

COLLEGE OF PHYSICIANS & SURGEONS OF ALBERTA

IN THE MATTER OF A HEARING UNDER THE *HEALTH
PROFESSIONS ACT*, RSA 2000, C. H-7

AND IN THE MATTER OF A HEARING REGARDING THE CONDUCT
OF DR. DE NGUYEN

**HEARING TRIBUNAL OF THE COLLEGE OF
PHYSICIANS & SURGEONS OF ALBERTA
DECISION ON SANCTION
November 6, 2023**

I. INTRODUCTION

1. The Hearing Tribunal of the College of Physicians & Surgeons of Alberta (the "College") met by video conference on September 11, 2023 to consider written submissions on sanction. The members of the Hearing Tribunal were:
Dr. Goldees Liaghati-Nasseri of Rocky View (Chair);
Dr. Neelan Pillay of Calgary;
Ms. Juane Priest of Calgary (Public Member);
Mr. Douglas Dawson of Edmonton (Public Member).
2. Ms. Julie Gagnon of Edmonton was also present and acted as independent legal counsel for the Hearing Tribunal.

II. BACKGROUND

3. In its decision dated May 25, 2023, the Hearing Tribunal found that Allegation 1 (a) to (q) was proven on a balance of probabilities. The Hearing Tribunal found that the proven conduct constituted unprofessional conduct under section 1(1)(pp) of the HPA, as follows:
 - 1(1)(pp) "unprofessional conduct" means one or more of the following, whether or not it is disgraceful or dishonourable:
 - (ii) contravention of this Act, a code of ethics or standards of practice;
 - (vii)(B) failure or refusal to comply with a request of or co-operate with an investigator,
 - (xii) conduct that harms the integrity of the regulated profession.
4. The Hearing Tribunal directed it would receive written submissions on sanction and provided timelines for the parties to provide their written submissions. The Complaints Director provided written submissions on sanction. Dr. Nguyen did not provide any written submissions.

III. DOCUMENTS PROVIDED

5. The Hearing Tribunal received the following written submissions from the parties:
 - (a) Written Submissions on Sanction of the Complaints Director dated June 28, 2023.

IV. SUBMISSIONS ON SANCTION

Submissions of the Complaints Director

6. The Complaints Director's written submissions note that the Hearing Tribunal's authority to order sanctions is set out in section 82 of the HPA. The Complaints Director seeks the following orders to be made by the Hearing Tribunal:
 1. Dr. Nguyen shall receive a reprimand of which the Hearing Tribunal's written decision shall serve as;
 2. Dr. Nguyen shall undertake and successfully complete a professionalism course at his own cost acceptable to the Complaints Director prior to being permitted to reinstate his practice permit;
 3. Dr. Nguyen shall, at his own cost, undertake a competence assessment suitable to the Complaints Director prior to being permitted to reinstate his practice permit;
 4. Following completion of Orders 2 and 3 and upon reinstatement of his practice permit, Dr. Nguyen shall, at his own cost, engage and fully cooperate with the Continuing Competency Department, including the Continuing Competency Rules for Member Participation and any remedial directions provided to him; and
 5. Dr. Nguyen shall pay the full costs of the investigation and hearing to a maximum of \$10,000 within 24 months from the date of the Hearing Tribunal's written decision on sanction on a schedule satisfactory to the Complaints Director.
7. The Complaints Director outlines the principles regarding the purpose of sanctions in a discipline hearing. These include: public protection, maintaining the integrity of the profession, fairness to the investigated member, and deterrence, both specific to the investigated member and general to the membership as a whole.
8. The Complaints Director's submissions review the factors in *Jaswal v Medical Board* (Nfld), 1996 CarswellNfld 32 (NL SC) for assessing sanction, as follows:
 - a. *The nature and gravity of the proven allegation:* The Hearing Tribunal found that Dr. Nguyen failed to respond in a timely manner or at all to 17 separate communications from the College regarding an investigation into his conduct. The proven allegation harms the integrity of the profession and demonstrate a failure of Dr. Nguyen to meet the high standards of professional and ethical judgement expected and required of a physician in Alberta. Although the gravity of the proven allegation is not on the most serious side of the spectrum, it is nevertheless serious and deserving of sanction.

- b. *The age and experience of the member:* Dr. Nguyen is 74 years of age and was a regulated member of the College for approximately 30 years. Inexperience is not a mitigating factor in this case. Dr. Nguyen should be aware of his requirement to comply with his statutory and regulatory obligations as a regulated member of the College.
- c. *The presence or absence of any prior complaints or convictions:* The College has recorded 29 prior complaints and one prior finding of unprofessional conduct against Dr. Nguyen. In 2007, Dr. Nguyen was charged and was issued a reprimand for failing to provide medical records to, or respond to, a request from a patient's legal counsel and for failing to provide the College with a status report on outstanding medical/legal reports for a period of six months. These show a pattern of failing to comply with requests of both a patient's legal counsel and the College. These are an aggravating factor in this case.
- d. *The number of times the offence was proven to have occurred:* The Hearing Tribunal found that Dr. Nguyen failed to respond, or failed to provide a sufficient response, to 17 different communications from the College over a period of approximately nine months. This is not a case where a member engaged in a single instance of unprofessional conduct at one point in time. Each failure to respond, or to provide a sufficient response, is evidence of an established pattern of behavior that the Hearing Tribunal should consider to be an aggravating factor in this case.
- e. *The role of the member in acknowledging what occurred:* There was no acknowledgement by Dr. Nguyen or any acknowledgement that he has reflected on his conduct. As such, this is not a mitigating factor in this case.
- f. *Whether the member has already suffered other serious financial or other penalties as a result of the allegation having been made:* Dr. Nguyen's practice permit was suspended under section 65 of the HPA based on concerns related to this matter. However, the Complaints Director is not aware of any financial penalties levied against Dr. Nguyen as a result of the allegation having been made. While the Complaints Director acknowledges that the penalties already suffered are extensive, they are also proportional to the seriousness of the conduct. A regulated member must cooperate with an investigation and respond to the CPSA. As such, the section 65 suspension should not be considered a mitigating factor in this case.
- g. *The presence or absence of any mitigating circumstances:* The Complaints Director is not aware of any mitigating circumstances.

- h. *The need to promote specific and general deterrence:* The proven allegation and Dr. Nguyen's lack of response to either the complaints process or this hearing suggest that Dr. Nguyen does not believe his conduct was serious or unprofessional. The sanction orders must ensure that both Dr. Nguyen and other regulated members understand similar conduct will not be tolerated.
 - i. *The need to maintain the public's confidence in the integrity of the profession:* Protecting the integrity of the profession is integral to the College's ability to function as a self-regulating body. The College must be able to demonstrate to the public that it is willing and able to regulate and govern the conduct of each regulated member. The public must be able to see that the College takes Dr. Nguyen's conduct seriously and that such conduct will not be tolerated. The public must also see that steps have been taken to sanction the conduct and ensure that it does not recur in the future.
 - j. *The degree to which the offensive conduct is clearly outside the range of permitted conduct:* The conduct is clearly beyond the range of permitted conduct.
 - k. *The range of sentence in other similar cases:* The Complaints Director's written submissions provide information regarding cases involving failure to respond to the College.
9. The Complaints Director notes the recent decision of the Alberta Court of Appeal in *Jinnah v Alberta Dental Association and College*, 2022 ABCA 336 and notes that *Jinnah* sets out four instances where it is appropriate to order a significant portion of costs of a hearing against an investigated member:
- a. when a professional has engaged in serious unprofessional conduct;
 - b. when a professional is a serial offender who has engaged in unprofessional conduct on two or more occasions;
 - c. when a professional fails to cooperate with a college's investigators and forces a college to spend more resources than is necessary to ascertain certain facts related to a complaint; and
 - d. when a professional engages in hearing misconduct and unnecessarily prolongs the hearing or otherwise results in increased costs of prosecution that are not justifiable.
10. The Complaints Director takes the position that Dr. Nguyen failed to cooperate with the College. His decision not to attend the hearing caused the College to incur time and expense to prove he had been served with the Notice of Hearing. Dr. Nguyen's failure to respond to communications from the College was found by the Hearing Tribunal to be serious unprofessional conduct. Dr. Nguyen has been in practice approximately 30 years and has responded to 29 prior complaints.

V. DECISION OF THE HEARING TRIBUNAL

11. The Hearing Tribunal carefully considered the written submissions of the Hearings Director. The Hearing Tribunal accepted the proposed orders put forth by the Complaints Director.
12. The Hearing Tribunal recognized that its orders with respect to sanction must be fair, reasonable and proportionate, taking into account the facts of this case. The Hearing Tribunal found that the proposed orders are fair, reasonable and proportionate.

VI. REASONS OF THE HEARING TRIBUNAL

13. The orders imposed by the Hearing Tribunal must protect the public from the type of conduct that Dr. Nguyen has engaged in. In making its decision on penalty, the Hearing Tribunal considered the *Jaswal* factors identified by the Complaints Director. The Hearing Tribunal accepted the analysis of the *Jaswal* factors presented by the Complaints Director.
14. The Hearing Tribunal agreed that a reprimand is appropriate in this case. Dr. Nguyen failed to respond, or to appropriately respond, to the College on numerous occasions. There were 17 attempts made to contact him. The Hearing Tribunal wishes to send a clear message to Dr. Nguyen that registration as a physician is a privilege and not a right. Members who are granted the privilege of registration have a corresponding obligation to respond to correspondence and requests for information from the College. In this manner, the College is able to self-regulate.
15. The requirement to complete a professionalism course is aimed at remediation and will ensure the protection of the public. It will give Dr. Nguyen an opportunity to reflect on his conduct and develop a better understanding of his obligations as a regulated member.
16. The Hearing Tribunal also found that a competence assessment is necessary and appropriate in this case. As noted by the Complaints Director, Dr. Nguyen has now spent a significant period out of practice. This matter initially arose because of his failure to comply with the Continuing Competence Department in relation to concerns about his practice. As such, a competence assessment is an appropriate and reasonable order in this case. It will ensure the protection of the public.
17. In addition, it is appropriate to make an order that if Dr. Nguyen is reinstated, he fully cooperate with the Continuing Competency Department, including the Continuing Competence Rules for Member Participation and any remedial directions provided to him. This also ensures the public is protected.
18. Competencies may change and evolve with time. It is important for a physician to be competent, but it is also important to remain current in their

competencies. The orders are important to ensure that Dr. Nguyen is competent and current in his competencies.

19. These orders will also serve to maintain the integrity of the profession. Finally, the orders achieve deterrence, both specific to Dr. Nguyen and to the regulated members generally. It is important that the Hearing Tribunal send a clear message that such conduct is unacceptable.
20. With respect to costs, the Hearing Tribunal carefully considered the submissions. The Hearing Tribunal considered the *Jinnah* factors set out by the Court of Appeal where a significant portion of costs can be ordered. The first is where a professional has engaged in serious unprofessional conduct. The Hearing Tribunal did recognize in its May 25, 2023 decision on the merits that this conduct is serious. Dr. Nguyen failed to respond repeatedly to correspondence from the College, over a period of several months. The failure to respond to a College engages the College's ability to self-regulate. It undermines the profession in the eyes of the public. It is completely unacceptable conduct.
21. The second factor in *Jinnah* is where the member is a serial offender. Dr. Nguyen has 29 prior complaints and one prior finding of unprofessional conduct. While complaints are not findings of unprofessional conduct, the number of complaints is significant. However, notably, the prior finding of unprofessional conduct relates to a failure to provide medical records to legal counsel and to respond to the College. The prior finding involves similar conduct to the proven allegation in this hearing.
22. The Hearing Tribunal also noted that *Jinnah* contemplates costs where a professional fails to cooperate with a college's investigators and forces a college to spend more resources than is necessary to ascertain certain facts related to a complaint. Dr. Nguyen did fail to cooperate with the College's investigators.
23. The last factor in *Jinnah* is where a professional engages in hearing misconduct and unnecessarily prolongs the hearing. While Dr. Nguyen did not attend the hearing and the Complaints Director had to prove service of the Notice of Hearing, the Hearing Tribunal did not view that this unduly prolonged the hearing.
24. Having considered the factors in *Jinnah*, the Hearing Tribunal noted that this was a case where it was appropriate to order significant costs. The proposed costs, up to a maximum of \$10,000, is reasonable.

VII. CONCLUSION

25. For the reasons set out above, the Hearing Tribunal makes the following orders pursuant to section 82 of the HPA:

1. Dr. Nguyen shall receive a reprimand. The Hearing Tribunal's written decision shall serve as the reprimand;
2. Dr. Nguyen shall undertake and successfully complete a professionalism course at his own cost acceptable to the Complaints Director prior to being permitted to reinstate his practice permit;
3. Dr. Nguyen shall, at his own cost, undertake a competence assessment suitable to the Complaints Director prior to being permitted to reinstate his practice permit;
4. Following completion of Orders 2 and 3 and upon re-instatement of his practice permit, Dr. Nguyen shall, at his own cost, engage and fully cooperate with the Continuing Competency Department, including the Continuing Competency Rules for Member Participation and any remedial directions provided to him; and
5. Dr. Nguyen shall pay the full costs of the investigation and hearing to a maximum of \$10,000 within 24 months from the date of the Hearing Tribunal's written decision on sanction on a schedule satisfactory to the Complaints Director.

Signed on behalf of the Hearing Tribunal by its Chair:



Dr. Goldees Liaghati-Nasseri

Dated this 6th day of November, 2023.