discipline Committee in the following passages:

[63] The Discipline Committee explained that protection of the public is generally taken as the paramount principle of sentencing. It is then that the Discipline Committee stated:

Although the two principles are not identical, and there will be cases where the egregious nature of the misconduct itself will demand revocation even where the risk of re-offence is low, a well-informed public would be expected to maintain confidence in a self-regulating process which results in the public being protected from abusive physicians.

[64] In this passage, the Discipline Committee was quite properly pointing out that revocation is sometimes "demanded" by egregious conduct alone. As it indicated in other parts of its reasons, however, it is tasked with arriving at a fair and just penalty that addresses all of the sentencing principles. Those principles include the paramount consideration of protection of the public, as well as maintenance of public confidence in the reputation and integrity of the profession, effective self-governance, general deterrence, specific deterrence, and the potential for the member's rehabilitation. Proportionality is also an important consideration.

[65] The Discipline Committee's reasons as a whole make clear that it did not erroneously assume that revocation was available only in a narrowly constrained set of circumstances. Rather, it concluded that the suspension and practice restrictions imposed struck the most appropriate balance between the variety of sentencing principles at play in this case.

[Emphasis added]

12. In this matter, the Hearing Committee accepts that there are cases where the "egregious nature of the misconduct itself will demand revocation", as proposed by the College in this case, but in seeking a fair and just penalty we will apply the principles set out in paragraph 64 of the *Peirovy* decision, with the objective of striking the most appropriate balance between those principles as they apply to the facts in this case.

4. Protection of the Public

13. Protection of the public must be paramount in our consideration of the appropriate disposition in this matter. In our opinion, Dr. Ezema's misconduct was serious. We believe that it is important not to minimize or excuse misconduct of a sexual nature between physicians and health workers.

14. This case illustrates the harm that can result when a physician crosses professional boundaries. Dr. Ezema was persistent in making advances towards Colleague 'A', which she did not invite or reciprocate. In order to avoid his advances, she had to resort to a strategy of taking the long way around in the halls of the workplace to avoid running into him or isolating herself in her office. It reached the point that she gave up her employment, took a job with another employer with a substantial reduction in pay, and only returned to her position after Dr. Ezema moved to another location.

15. Likewise, it goes without saying that no health worker, like Colleague 'C', should be cornered in the file room for an unwanted hug and kiss from a physician.

16. We regard these incidents as serious, both as to the conduct itself and the harm done to Colleagues 'A' and 'C' as a result.

17. These health workers are members of the public that the College is mandated to protect from professional misconduct. Considering protection of the public only, Dr. Ezema's conduct calls for a disposition which makes it clear that his conduct cannot be tolerated.

5. Maintaining the Confidence of the Public in the ability of the College to Regulate the Medical Profession

18. An appropriate disposition of the matter should be one that leaves no doubt that the College takes sexual harassment and assault by physicians seriously. The serious nature of Dr. Ezema's misconduct must be considered in imposing a disposition that will maintain the confidence of the public in the ability of the College to regulate the medical profession. The decision of the College in this matter will be made known to the public. Sexual harassment and assault of hospital workers by physicians is unacceptable and the decisions of the College should reflect the seriousness of this conduct not only to deter it, but to demonstrate to the public that the College has the public interest as its primary consideration.

6. General Deterrence

19. There is no doubt that a disposition of this matter resulting in the revocation of Dr. Ezema's license to practice would send a strong message to physicians that sexual harassment of hospital staff will not be tolerated in Nova Scotia.

20. Whether revocation is the only disposition that would send that message is not as clear. We have not been presented with evidence that sexual harassment of health workers by physicians is endemic in Nova Scotia. In our opinion, we should not assume that only the most severe disposition will create the desirable level of general deterrence. A reprimand and a significant suspension would also send a strong message that the College will not minimize or excuse this kind of conduct.

7. Specific Deterrence

21. Specific deterrence is an important consideration here. If we concluded that it was unlikely that a suspension would deter Dr. Ezema from repeating acts of professional misconduct, the College's request for revocation of his license could be the appropriate disposition. If we were convinced that Dr. Ezema was unlikely to repeat his professional misconduct, a disposition other than revocation could be appropriate.

22. In our opinion, Dr. Ezema himself needs to be sent a strong message. His persistent sexual harassment of Colleague 'A' and its repetition, in another form, with Colleague 'C', demonstrates a course of conduct over time that cannot be regarded as an isolated mistake. In our opinion, there was deliberate repeated breaches of professional sexual boundaries.

23. Dr. Ezema did not admit any of his misconduct. That, of course, was his right but, even at the disposition hearing his counsel referred to our findings as allegations. Dr. Ezema's persistent denial of his conduct means that we have no evidence that he has developed insight into the impact of his conduct on his workplace colleagues.

24. In his written submissions, Dr. Ezema emphasizes the absences of any prior disciplinary history with the College and that there had been no allegations of misconduct since the incident with Colleague 'A' in December 2014. He points out that he has been proactive in taking steps to change the behaviour identified through this process, having attended the University of Toronto Boundaries Course in June 2015. He also points out that after Colleague 'A' sent him an email complaining about his conduct in December 2013, he went to her office and apologized and did not continue to harass her. Dr. Ezema also stresses the evidence that he was well regarded by his colleagues and was considered by them to maintain a high standard of professional and personal conduct with respect to patients.

25. In our view, we cannot treat Dr. Ezema's misconduct as isolated incidents. His repeated advances to Colleague 'A' ended when she complained, but he later engaged in sexual harassment and assault with respect to Colleague 'C'.

26. Although Dr. Ezema took the boundaries course at the University of Toronto in June 2015, nothing in his evidence convinces this Hearing Committee that he recognizes the professional boundaries between himself and women in his workplace that he finds attractive. In his evidence Dr. Ezema emphasized cultural differences that resulted from growing up and receiving his education in Nigeria and Cameroon and from working for several years in Ireland. We do not accept that Dr. Ezema's cultural background explains or mitigates his conduct towards Colleague A and Colleague C.

27. In our view, specific deterrence in the circumstances of this case requires a disposition that causes Dr. Ezema to understand that any future repetition of his misconduct may have the consequence of the revocation of his license sought by the College in this matter.

8. Potential for the Member's Rehabilitation

28. Given Dr. Ezema's denial of the incidents that the Hearing Committee has found in its hearing on the merits, we really have no evidence of potential for his rehabilitation.

9. Proportionality

29. None of the factors we have considered can be applied to the facts of this case in isolation. An appropriate balance between the disposition principles at play in this case must also include consideration of the principle of proportionality. Not every breach of professional sexual boundaries justifies revocation of a physician's license. Any sanction imposed in the disposition of this matter must be proportionate to Dr. Ezema's misconduct.

30. In this matter, the Hearing Committee has found Dr. Ezema guilty of professional misconduct for having breached professional and/or sexual boundaries arising from inappropriate comments made on a number of occasions in 2013 to a professional colleague in the workplace; and, that on or about December 16, 2014, while discussing a mutual patient with a work colleague, put his arms around her and ran his tongue along her lower lip and held onto her.

31. The cases which have been cited to us where revocation was imposed – *College of Physicians and Surgeons of Ontario v MMS Lee*, 2017 ONCPSD 46, and *College of Physicians and Surgeons of Ontario v Beirsto*, 2017 ONCPSD 43 – were cases that involved the sexual abuse of patients, not colleagues, and, therefore, do not provide strong guidance to us as to disposition in this case.

32. We are not convinced that these findings justify revocation of Dr. Ezema's license. While we agree with the College that sexual harassment by physicians in the workplace is unacceptable and that the College should not tolerate sexual harassment and assault of a colleague, in our opinion, revocation of his license is disproportionate to Dr. Ezema's misconduct. A disciplinary sanction short of revocation will meet the requirements of general deterrence and specific deterrence and send a strong message to the medical profession and to Dr. Ezema that this conduct cannot be tolerated.

33. On the other hand, Dr. Ezema's failure to take responsibility for his conduct at the disposition stage of this matter and the absence of any demonstration of insight into the harm caused by his conduct leaves doubt about his respect for professional boundaries which must be part of the balance in choosing the appropriate disposition.

34. We are not satisfied that revocation of his license is necessary to protect the public or to maintain the credibility of the College with the public. In our view, Dr. Ezema's conduct calls for a significant period of suspension. In order to consider the appropriate length of a suspension, previous decisions of the hearing committee or similar bodies can provide guidance.

10. Consideration of the Case Law

35. The case law provided by the parties does not support revocation of license as the disposition after a finding of sexual harassment or breach of professional and sexual boundaries in the workplace. The cases cited to us where revocation was imposed, relate to the sexual abuse of a patient. While, in this case, the power imbalance between Dr. Ezema and his workplace colleagues is a factor in weighing the seriousness of his conduct, the vulnerability of a patient to sexual abuse from a physician is significantly greater.

36. There are no previous hearing committee decisions that have been cited to us that involve the breach of professional and sexual boundaries with colleagues. Both parties cited the decision of the Hearing Committee in the matter of Dr. Oluwarotimi Fashoranti, which was decided on May 12, 2014 and upheld by a decision of the Nova Scotia Court of Appeal in *Fashoranti v College of Physicians and Surgeons*

of *Nova Scotia*, 2015 NSCA 25. In that case, the Hearing Committee imposed a 3-month suspension for an inappropriate examination of a female patient. The disposition of a 3-month suspension is obviously a significant sanction but not a strong precedent for us because it involved a single incident with a patient in contrast to the repeated sexual harassment of workplace colleagues by Dr. Ezema in this matter.

37. The parties also cited decisions of the College of Physicians and Surgeons of Ontario that involved the sexual harassment of co-workers by physicians. In *College of Physicians and Surgeons of Ontario v Minnes*, 2015 ONCPSD 3, Dr. Minnes engaged in repeated boundary violations with female nursing staff. The behaviour consisted mainly of unwanted and inappropriate touching. He accepted responsibility for his misbehaviour, attended therapy and made progress in understanding his behaviour and its impact on others. The Discipline Committee imposed a reprimand and a suspension of 3-months.

38. In *College of Physicians and Surgeons of Ontario v Abawi*, 2014 ONCPSD 10, Dr. Abawi had guided a nurse into a bathroom and made unwanted and inappropriate sexual advances in trying to hug and kiss her. He made inappropriate remarks in asking her if she was interested in having an affair. The parties made a joint submission that included a 4-month suspension, which was accepted by the Committee.

39. In *College of Physicians and Surgeons of Ontario v McInnis*, 2013 ONCPSD 32, Dr. McInnis made repeated flirtatious comments to a nurse with respect to her physical appearance. On another occasion, he placed his left hand behind her back and leaning in towards her, attempted to kiss her. Despite being rebuffed, he put his left arm around her back, pulling her towards him and kissing her on the left cheek. The parties made a joint submission that included a 2-month suspension and terms, conditions and limitations including monitoring and psychotherapy.

40. In *College of Physicians and Surgeons of Ontario v Carll*, 2012 ONCPSD 29, Dr. Carll had repeatedly verbally and physically abused six nurses over a period of 10 years. The Discipline Committee imposed a 12-month suspension, six-months of which was to be suspended if Dr. Carll successfully completed the College's boundaries course.

41. In *College of Physicians and Surgeons of Ontario v Bhatt*, 2016 ONCPSD 10, Dr. Bhatt had been rude and verbally abusive to nurses over a period of six years. The parties proposed a 4-month suspension which was accepted by the Committee.

42. In *College of Physicians and Surgeons of Ontario v Podell*, 2017 ONCPSD 4, Dr. Podell made inappropriate comments in the presence of colleagues, was not respectful of his fellow workers and was disruptive to the surgical team. In conduct that persisted over 6 years, he admitted his wrongdoing and accepted responsibility for his conduct. The parties proposed a 3-month suspension that was accepted by the Committee.

43. In *College of Physicians and Surgeons of Ontario v Saunders*, 2008 ONCPSD 18, Dr. Saunders had grabbed a registered nurse around the waist, knocking the wind out of her and commenting that she "had love bites before". He admitted his behaviour, sought physiatrist treatment and took the boundaries course. The parties made a joint submission proposing a reprimand, continued physiatrist treatment and monitoring for 30-months which was accepted by the Committee.

44. None of these cases are exactly the same as the matter before us. Some of the cases involve inappropriate comments only. Others involve repeated conduct over several years. Most of the decisions involved a joint submission by the College and the physician. All of the Ontario decisions included

conditions and restrictions which were not proposed by either the College or Dr. Ezema in this matter. However, the cases provide some guidance as to the appropriate length of a suspension of the right to practice in this type of case. On our analysis, a suspension of the physician's license in the range of 2 to 6 months is appropriate in sexual boundary cases involving fellow employees.

45. In this matter, the evidence of the harm caused to Colleague 'A' and the assault on Colleague 'C', in our opinion, calls for a suspension higher in this range rather than lower. Dr. Ezema's failure to accept responsibility for his conduct leaves doubt about his future compliance with the standards expected of physicians with respect to professional boundaries with workplace colleagues. This too, calls for a suspension higher in the range. In our view, the appropriate disposition of this matter should include a reprimand and a suspension of 4 months from practice.

46. At the time of the disposition hearing, Dr. Ezema was not practicing for reasons other than this matter. Accordingly, the 4 month suspension should begin when he becomes eligible to resume practice.

11. Costs

47. The College has requested that the Hearing Committee order Dr. Ezema to pay costs to the College in the amount of \$110,000. We have been provided with an affidavit of Noreen Gaudet with the details of the expenses that have resulted from the investigation and hearing of this matter. The total amount expended is \$169,700. Dr. Ezema does not dispute the amount of the actual expenses incurred by the College but argues that no costs should be awarded to the College because of divided success in proving the charges against him and financial losses suffered by Dr. Ezema because of suspensions related to the matter.

48. The *Medical Act*, SNS 2011 c.38, includes the following provisions:

54 (1) Where a hearing committee finds professional misconduct, conduct unbecoming, incompetence or incapacity, the committee shall dispose of the matter in accordance with the regulations.

...

57 (1) For the purpose of the execution of their duties under this Act, the College or any committee of the College may retain such legal or other assistance as the College or the committee may think necessary or proper.

(2) Where authorized by this Act or the regulations, the costs of such assistance may be included, in whole or in part, as costs ordered by the committee.

49. Section 121 of the *Medical Practitioners Regulations*, N.S. Reg. 18/2015 makes provision for a hearing committee to order costs. Section 121 provides as follows:

Costs for investigation and hearing

121 (1) For purposes of this Section, "costs" includes all of the following:

- (a) expenses incurred by the College in the investigation of a complaint;
- (b) expenses incurred by the College for the activities of an investigation committee and a hearing committee;

- (c) expenses incurred for participation in any competence assessment arising from a decision of an investigation committee or a hearing committee;
- (d) expenses incurred under subsection 88(4), 99(4) or 110(6);
- (e) the College's solicitor and client costs, including disbursements and HST, relating to the investigation and hearing of a complaint, including those of College counsel and counsel for a hearing committee;
- (f) fees for retaining a court reporter and preparing transcripts of the proceedings;
- (g) travel costs and reasonable expenses of any witnesses, including expert witnesses.

(2) Except when awarded costs under this Section, a respondent is responsible for all expenses incurred in their defence.

(3) If a hearing committee finds professional misconduct, conduct unbecoming the profession, incompetence or incapacity on the part of the respondent, it may order that the respondent pay costs in whole or in part.

(4) If a hearing committee considers that a hearing was not necessary, it may order the College to pay some or all of the respondent's legal costs.

(5) The Registrar may suspend the licence of any respondent who fails to pay the costs within the time ordered until payment is made or satisfactory arrangements for payment are made.

[Emphasis added]

50. Having found professional misconduct, the Hearing Committee has discretion whether to order Dr. Ezema to pay costs, in whole, in part or at all. In deciding whether to order Dr. Ezema to pay costs and determining whether to order him to pay all of the College's costs or part of them, we are required to exercise our discretion in accordance with the purpose and objects of the College as set out in Section 5 of the *Medical Act*. Essentially, our discretion on costs should be exercised in such a manner that the public interest will be served and protected.

51. An order for costs under Section 121 of the *Medical Practitioner Regulations* is not a penalty. The purpose of an order of costs under Section 121 is to appropriately reimburse the College for its expenses for investigation and proving professional misconduct. However, Section 121 provides that an order to pay costs is discretionary and specifically provides that an order to pay costs may be a partial reimbursement. The Hearing Committee must therefore consider whether there are any public interest factors that would deprive the College of reimbursement of some or all of its costs.

52. In this case, we think that the College should be appropriately reimbursed for part of its expenses in proving that Dr. Ezema is guilty of professional misconduct. All of the costs claimed by the College fall under the definition of "costs" found in Section 121 of the *Medical Practitioner Regulations*. The greater part of these costs are legal fees and disbursements and the honoraria

paid to members of the Investigation Committee and the Hearing Committee. We have reviewed the amounts claimed as set out and documented in Noreen Gaudet's affidavit and find that the amounts of the expenses themselves are reasonable and properly fall within the categories included in "costs" in Section 121.

53. The \$169,700 in expenses incurred by the College in this matter is high. This is undoubtedly a significant burden to the College. At the same time it is unlikely that Dr. Ezema can easily pay these costs. A close analysis of the expenses of investigating and proving the charges that led to a finding of professional misconduct and consideration of public interest factors leads us to conclude that the order to pay costs should require him to pay costs considerably lower than the actual expenses of the College.

54. It is not in the public interest to require Dr. Ezema to reimburse to College for its expenses as to the investigation and hearing of the charge that we have dismissed. We have assessed the degree to which the College was successful in establishing professional misconduct. The College was successful in both the charges related to Colleague 'A' and Colleague 'C', but was not successful in the charge that related to Colleague 'B'.

55. Procedural and preliminary issues accounted for a significant portion of the expenses incurred by the College in this matter. Dr. Ezema brought a Motion relating to pre-hearing disclosure of documents that involved written submissions from the parties, an oral hearing and a written decision by the Committee. He also brought a Motion that the charges against him should be dealt with in separate hearings. This too required written submissions by the parties, an oral hearing and a written decision from the Committee. Dr. Ezema made a Motion that the Chair should recuse himself, which resulted in written submissions from the College and a portion of the time scheduled for the separate hearing Motion to address the question of recusal. All three of these Motions were without merit and were dismissed by the Committee.

56. In view of its partial success in this matter, the College has proposed that instead of its actual expenses of \$169,700, the Hearing Committee should order Dr. Ezema to pay costs in the amount of \$110,000. This figure provides us with a starting point for our consideration of public interest factors that could reduce the order to pay costs further.

57. College Counsel has referred us to *Jaswal v Newfoundland Medical Board* [1996] N.J. No. 50 (Nfld S.C.-T.D.) where the Court identifies some of the factors that should be considered in these circumstances:

50 It is necessary, therefore, to determine the factors appropriate to the proper exercise of the judicial discretion to make an order for payment or partial payment of expenses. In my view, based on the submissions of counsel, the following is a non-exhaustive list of factors which ought to be considered in a given case before deciding to impose an order for payment of expenses:

1. the degree of success, if any, of the physician in resisting any or all of the charges
2. the necessity for calling all of the witnesses who gave evidence or for incurring other expenses associated with the hearing
3. whether the persons presenting the case against the doctor could reasonably have anticipated the result based upon what they knew prior to the hearing

4. whether those presenting the case against the doctor could reasonably have anticipated the lack of need for certain witnesses or incurring certain expenses in light of what they knew prior to the hearing
5. whether the doctor cooperated with respect to the investigation and offered to facilitate proof by admissions, etc.
6. the financial circumstances of the doctor and the degree to which his financial position has already been affected by other aspects of any penalty that has been imposed.

58. We are also mindful of the comments of the Nova Scotia Court of Appeal in *Creager v. Provincial Medical Board of Nova Scotia* [2005] N.S.J. No 32 about reasonableness of a cost award in these circumstances. The Court states as follows:

95 I agree with the comments of the Saskatchewan Court of Appeal. The reasonableness standard of review permits consideration of whether the quantum of costs would be so excessive as to deny the accused person a fair opportunity to dispute the allegations of professional misconduct.

96 The reasonableness standard might also involve consideration of whether the costs award is so exorbitant that it would effectively bar the complainant from practice, contrary to the Committee's express dispositive sanction...

12. Jaswal Factors

59. On balance, we have determined that the application of the *Jaswal* factors should lead to some reduction in the costs of the College in this case based on the following considerations:

- a) *"The degree of success if any, of the physician in resisting any or all of the charges"*: We have already taken this factor into account by starting consideration at two thirds of the College's actual expenses reflecting the dismissal of the charge related to Colleague 'B';
- b) *"The necessity for calling all of the witnesses who gave evidence or for incurring other expenses associated with the hearing"*: All of the witnesses called by the College provided relevant evidence which led to findings of professional misconduct. This factor would not result in reducing the amount of costs;
- c) *"Whether the persons presenting the case against the doctor could reasonably have anticipated the result based upon what they know prior to the hearing"*: Having eliminated the expenses incurred by the College where the decision went against it, we see no basis to further reduce the order to pay costs due to this factor;
- d) *"Whether those presenting the case against the doctor could reasonably have anticipated the lack of need for certain witnesses or incurring certain expenses in light of what they know prior to the hearing"*: Here again this factor would not further reduce an order to pay costs. The College called

only relevant evidence from witnesses directly involved in the issues before the Committee.

- e) *“Whether the doctor cooperated with respect to the investigation and offered to facilitate proof by admissions, etc.”*: In this case Dr. Ezema cooperated with the College throughout and the order to pay costs should reflect that cooperation; and,
- f) *“The financial circumstances of the doctor and the degree to which his financial position has already been affected by the other aspects of any penalty that has been imposed”*: Although not directly related to the expenses of the College in proving its charges against Dr. Ezema, in April 2015, Dr. Ezema’s privileges were suspended after Dr. Ezema was charged with common assault of College ‘C’. The suspension of privileges led to the College holding Dr. Ezema’s license in abeyance. Dr. Ezema was out of practice for approximately 4 months and did not return to practice until August 2015. During this period of time, he suffered a significant loss of income.

In March 2016 the Investigation Committee imposed an interim restriction on Dr. Ezema’s license so that all patient encounters were required to take place in the presence of a chaperone. This restriction remained in place for approximately 4 months and Dr. Ezema was not able to see patients because arranging for a chaperone was not possible. This decision by the Investigation Committee was based on a report that suggested he was a risk to patients. Upon investigation this was found to be untrue.

At the time of the disposition hearing in January 2018, Dr. Ezema did not have a license to practice because of a failure to qualify for his license that was unrelated to this matter. At least at that time, his financial circumstances were difficult.

To a certain extent, therefore, Dr. Ezema’s financial circumstances have already been affected by the events giving rise to the charges and the investigation of those events. This factor points to a reduction in the amount of costs that Dr. Ezema should pay the College.

13. Creager Factors

60. We accept that it would be inappropriate for the Committee to impose an order to pay large amount of costs as a pre-condition for reinstatement of Dr. Ezema’s license. Given what we know about his financial circumstances, that would likely amount to a “back-door revocation”. Such an outcome would not result if Dr. Ezema were permitted to pay the costs of the College over a period of time after the reinstatement of his license, provided that the monthly amount was reasonably achievable on a physician’s income.

61. We also accept that a large order to pay costs could deter a physician from contesting charges of professional misconduct or professional incompetence and force them to accept an otherwise unacceptable settlement agreement as the best alternative to a potential ruinous order to pay costs. In our view, the potential of a cost award should influence a member to make proper admissions and to refrain from making numerous procedural objections lacking merit. However,

it should not prevent a physician from defending themselves against charges that the physician does not accept as warranted.

62. In this matter, the expenses of the College were increased as a result of the Motions brought by Dr. Ezema. The hearing of the evidence was quite efficient, but unnecessary time and expense was incurred in dealing with Dr. Ezema's Motions which lacked merit.

63. Considering all of these factors, the Hearing Committee concludes that the public interest is consistent with some reduction of the costs that Dr. Ezema should pay in this matter. The only factor which clearly supports a reduction in costs is Dr. Ezema's financial circumstances and the degree to which his financial position has already been affected by other aspects of the matters giving rise to the charges against him. To some degree, the recognition of this factor is counter-balanced by the additional expense of the proceeding as a result of Dr. Ezema's Motions that were found to be without merit. At the same time, we have to take into account the potential of a substantial cost award in this case to unfairly influence other members in future cases.

64. Accordingly, the Hearing Committee orders Dr. Ezema to pay \$75,000 towards the expenses of the College in this matter. Further, we order that Dr. Ezema be permitted to pay those costs at a reasonable rate per month, starting at the end of the month in which his license is reinstated until the balance of the Order for costs is paid in full. If there is any dispute between Dr. Ezema and the College as to the amount of the monthly payment or if Dr. Ezema has not returned to practice within one year of this decision, the Hearing Committee reserves jurisdiction to determine the monthly amount or, if necessary, the date by which he must pay the College's costs in full.

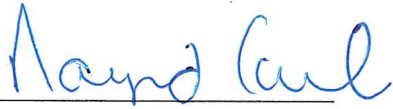
14. Summary of Disposition

65. In summary, the Hearing Committee has determined, pursuant to Section 121 of the *Medical Practitioners Regulations*, that:

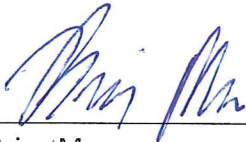
1. Dr. Enyinnaya Ezema is reprimanded and his license to practice medicine is suspended for a period of 4 months for professional misconduct. At the date of the disposition hearing, Dr. Ezema was not permitted to practice for reasons unrelated to this matter, but related to his eligibility to be licensed. In the event that he remains out of practice at the date of this Order, the period of suspension shall begin on the date that he becomes eligible to resume practice or, if he has returned to practice since the disposition hearing, the period of suspension should begin immediately.
2. Dr. Ezema shall pay costs to the College in the amount of \$75,000. Dr. Ezema shall be permitted to pay those costs at a reasonable rate per month, starting at the end of the month in which his license is reinstated until the balance of the Order for costs is paid in full. If there is any dispute between Dr. Ezema and the College as to the amount of the monthly payment or if Dr. Ezema has not returned to practice within one year of this decision, the Hearing Committee reserves jurisdiction to determine the monthly amount or, if necessary, the date by which he must pay the College's costs in full.

3. The Hearing Committee retains jurisdiction on any matter arising from the implementation of this Order.

Dated at Halifax, Nova Scotia this 3rd day of July, 2018.



Raymond F. Larkin, Q.C., Chair



Dr. Brian Moses



Dr. P. Scott Theriault



Dr. Ethel Cooper-Rosen



Ms. Gwen Haliburton