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. OBAID AFRIDI

DECISION OF THE HEARING TRIBUNAL OF THE COLLEGE OF PHYSICIANS & SURGEONS OF ALBERTA REGARDING SANCTIONS

September 20, 2024

I. INTRODUCTION

1. The Hearing Tribunal held a hearing into the conduct of Dr. Obaid Afridi on January 18, 19 and 22, 2024, to hear evidence and submissions on sanction. The members of the Hearing Tribunal were:

   Ms. Naz Mellick (Chair and Public Member);
   Dr. Vonda Bobart;
   Dr. Kim Loeffler;
   Mr. Douglas Dawson (Public Member).

2. Ms. Mary Marshall acted as independent legal counsel for the Hearing Tribunal.

3. In attendance at the hearing was Mr. Craig Boyer, legal counsel for the Complaints Director of the College of Physicians & Surgeons of Alberta; Dr. Obaid Afridi; and Ms. Valerie Prather, Ms. Andrea Steele, and Ms. Chelsea Tolppanen, legal counsel for Dr. Afridi.

II. PRELIMINARY MATTERS

4. Neither party objected to the composition of the Hearing Tribunal or its jurisdiction to proceed with the hearing. There were no matters of a preliminary nature.

5. The hearing was open to the public pursuant to section 78(1) of the *Health Professions Act*, RSA 2000, c. H-7 (the "HPA"). No application was made to close the hearing to the public.

III. BACKGROUND

6. In its decision dated March 29, 2023, the Hearing Tribunal found that Allegation 1 was not proven; Allegation 2 was proven with respect to particulars 2(a-e) and 2(i); Allegation 3 was not proven. The proven allegations are:

> You did fail to create an adequate patient record for visits with your patient as required by the College of Physicians and Surgeons of Alberta Standard of Practice on Patient Record content, particulars of which include one or more of the following;
>
> a) Failure to record details of the nature and duration of the complaint of hematuria on May 27, 2019,
>
> b) Failure to record details of the nature and duration of the complaint of back pain on May 29, 2019,
>
> c) Failure to record any plan for care or advice provided to the patient on May 29, 2019,

d) Failure to record details of the nature or duration of abdominal pain reported by the patient on June 12, 2019,

e) Failure to record details of the nature and location of pain,

…

i) Failure to record the details of a discussion of the medication, Ativan, prescribed on September 26, 2019, including any potential side effects, risks or restrictions that may occur.

7. The Hearing Tribunal further found that the failure to record the details of a discussion of the medication, Ativan, prescribed on September 26, 2019, including any potential side effects, risks or restrictions that may occur constitutes unprofessional conduct.

IV. EVIDENCE

8. The following Exhibits were entered into evidence during the hearing:

Exhibit 5: Agreed Exhibit Book

- **Tab 1:** Terms of Resolution dated August 19, 2016
- **Tab 2:** Certificate of Completion – Medical Records course dated May 10, 2017
- **Tab 3:** Memorandum of Understanding dated November 19, 2017
- **Tab 4:** Individual Practice Review Program report provided to Dr. Afridi on January 10, 2018

Exhibit 6: Document labeled 'Original Media Release dated April 25, 2023' containing email from CP to Valerie Prather dated April 25, 2023, and media release dated April 25, 2023

Exhibit 7: Document labeled 'Amended Media Release dated May 3, 2023' containing media release

Exhibit 8: Document labeled '2023-12-19 CDB email to A. Steele' containing string of emails beginning with email from Craig Boyer to Andrea Steele dated December 19, 2023

Exhibit 9: Document labeled 'Closing letter from Dr. C dated October 4, 2017' containing letter from MC to Rose Carter dated October 4, 2017 re: File No. 150239.1.1 and 150443.1.1

Exhibit 10: Document labeled 'Closing letter from Dr. C dated November 15, 2017' containing letter from MC to Dr. Obaid Chan Afridi dated November 15, 2017 re: File No. 160663.1.1

Exhibit 11: Document labeled 'CPEP Flyer' containing description of medical record-keeping seminar & personalized implementation program offered remotely via CPEP live

9. Counsel for the Complaints Director also filed the following Book of Authorities:

   a. Schedule 21 of the HPA;

   b. Physicians, Surgeons, Osteopaths and Physician Assistants Profession Regulation;

   c. Cases on interpretation of regulator's home statute:

      i. *Pharmascience Inc. v. Binet,* 2006 SCC 48, [2006] 2 S.C.R. 513, [2006] 2 R.C.S. 513, [2006] S.C.J. No. 48, [2006] A.C.S. no 48, 2006 SCC 48;

      ii. *Gore v. CPSO, 2009 ONCA 546*;

      iii. *Farooq v. Alberta College of Pharmacists,* 2010 ABCA *306;*

      iv. *Sazant v. CPSO*, 2012 ONCA 727;

   d. Cases on consideration of prior complaints:

      i. *Jaswal v. Newfoundland Medical Board*, 1996 NJ 50;

      ii. *Litchfield v. College of Physicians and Surgeons of Alberta*, 2008 ABCA 164;

      iii. *Lum v Alberta Dental Association and College (Review Panel),* 2016 ABCA 154;

   e. Cases on procedural fairness is owed to all parties:

      i. *Prassad v. Canada (Minister of Employment and Immigration)*, [*1989*] S.C.J. No. 25;

      ii. *Pytka v. Halifax District School Board*, [1993] N.S.J. No. 323;

      iii. *Speck v. Ontario Labour Relations Board*, 2021 ONSC 3176;

   f. Cases regarding publication by regulator:

      i. *Zakhary v College of Physicians and Surgeons of Alberta*, 2012 ABQB 623;

      ii. *Zakhary v College of Physicians and Surgeons of Alberta*, 2013 ABCA 336;

      iii. *Jiwa (Re)*, 2020 CanLII 45163 (AB CPSDC);

      iv. *Hodgson (Re)*, 2020 CanLII 86676 (AB CPSDC);

   g. *Visconti v. College of Physicians and Surgeons of Alberta*, 2012 ABCA 46;

h. CPSA discipline cases for non-compliance:

i. *Barr (Re)*, 2019 *CanLII* 73594 (AB CPSDC);

ii. *Barr (Re)*, 2020 *CanLII* 74224 (AB CPSDC);

iii. *Mausolf (Re)*, 2018 *CanLII* 119633 (AB CPSDC);

iv. *Tse (Re)*, 2021 CanLII 18472 (AB CPSDC);

v. *Tse (Re)*, 2021 *CanLII* 59468 (AB CPSDC).

10. Counsel for Dr. Afridi also filed the following Book of Authorities:

a. Disclosure of IPR Report;

i. *Atco Gas and Pipelines v Alberta*, 2006 SCC 4;

ii. *Health Professions Act*, RSA 2000, c H-7;

iii. *Summary* of *Statutory Interpretation Argument*;

b. Media Releases

i. College of Physicians and Surgeons of Alberta Bylaws, effective March 31, 2023;

ii. College of Physicians and Surgeons of Alberta Policy "Publication of Hearing Tribunal Decisions & Criminal Charges", effective September 25, 2020;

iii. *Jiwa (Re)*, May 29, 2020 [Hearing *Tribunal*];

iv. Media *Release*, *Jiwa (Re)*, July 18, 2020;

c. Impact on Physician's Practice & Appropriate Sanction:

i. *Visconti v. College of Physicians and Surgeons of Alberta*, 2012 ABCA 46;

d. Appropriate Penalty:

i. *Barr (Re)*, July 3, 2019 [Hearing Tribunal];

ii. *Barr (Re)*, January 21, 2020 [Council].

Evidence on Behalf of the Complaints Director

11. The Complaints Director, Dr. GG, was the sole witness.

Dr. GG – Direct Examination

12. Dr. G has been the Complaints Director for the College since 2023. The Complainant was asked if she would agree to an informal resolution of the complaint against Dr. Afridi, and she was not in agreement. When the professional conduct department is able to do an informal resolution, there are a number of options and they depend on the issues. There may be coursework or an assessment, or there may be a referral to the Continuing

Competence Program. The professional conduct department does not have its own resources for assessing competence. If a Hearing Tribunal orders an assessment of a physician, the professional conduct department would engage the Continuing Competence Program. The Terms of Resolution and Memorandum of Understanding in Exhibit 5 dealt with three separate complaints.

Dr. GG – Cross-examination by Counsel for Dr. Afridi

13. Dr. MC and Dr. DH were previous Complaints Directors who were involved with this particular complaint. In the Terms of Resolution, Dr. Afridi agreed to take a medical records course and to have an independent practice review through the Continuing Competence Program. There is no reference to the Complaints Director being allowed to use the complaints that are the subject of the Terms of Resolution in a subsequent hearing.

14. Counsel for the Complaints Director objected to a question regarding whether or not the Continuing Competence Program is allowed to share information about an independent practice review with the Complaints Director on the basis that the witness is being questioned about legal issues. The Hearing Tribunal sustained the objection and asked counsel for Dr. Afridi to rephrase the question. Counsel for Dr. Afridi stated that the issue would be left for legal argument.

15. The Memorandum of Understanding dated November 19, 2017 was signed by Dr. C and Dr. Afridi. Both the Terms of Resolution and Memorandum of Understanding were intended to achieve the same outcome. The Memorandum of Understanding resolved the complaint by Dr. Afridi continuing to engage in the process that he had agreed to under the Terms of Resolution. There is no reference in the Memorandum of Understanding to the Complaints Director being able to use it and the complaint in a subsequent hearing.

16. Dr. MWW sent a letter to Dr. Afridi dated January 10, 2018 that enclosed the report on Dr. Afridi's independent practice review. Dr. G was unsure what materials were included in the disclosure package that were given to the counsel for the Complaints Director for the purposes of this hearing, and whether they included the January 10, 2018 letter and the independent practice review.

17. Counsel for the Complaints Director objected to a question regarding whether section 52 of the *Health Professions Act* specifically prohibits the disclosure of an independent practice review on the basis that it calls for a legal opinion. The Hearing Tribunal sustained the objection on the basis that the witness was being questioned about legal issues and his general interpretation of a section of the *Health Professions Act*. Counsel for Dr. Afridi stated that the interpretation of section 52 would be left for argument.

18. Counsel for the Complaints Director provided the letter from Dr. MWW and the independent practice review to counsel for Dr. Afridi on December 19, 2023. Counsel for the Complaints Director obtained the letter and the independent practice review in February 2021 directly from the Continuing Competence Program. Consent for releasing the independent practice review was obtained when the Terms of Resolution were created and signed. Dr. Afridi was not asked to consent in 2021 when the independent practice review was released to counsel for the Complaints Director.

19. The independent practice review is dated November 13, 2017. The reviewer concluded that Dr. Afridi provides excellent medical care, but he needs to improve the legibility of his medical records.

20. The Complaints Director is seeking a one-month suspension of Dr. Afridi's licence to practice medicine. He is aware that it is difficult for patients to get primary care doctors, and that losing a physician for a month in Grande Prairie could have an impact on the functioning of the emergency room.

21. The Complaints Director has input into media releases regarding the results of hearings along with members of the executive and the communications team. The affected practitioner has no input into media releases. The media release was sent to counsel for Dr. Afridi on April 25, 2023 and then posted later that day. The media release contained information about the unproven allegations. A second media release was sent to counsel for Dr. Afridi on May 3, 2023. Information about the unproven allegations was removed from the second media release.

22. If something has gone through the College process, it is reasonable and in the public interest to say what the allegations were and the actual finding. It is the College's responsibility to make sure that communications are accurate. Dr. G does not know why a second media release was issued.

23. Counsel for the Complaints Director objected to a question concerning whether a media release that contains unproven allegations could be taken out of context by members of the public and used on social media or cause them to think that the allegations are proven. Counsel objected on the basis that the question calls for speculation and is hypothetical. Counsel for Dr. Afridi submitted that it is fair to ask the Complaints Director whether a media release could cause harm to a physician because people that read them do not necessarily understand them or put them in context. Counsel for the Complaints Director submitted that publication is not a sanction and referred to the Court of Appeal decision in *Zakhary v College of Physicians and Surgeons of Alberta*. Publication concerns just transparency and accountability. There is a duty to inform the public. The HPA provides for a Notice of Hearing to be made public, and the Hearing Tribunal full decision is also public information. The summary in the media release informs the public about the decision. Counsel for Dr. Afridi submitted that the media release

describes what the College wants to convey without any input from the affected practitioner. The Hearing Tribunal sustained the objection on the basis that the question called for speculation on a hypothetical question.

Dr. GG – Redirect Examination by Counsel for the Complaints Director

24. An opinion was requested by the previous Complaints Director regarding next steps with the complaint. The independent practice review was transferred to counsel for the purposes of that opinion.

Questions from the Hearing Tribunal

Who is responsible for the media release?

25. The contents of a media release are a joint decision. Section 119 of the *Health Professions Act* is the ultimate section for legal authority.

Why was there a change between the first and second media release?

26. The witness has no information about the changes between the first and second media release.

Evidence on Behalf of Dr. Obaid Afridi

27. Dr. Afridi testified on his own behalf.

Dr. Obaid Afridi – Direct Examination

28. Dr. Afridi first started to explore an electronic medical record (EMR) following his independent practice review. It took some time to explore different EMR options. Dr Afridi obtained the EMR by the end of 2021, and it started functioning in 2022. The doctor who conducted the independent practice review chose the charts, not Dr. Afridi. The independent practice review was a good process. The cost of the independent practice review was around $8,000. Dr. Afridi does not recall giving his permission to the Continuing Competence Program to give the independent practice review to the Complaints Director or the Complaints Director's counsel or being asked to give his permission.

29. Dr. Afridi's wife picked the current EMR, Healthquest.

30. Dr. Afridi was not using an EMR during the time that the Complainant was his patient. Dr. Afridi was reluctant to use an EMR because he is not well versed with a computer. The initial cost of an EMR was between $12,000 and $14,000, with an ongoing monthly fee of around $1,100 per month. It took a long time to get approval from the Information and Privacy Commissioner to start using the EMR. After approval was obtained, the EMR has been very useful. Dr. Afridi tried a number of voice recognition systems and has found one that works very well.

31. Dr. Afridi signed Terms of Resolution with CPSA in 2016 and a Memorandum of Understanding in 2017. The Complaints Director did not advise him that these agreements could be used against him in a hearing about a different matter. Dr. Afridi came to an agreement to resolve the complaints.

32. Dr. Afridi incurred costs to attend the medical record-keeping course, and he found it very helpful. The independent practice review was helpful, and the advice was good. Dr. Afridi's charting has improved with the use of an EMR.

33. Dr. Afridi has four children in their 20s. Dr. Afridi heard about CPSA's media release on April 25, 2023, through his family. CPSA's use of media should be improved to minimize the effect on a physician's family. Dr. Afridi's wife told him that CPSA changed the media release. Dr. Afridi had no input into the changes. In his situation, the damage has already been done and he is not concerned about a further media release. CPSA should be cautious with other media releases in the future.

34. Dr. Afridi is concerned about a suspension because he has sick patients who need follow-up. He is also concerned about coverage in the emergency room. Dr. Afridi does not interview people before taking them on as a patient, and he does not turn them away if they are sick. He works 14 to 16 shifts in the ER in Grande Prairie each month. There are three full-time physician jobs open in the emergency room. A suspension of one month would impact patients in the emergency room. Dr. Afridi's prescription for 20 tablets of Ativan was an inadvertent mistake. Dr. Afridi is very doubtful that any physician will take sick patients into their practice.

35. Regarding penalty, Dr. Afridi does not want the College to let him go scot-free. The College can caution him, reprimand him, and monitor his chart notes. His biggest request is that the College not publish the penalty. Dr. Afridi is willing to take a CPSA course dealing with electronic medical records and how to be more efficient and better at them.

Dr. Afridi – Cross-Examination by Counsel for the Complaints Director

36. Dr. Afridi started using an EMR around the end of 2021 or early 2022. There was nothing about fraud in the College media release. After the media release, there was a social media outburst for a few weeks and other people were making accusations about fraud. Dr. Afridi recalls the Complainant giving testimony that she felt unheard as a patient.

Dr. Afridi – Redirect Examination by Counsel for Dr. Afridi

37. Accusations about Dr. Afridi relating to fraud, drug use, drug pushing and cheating came to social media after the College media release.

Questions from the Hearing Tribunal

What is the impact on his practice and on the Grande Prairie emergency room in the event of a suspension?

38. Dr. Afridi's work is very time-sensitive. There are very sick patients from the inpatient point of view in the hospital as well. Currently Dr. Afridi has nine patients in the hospital, and it would be unfair to have them transferred to another doctor who knows nothing about them. It is also unfair to the physician and does not provide optimal care. Dr. Afridi is a senior physician in the emergency department, and junior colleagues look to him and other senior physicians for advice. There will be an overall impact on patient care, and the impact will be enormous.

V. SUBMISSIONS OF THE PARTIES

Submissions on Behalf of the Complaints Director

39. The Hearing Tribunal made one finding of unprofessional conduct relating to the conduct of prescribing and failing to record in the chart the details of the discussion of the prescribing of Ativan on September 26, 2019. This is approximately 19 or 20 months after the IPR had been completed. There were a number of findings regarding allegations 2(a), (b), (c), (d), and (e) that there were breaches of the Standard of Practice but not sufficient to amount to unprofessional conduct. These are part of the context for the hearing.

40. There are three general themes that came out of the sanction hearing. The first is the use of prior complaint resolutions in consideration of sanction. The second is the accessing of the independent practice review report and using it for this sanction hearing. The third is evidence about publication and the media release that was issued by the College after the Hearing Tribunal's decision was issued on March 29, 2023.

41. At the relevant time, the Continuing Competence Program was described and defined in the Physicians, Surgeons, Osteopaths and Physician Assistants Profession Regulation ("the Regulation"). Subsequently components of the Regulation were transferred into the Standards of Practice that say essentially the same thing as the Regulation.

42. Section 2(c) of the HPA states that a college has the capacity and, subject to the HPA, the rights, powers and privileges of a natural person. Section 3 provides that the college must carry out the activities and govern the regulated profession in a manner that protects and serves the public interest. Part 3 of the HPA deals with continuing competence. Section 119 is the part of the HPA where the Registrar makes the decision on publication. Section 44 of the Regulation speaks to things that the College has to make available on the website so that it is public. The Notice of Hearing or the details of the hearing must be kept public until the hearing is concluded.

43. The Complaints Director gave evidence that the complaints department may engage the continuing competence department to undertake assessments or evaluations of fitness that are needed to determine how a complaint should be dealt with. Exhibit 5 contains the Terms of Resolution and the Memorandum of Understanding relating to three complaints against Dr. Afridi. The complaints were dealt with through taking a record-keeping course and individual practice visits. Paragraph 6 of the Terms of Resolution speaks about the Complaints Director having the right to look at the outcome in ensuring that any recommendations and advice given from the independent practice review are to his satisfaction. The complaints department does not have resources that the continuing competence department does. Dr. Afridi did not come into the continuing competence department independent of the complaints department. This was not a self-report as physicians must do if they have an illness or disease or condition that affects their ability to practice. Section 52 of the HPA protects confidentiality in those circumstances so that they can remain confidential unless the continuing competence committee determines that they need to make a referral to the Complaints Director under section 51.1 of the HPA.

44. The Supreme Court of Canada decision in *Pharmascience* states that a regulator has a very heavy burden and a duty to protect the public. As such, the regulator's investigative powers should be interpreted broadly because it defeats the protection of the public provision by trying to put a narrow interpretation on the investigative powers. The same principle was repeated in the Ontario Court of Appeal decision in *Gore v. CPSO* where the court stated that the powers of a regulator are to be interpreted broadly to be able to fulfill the public protection duty. The Alberta Court of Appeal stated in *Farooq v. Alberta College of Pharmacists* that it would be inappropriate to put a restrictive interpretation on the investigative powers of the regulating college. In *Sazant v. CPSO*, the doctor was trying to prohibit the college from obtaining the criminal investigation records for their own internal discipline investigation. The Ontario Court of Appeal rejected the challenge and stated that a regulated physician has a lower expectation of privacy vis-à-vis the regulator. These are important cases in relation to the interpretation of section 52 of the HPA.

45. Dr. Afridi signed the Terms of Resolution and the Memorandum of Understanding. He was being advised by senior legal counsel. Paragraph 6 of the Terms of Resolution makes it clear that the Complaints Director has a continuing role in seeing the outcome of the independent practice review. The issue is broader than just the independent practice review and concerns the Terms of Resolution and the Memorandum of Understanding. The decision in *Jaswal* contains the factors to be considered for sanction that include the previous character of the physician and, in particular, the presence or absence of any prior complaints or convictions. In *Litchfield v. College of Physicians and Surgeons of Alberta*, a prior complaint was considered for determination of sanction. In *Lum v. Alberta Dental Association and College*, Dr. Lum had been a member of the BC College of

Dentists and had 22 complaints over the course of 10 years. Although none of those complaints had resulted in a disciplinary hearing, the court concluded that they were properly considered for the determination of whether or not he met the good character requirement for registration as a dentist in Alberta. The appeal was dismissed.

46. Prior complaints are relevant to decisions about a regulated person. Case law supports the fact that the Hearing Tribunal can consider prior resolutions, and it is not a matter of consent. There is nothing in the HPA or the agreements themselves that support the conclusion that consent is required.

47. Regarding publication, the media release on April 25, 2023, was factually accurate and very succinct. The issue of publication is not a matter that involves consent by the investigated physician. Section 119 of the HPA specifies that the decision regarding publication is for the Registrar. The Court of Queen's Bench decision in *Zakhary v. CPSA* states that publication is not an issue of sanction or punishment. It is a requirement of transparency and accountability for the regulator to show that the public interest is being served. On appeal the Court of Appeal confirmed that there is no prohibition on publication in the HPA. CPSA decisions are published on an open-source and public legal database, and those decisions state allegations when they are not proven to be unprofessional conduct.

48. Dr. Afridi gave evidence that there were things said on social media by other parties, and he was told about these things by family members. Dr. Afridi did not view these social media comments himself. This hearing is open to the public, and there was no application by either party to close the hearing. The "open courts" principle is reflected in the HPA.

49. Regarding sanction, Dr. Afridi is an experienced physician. The evidence shows prior complaints dealing with the quality of charting, remedial efforts made to improve the quality of charting, and the independent practice review report showing that the quality of charting appears to be up to standard. The IPR report is in early 2018, and 19 to 20 months later there are problems with charting.

50. The CPSA discipline decisions involving Dr. Barr, Dr. Mausolf, and Dr. Tse are examples of physicians who have had a failure to engage, failure to cooperate, and failure to comply with what they promised to do and having sanctions as a result of that. Regarding Dr. Afridi, the terms of resolution and memorandum of understanding addressing three complaints from three different patients, the two-day records course in Toronto, and the independent practice review process do not appear to have taken effect or, if they took effect, that effect did not last. The Hearing Tribunal should reject Dr. Afridi's suggestion that he take the CPEP course because further education is not what is needed. Instead, there should be a clear message that there are consequences for Dr. Afridi's failure to maintain what he has demonstrated that he can do.

51. In *Visconti*, the member argued that he should not have to serve a 30-day suspension because he was such a busy doctor and his patients would be negatively affected. The Alberta Court of Appeal held that the proposition that a physician who practices in an area where physicians are in high demand and short-staffed should be held to a lower standard of accountability than other physicians was unacceptable.

52. A suspension causes a financial impact on the member, and the other tool that the Hearing Tribunal has to impose a financial impact is a fine. Pursuant to the HPA, the maximum amount that could be imposed by way of a fine would be $10,000.

53. *Jaswal* sets out the following factors to be considered regarding costs: the degree of success; the necessity for the witnesses; whether the person that presented the case could reasonably have anticipated the result; and whether those presenting the case could reasonably have anticipated the need to call certain witnesses. A substantial amount of work was required by counsel for the Complaints Director to prepare for witnesses that were ultimately not called on behalf of Dr. Afridi. Case law provides that fairness is owed to both parties, and the Complaints Director is entitled to have reasonable notice of witnesses being called by Dr. Afridi and to know what evidence he may need to call in response. There is an expectation that there is disclosure and that the parties will disclose names of witnesses and what they are expected to say. This is a matter where there needs to be a sanction based on deterrence since remediation had been done previously. Although there was one finding of unprofessional conduct, there should be a meaningful award of costs, and the Complaints Director proposes 50 percent.

Questions from the Hearing Tribunal

What specific terms is the Complaints Director seeking with respect to penalty?

54. The Complaints Director is advocating for a 30-day suspension, and 50 percent of the costs. If the Hearing Tribunal is not willing to order a suspension, the Complaints Director has the alternative submission of a fine. The maximum amount of the fine is $10,000, and there is no current estimate of costs.

Submissions on Behalf of Dr. Afridi

55. The basic principle of statutory interpretation is that we look to the plain and ordinary grammatical meaning of the words used in the HPA and interpret the statute as a whole. The independent practice review report was obtained by the Complaints Director in 2021 when the investigation into the complaint was complete, and attempts to informally resolve the complaint had been refused by the Complainant. There was no investigation in progress when the Complaints Director sought the independent practice review report and, as such, the cases cited by counsel for the Complaints Director relating to investigatory powers do not apply. As such, the manner in which the

Complaints Director came into possession of the independent practice review report was inappropriate, and the inappropriate disclosure of the independent practice review report should be a mitigating factor when considering sanction.

56. The Terms of Resolution and the Memorandum of Understanding resolved complaints pursuant to section 55(2)(a.1) of the HPA.

57. The terms of the agreement were for Dr. Afridi to do two things: the record-keeping course and engage in the independent practice review program. The independent practice review is conducted under Part 3 of the HPA. Section 52 of the HPA states that participation in a continuing competence program is confidential. Section 53 makes it an offence for that information to be disclosed. The intent of section 52 is to ensure that physicians are open, honest and forthright in the independent practice review program without fear of findings in that process having a negative impact on their career. There are exceptions in section 52(2), and a referral may be made in the event of noncompliance. The Complaints Director received the independent practice review report for the purpose of entirely different complaints. Paragraph 6 of the Terms of Resolution does not provide blanket consent for release of the independent practice review report. Dr. Afridi was advised by the Complaints Director that he had completed his covenants, and the complaint files were closed. As such, the term of the agreement concluded no later than November 15, 2017, and the Complaints Director was not entitled to any further information about Dr. Afridi's participation in the independent practice review program. Dr. Afridi did not provide consent for the Complaints Director to access the independent practice review report in an entirely different matter. If the Complaints Director's interpretation of section 52 is accepted, it will have a chilling effect on physicians being willing to engage in a consensual resolution that involves an independent practice review.

58. Regarding the media release, Dr. Afridi is requesting that no media release accompany the release of this decision or, in the alternative, that Dr. Afridi be permitted the opportunity to provide input into the content of that media release and that any dispute related to the content be referred back to this Hearing Tribunal. Publication is provided for in section 119(1.1) and section 135.92(4) of the HPA. Section 49(2)(E) of the CPSA bylaws permits the publication of a decision of the hearing tribunal and does not make any reference to media releases. The CPSA publishing policy states it will publish all decisions by posting the decision on the CPSA website and sending a press release. The decision in *Zakhary* speaks to the publication of the results of a hearing and does not directly address the publication of a media release. Dr. Afridi's position is that posting the decision itself is sufficient, and an editorialized media release is unnecessary. The media release traumatized Dr. Afridi and his family deeply. The Hearing Tribunal has the authority to make an order regarding media releases pursuant to section 82(1).

59. Counsel for Dr. Afridi addressed the *Jaswal* factors. Regarding the nature and gravity of the proven allegation, while failing to meet the Standard of Practice for record-keeping is a serious matter, it is on the lower end of the spectrum when it does not have any impact on the patient. Dr. Afridi is a senior physician in terms of age and clinical practice, but he has no experience with technology and was slow to embrace an electronic medical record.

60. Regarding the presence or absence of any prior complaints or convictions, Dr. Afridi has no prior convictions and this is his first College hearing. Dr. Afridi does not contest the admissibility of those prior resolutions. Regarding the use of the Terms of Resolution and Memorandum of Understanding, Dr. Afridi submits that the Hearing Tribunal cannot use the evidence of the prior resolutions to punish Dr. Afridi for complaints that are not before the Hearing Tribunal and that have not been tested or proven. The informal resolutions show that Dr. Afridi worked collaboratively with the College to resolve complaints, and this should be a mitigating factor. An informal resolution is not an admission that the conduct in the complaint occurred or that, if it did occur, it amounts to unprofessional conduct.

61. Regarding the age and mental condition of the offended patient, this factor is irrelevant because the Complainant was not impacted by Dr. Afridi's failure to chart his discussions with her. There is only one offence on one occasion that has been proven to have occurred. Dr. Afridi acknowledged in his evidence before the Hearing Tribunal that his charting was not good when he prescribed the Ativan, and that he should have charted the discussion he had with the patient as it is his standard practice to have that discussion, and it would be typically his standard practice to record it. The failure to chart should be put into the context of a patient who came with multiple complaints and required assurance about her concerns.

62. Regarding whether the physician has already suffered serious financial or other penalties, Dr. Afridi has suffered in a number of ways as a result of the allegations. He had to spend a considerable amount of time preparing for and defending himself. The Complaints Director failed to ensure that its expert was careful to be medically accurate and properly instructed. Dr. Afridi gave evidence that the media release had a significant impact on him and his family. The practice is to send the media release to counsel for the member on the day that it is being released. The public and false shaming of Dr. Afridi on social media was ignited by the media release. Proof that including the unproven allegations was unnecessary is the fact that the College issued an updated press release on May 3, 2023. The College owes a duty to physicians to report tribunal findings accurately and fairly, and the failure to do so and subsequent harm to Dr. Afridi and his family should be a significant factor in determining the appropriate penalty.

63. Dr. Afridi's failure to chart on September 26, 2019 had no impact on the patient. The main mitigating factor in this case is the significant steps that

Dr. Afridi has taken to improve his charting practice since the implementation of the EMR.

64. Regarding specific and general deterrence, specific deterrence is not required. General deterrence is more of a consideration in cases where the unprofessional conduct is something significant, like diverting TPP medications, boundary violations, significant clinical issues, or not responding to the College.

65. A one-month suspension would take Dr. Afridi out of the hospital and out of his office, and that would actually cause harm to the public and his patients. It was quality-of-care issues that concerned the Court of Appeal in *Visconti* when they said that patients are not disentitled to good quality of care by virtue of the fact that a physician is a busy practitioner, and that a one-month suspension should be sustained. Dr. Afridi's proposal to invest in a course on charting specific to EMRs that is endorsed by the College is a far more practical way of ensuring the safe and proper practice of medicine as it relates to record-keeping. Members of the medical profession would see a one-month suspension as unduly harsh. The penalties should be reasonable and address the issue at hand.

66. The conduct that occurred in this case is conduct that could and does happen to every physician because they sometimes fall short of expectations in their charting. Regarding the range of penalties in similar cases, the three discipline reports submitted by the Complaints Director are not similar to this case at all. The refusal to respond and cooperate with the College is a very significant matter. The three cases involved failures by physicians to respond to repeated communications from the College and to abide by the terms of reference that they had signed. This is a serious offence as it undermines the ability of physicians to maintain the privilege of being a self-governing profession and the ability of the College to regulate the conduct of physicians. None of the three cases resulted in a one-month suspension as argued for by the Complaints Director in this case.

67. A fine of $10,000 is also disproportionate. Dr. Afridi proposes that the Hearing Tribunal impose a requirement that he take and pass the CPEP course, which is entitled "Improving Patient Safety Through Effective Record Keeping". Dr. Afridi has demonstrated significant change and improvement in his practice and charting, and this is another step in the process.

68. If the Hearing Tribunal determines that a suspension is warranted, Dr. Afridi proposes that he be directed to work pro bono for that period of time to allow him to care for his patients. There is no issue with his quality of care and patient safety.

69. It is premature for the Hearing Tribunal to consider costs until an appropriate penalty has been determined.

70. Regarding the fairness issues, counsel for the Complaints Director had advised that he intended to call Dr. MC and Dr. DH as witnesses for the sanction hearing. Dr. C was the Complaints Director when the Terms of Resolution and the Memorandum of Understanding were entered into with Dr. Afridi. Dr. H was the Complaints Director when this matter was sent to a hearing and when the media releases were issued. There was no information given about the scope of their testimony. It was a great deal of work to obtain an expert opinion without knowing what evidence would be called by counsel for the Complaints Director. On January 12, 2024, they were informed that Dr. C and Dr. H would not be testifying and that Dr. G would be giving evidence. The expert report was held in reserve in case it was ultimately necessary as part of Dr. Afridi's defence. By electing to call Dr. G as the only witness, the Complaints Director insulated Dr. C and Dr. H from giving evidence about their involvement and being cross-examined. Counsel for Dr. Afridi submitted that the fact that a second media release was issued without the unproven allegations shows that the Complaints Director recognized that it was wrong to issue the first media release and that it could cause harm.

Question from the Hearing Tribunal

How does information about the conduct of the Complaints Director assist the Hearing Tribunal in crafting an appropriate penalty?

71. Counsel for Dr. Afridi submitted that the conduct of a fair hearing is important, and that she was responding to issues raised earlier about the way that counsel for Dr. Afridi had conducted the hearing.

Reply submissions on Behalf of the Complaints Director

72. Counsel for the Complaints Director submitted that the decision in *Atco Gas and Pipelines v Alberta (Energy and Utilities Board)* dealt with an Atco Gas owned and operated utility. The court held that the Energy and Utilities Board had the authority to approve the sale of an asset, but not to direct what would become of the sale proceeds. The Supreme Court of Canada decision in *Pharmascience* was issued ten months after the decision in *Atco Gas* and makes no reference to *Atco Gas*. *Pharmascience* and the decisions cited by the Complaints Director are applicable in the professional regulatory context. Further the general principle in *Atco Gas* does not assist Dr. Afridi because there is no provision in the HPA that states that the Complaints Director loses authority or oversight over complaints where there has been a resolution process that engages the services of the continuing competence department.

73. Regarding publication, the legislature gave the Hearing Tribunal the powers under section 82. The issue of publication is ultimately in the hands of the Registrar pursuant to section 119 of the HPA. There is no statutory or case authority for the proposition that there should be some sort of advance notice on a publication and an opportunity for review and comment.

74. Regarding the independent practice review report, there was no evidence that the opinion sought by the Complaints Director in January 2021 was about the likelihood of success of a prosecution. The date of the expert opinion is April 21, 2021, and, as such, the investigation had not concluded because the expert opinion had not been obtained. After the expert report is obtained, there is the decision by the Complaints Director to refer specific allegations to a hearing, and the Notice of Hearing is dated April 21, 2021. An investigation is not some finite component, and that interpretation of the HPA would be contrary to the decisions in *Pharmascience*, *Gore*, *Farooq*, and *Sazant*.

75. Counsel for Dr. Afridi did not ask what specifically Dr. H or Dr. C would say.

76. Regarding the pro bono proposal, counsel for the Complaints Director submitted that there are challenges with the additional work and complexity that would be required.

77. There is no property in a witness, and Dr. Afridi would have been able to call a former Complaints Director as a witness, although there would not be an opportunity for cross-examination.

Questions from the Hearing Tribunal

What sections of the HPA apply to the IPR in these circumstances?

78. Counsel for the Complaints Director submitted that the Continuing Competence Program is created under Part 3 of the HPA, and the established programs are described in the Regulation. The Complaints Director wanted to use the independent practice review process for an assessment for the conclusion of a complaint, and so that is within Part 4 of the HPA. It is similar to the Complaints Director hiring an outside service provider. While the Complaints Director is using the services, it is an adjunct to the complaints process and not a process that comes up through the different programs that are identified in the Regulation. There are three programs that are identified in the Regulation as part of the continuing competence program: a general assessment, continuing professional development, and a competency assessment. The Complaints Director gave evidence that there are times when the conduct department needs to access those skills and systems to do the final assessment for a terms of resolution or an informal resolution. Section 52 of the HPA does not apply when the independent practice review is done at the request of the Complaints Director because it is not done as part of the Continuing Competence Program.

79. Counsel for Dr. Afridi submitted that there is no contracting out of section 52 of the HPA. When the independent practice review program is used by the Complaints Director as a tool to resolve complaints, it falls under section 23(b) of the Regulation as part of the continuing professional development of the physician.

How should the information about the IPR be used for this matter?

80. Counsel for Dr. Afridi submitted that he should have been asked for consent to use the independent practice review. The legislation does not allow the Complaints Director to access, in this case, the results of an independent practice review in a previous case. However, since the Complaints Director did access the independent practice review, the independent practice review demonstrates that Dr. Afridi complied with the Terms of Resolution, he did the independent practice review successfully, and the physician conducting the independent practice review thought that he was an excellent physician who needed to have more legible handwriting.

81. Counsel for the Complaints Director submitted that the independent practice review showed that the learnings were taken in and were applied and reflected in the records. When Dr. Afridi was no longer under supervision, the charting dropped back down below a minimum standard.

Why are the costs submissions premature?

82. Counsel for Dr. Afridi submitted that they do not know what the costs are, and there needs to be some disclosure before submissions. More importantly, if the penalty is closer to an educational approach, then that should affect the costs. As well, once the Hearing Tribunal has issued the decision on penalty, there may be an agreement on costs without having to bring back issues before the Hearing Tribunal.

83. Counsel for the Complaints Director submitted that case law supports that for every full day of hearings, the costs are approximately $23,000. As such, the costs are well over $100,000.

What are the decisions that address Jaswal Factor Number 13 and the range of sanctions in similar cases?

84. Counsel for the Complaints Director submitted that the one month is based on the idea that there were three prior complaints with concerns about charting. There is a formal resolution of those complaints, and an independent practice review process which is implemented which shows Dr. Afridi's learnings. The educational approach appears to have failed, and that is the reason for the request for a one-month suspension. Similar to the situation for Dr. Barr, the penalty is meant to deliver a sharp message to the practitioner and the profession. There are not a lot of cases in this area that deal with a charting issue because typically a charting issue is a first-time matter where there are no prior complaints, and it is resolved through the educational approach such as a reprimand and charting course.

85. Counsel for Dr. Afridi submitted that he would like to build on what he has already done and learn more about how to efficiently use the EMR that he has incorporated into his practice. This is not the case for a sharp penalty.

VI. ORDERS

86. The Hearing Tribunal carefully considered the evidence and the submissions of the parties, and hereby makes the following orders:

a. Dr. Afridi shall receive a reprimand with the Hearing Tribunal's written decision serving as that reprimand.

b. Dr. Afridi shall pay a fine of $6,000 to the College, due within 60 days after he receives a copy of the Hearing Tribunal's written decision.

VII. REASONS FOR ORDERS

87. In determining the appropriate orders, the Hearing Tribunal has considered the factors set out by the Court in *Jaswal v. Newfoundland Medical Board*. The Hearing Tribunal's consideration of the *Jaswal* factors is set out below.

a. Nature and Gravity of the Proven Allegations

Dr. Afridi was found to have breached the Standard of Practice on Patient Record Content, which is at the lower end of seriousness. Record-keeping is important for a variety of reasons that were set out in the merits decision. In this situation, the breach of the Standard on Patient Record Content involved the prescription of Ativan.

b. Age and Experience of Dr. Afridi

Dr. Afridi is a senior physician with extensive experience in the clinical and hospital setting. On behalf of Dr. Afridi, counsel urged the Hearing Tribunal to take into account that he is inexperienced with technology. However, the concerns in this situation involve Dr. Afridi's written records, not his electronic medical records. As such, the Hearing Tribunal finds that his lack of experience with technology is an irrelevant factor. The Hearing Tribunal finds that the age and experience of Dr. Afridi is an aggravating factor.

c. Previous Character and Prior Complaints or Convictions

As set out in *Jaswal*, evidence of prior complaints is one factor to consider when assessing the appropriate sanction. Dr. Afridi submitted that the evidence of prior resolutions cannot be used to punish him when the complaints are not before the Hearing Tribunal. In this situation, the prior complaints and resolutions show that Dr. Afridi was well aware of concerns with his record-keeping, that he had taken a course and been involved in an independent practice review to improve his record-keeping and had improved his written records by the conclusion of the independent practice review. Dr. Afridi confirmed this while giving evidence. The fact that Dr. Afridi had difficulty implementing an EMR does not mean that he did not have a continuing

obligation to keep written records in accordance with the requirements as set out in the Standard of Practice. The Hearing Tribunal determined that the prior complaints were an aggravating factor when determining sanction.

The Hearing Tribunal agrees with submissions by counsel for the Complaints Director that the HPA, case law, as well as the Terms of Resolution and the Memorandum of Understanding, all support the conclusion that the resolutions of prior complaints may be used without the consent of the member.

A plain reading of the provisions in Part 3 of the HPA shows that there are specified programs relating to continuing competence as set out in the Regulation. The use of the services of the continuing competence department to provide services to the Complaints Director in connection with complaints pursuant to Part 4 is distinct from the Continuing Competence Program set out in the Regulation. The Hearing Tribunal rejects the submission made on behalf of Dr. Afridi that the use of the services of the continuing competence department in these circumstances constitutes "continuing professional development" as described in section 25 of the Regulation. As such, section 52 of the HPA does not apply and does not impose confidentiality obligations in relation to the types of referrals that are at issue here.

d. Age and Mental Condition of the Patient

This is a neutral factor.

e. Number of Times the Offence Occurred

The Hearing Tribunal made findings that Dr. Afridi's record-keeping fell below the requirements in the Standard of Practice on Patient Record Content a number of times. However, there was one finding that this rose to the level of unprofessional conduct.

f. Role of the Physician in Acknowledging What Occurred

Dr. Afridi has the right to contest the allegations, and this is a neutral factor.

g. Whether the Physician has Suffered Other Serious Financial Consequences

On behalf of Dr. Afridi, counsel submitted that the harm to Dr. Afridi and his family as a result of the media release should be taken into account when determining the appropriate penalty. There was no evidence before the Hearing Tribunal that Dr. Afridi has suffered adverse financial consequences as a result of patients refusing care

following the media release. The Hearing Tribunal finds that the consequences from publication should not be considered when determining whether the physician has already suffered serious financial or other penalties. The Hearing Tribunal also notes that there was no direct evidence about what was actually posted on social media, and the only evidence was given by Dr. Afridi relating to the impact on his family.

h. Impact of the Incident on the Patient

This is a neutral factor.

i. The Presence of Absence of any Mitigating Circumstances

The disclosure of the independent practice review report in these circumstances was not inappropriate, and the Hearing Tribunal rejects the submission on behalf of Dr. Afridi that the disclosure is a mitigating factor.

j. Need to Promote Deterrence and Need to Maintain Public Confidence in the Profession

The Hearing Tribunal finds that specific deterrence is a consideration in this case. Educational programs were involved in resolving earlier complaints, and Dr. Afridi is before the Hearing Tribunal with similar concerns. Of equal importance is the need to deter other members of the profession from engaging in similar conduct. Complete and accurate records are important for patient care.

k. Degree to Which the Conduct was Outside the Range of Permitted Conduct

The Hearing Tribunal finds that Dr. Afridi's conduct fell outside the range of permitted conduct and is not acceptable.

l. Range of Sentence in Similar Cases

The Complaints Director submitted CPSA decisions that are not directly analogous because of the unique set of circumstances here. In *Mausolf*, there was a violation of the terms of resolution that required that Dr. Mausolf promptly reply to all correspondence from the College. In *Tse*, there was a violation of the terms of resolution that required that Dr. Tse provide required information to Alberta Health. In *Barr,* there was a violation of the terms of resolution that required Dr. Barr to respond to the College.

88. Although the decisions in *Mausolf, Tse* and *Barr* are not directly relevant for determining the appropriate penalty, they do provide a clear illustration of why it is essential that the Complaints Director and this Hearing Tribunal have access to information about prior complaints and their resolution.

Section 3 of the HPA provides that the College must govern its regulated members in a manner that protects and serves the public interest. In this situation there were three previous complaints that dealt with deficiencies in record-keeping. The Hearing Tribunal determined that a reprimand would be appropriate in these circumstances. The resolution of the three previous complaints shows that Dr. Afridi was well aware of his professional obligations and failed to meet them.

89. The Complaints Director submitted that a one-month suspension would be the appropriate penalty or, in the alternative, a fine. In these circumstances, the Hearing Tribunal is able to impose a fine of up to $10,000. Dr. Afridi submitted that he would be willing to work for one month pro bono so that his patients would receive services and he would still suffer a financial penalty.

90. The Hearing Tribunal considered the suggestion by Dr. Afridi that he be permitted to work pro bono in lieu of a suspension and determined that this type of order is not provided for under section 82 of the HPA.

91. After careful consideration, the Hearing Tribunal has determined that a fine in the amount of $6,000 would be appropriate. A fine may also be used to impose a penalty that is more serious than a reprimand alone but less than a suspension. A fine will also accomplish both specific and general deterrence. Although the failure to comply with the Standard of Practice on Patient Record Content is serious, it does not fall at the most serious end of unprofessional conduct. As such the Hearing Tribunal determined that the maximum fine of $10,000 would not be appropriate and that the fine should be set at the mid level of the scale. The Hearing Tribunal also determined that the minimum fine should not be imposed in these circumstances. The information relating to the resolution of the three previous complaints shows that Dr. Afridi had all of the necessary tools to assess his own compliance with the Standard relating to patient records and avoid complaints and subsequent disciplinary actions. He failed to do so. When determining the fine and time to pay, the Hearing Tribunal took into account that Dr. Afridi will not be subject to a suspension, required to work pro bono, or required to take a course with the attendant costs and time away from work. Dr. Afridi will be able to continue to work without disruption.

92. The Hearing Tribunal considered submissions on behalf of Dr. Afridi that the Hearing Tribunal should make an order regarding publication. Section 82 provides the authority for the Hearing Tribunal to issue orders. There is nothing in section 82 that specifically deals with publication. Instead, the authority to determine publications is given to the Registrar pursuant to section 119 of the HPA.

93. Section 119 was amended in 2023 to specifically provide for the Registrar’s authority in relation to the publication of information respecting any order made by a hearing tribunal or council. Section 119(1.1) states as follows:

> 119(1.1) *Subject to the bylaws, the registrar may publish or distribute information respecting any order made by a hearing tribunal or council under Part 4.*

94. As noted in the Court of Queen's Bench decision in *Zakhary*, the decision to publish is not a sanction and is a discretionary decision of the Registrar that is "subject to the bylaws" and under the ultimate authority of Council. Any concerns related to publication are not within the jurisdiction of the Hearing Tribunal.

> *[22] The decision to publish is framed in s 119(1)(f) as a decision of the Registrar, but both parties to this application have treated it as in essence a decision of the CPSA. That seems appropriate, particularly as the Registrar's discretion is "subject to the bylaws", the bylaws are adopted by the Council of the CPSA, and the decision in question reflects the approach adopted by the Council in Bylaw 35(1)(d).*
>
> *[38] The purpose of publication by the CPSA is not to punish; no more than having open proceedings or allowing public access to information about proceedings is intended to punish. The purpose in all of these cases to is to promote the public interest through transparency. The CPSA has the mandate and expertise to determine when and how disciplinary decisions should be published in the public interest.*

95. Counsel for Dr. Afridi has requested the opportunity to review and approve any media release. A regulated member does not have the capacity to intervene in College governance, and publication should not be subject to individual preference. The College published accurate information and cannot be held responsible for actions taken by third parties on social media.

96. Section 119 has been interpreted as fostering the goals of transparency and accountability. It is not within the Hearing Tribunal's jurisdiction to determine whether or not the College has exceeded its authority with the publication of media releases. As such, the Hearing Tribunal will not make an order dealing with publication of this decision.

97. The Complaints Director has already made oral submissions regarding costs. The Complaints Director shall file brief written submissions on costs within 14 days of the date of the decision. Dr. Afridi shall file brief written submissions on costs within 7 days after service and filing by the Complaints Director.

Signed on behalf of the Hearing Tribunal by the Chair:

Naz Mellick

Dated this 20th day of September, 2024.