

ALBERTA COLLEGE OF PHARMACISTS

IN THE MATTER OF
THE HEALTH PROFESSIONS ACT

AND IN THE MATTER OF A HEARING REGARDING THE CONDUCT OF
MOUSTAFA ALREFAEY

DECISION OF THE HEARING TRIBUNAL ON SANCTION

April 4, 2018

I. INTRODUCTION

In its written decision dated January 24, 2018, the Hearing Tribunal described its findings with respect to the allegations of unprofessional conduct as set out in the Notice of Hearing dated April 3, 2017 against Moustafa Alrefaey. In summary, the Hearing Tribunal found that allegations 6, 8 and 9 were factually proven and also constitute “unprofessional conduct” as defined in the HPA.

Following the written decision, the parties indicated that they were prepared to address sanction by way of a Joint Submission on Sanctions. Moreover, they indicated that they were prepared to proceed by way of written submissions, rather than an in-person hearing.

Counsel for the Complaints Director provided written submissions, dated March 7, 2018. Appended as TAB 1 to the written submissions was a Joint Submission on Sanctions, dated March 7, 2018.

Counsel for Mr. Alrefaey provided written submissions, dated March 15, 2018.

The Hearing Tribunal met via teleconference on March 21, 2018 to consider the Joint Submission on Sanction and the submissions of the parties. In attendance on behalf of the Hearing Tribunal were: Kevin Kowalchuk, Pharmacist (Chair), Gillian Hansen, Pharmacist, and Tanner Bengry, Pharmacist. Katrina Haymond, independent legal counsel, was also in attendance. The parties were advised in advance that Nancy Brook, Public Member, was not able to participate in this aspect of the hearing.

II. JOINT SUBMISSION ON SANCTIONS

The Joint Submission on Sanctions was included in the materials provided by Mr. Boyer. The parties jointly submitted that the Hearing Tribunal should make a number of orders, including a three-month period of suspension (with six weeks of the suspension being held in abeyance), a condition on Mr. Alrefaey’s practice permit requiring him to have a female chaperone in attendance at all times, a condition that he not administer any medication to a patient except for administering a medication by injection, completion of the PROBE course, and 75% of the costs of the hearing to a maximum of \$45,000.00.

III. SUBMISSIONS OF THE PARTIES

Mr. Boyer provided a written submission on behalf of the Complaints Director. Mr. Boyer’s written submission outlined in this case, that the joint submission meets the public interest test and should be accepted by the Hearing Tribunal. The orders proposed would protect the public and preserve the integrity of the profession and would serve to educate and deter the investigated member and other members of the profession from any future conduct of this nature.

Mr. Boyer highlighted The Principles of Determining Sanction in Section 82 of the *Health Professions Act* as it sets out the range of orders that the Tribunal can impose after making a finding of unprofessional conduct.

References were made to the decision in *Jaswal v Newfoundland Medical Board* where a non-exhaustive list of factors are provided to consider when determining sanction in a professional discipline matter, but also included factors to also consider when determining costs to be imposed on disciplined professionals. The decision in *Alberta College of Physical Therapists v Fitzpatrick*, further provides guidance in the determination of costs to be imposed.

Mr. Boyer emphasized that it is important to review these factors in relation to this case and the allegations that have been proven.

The reasons for the requested orders in this case presented by Mr. Boyer included:

1. Mr. Alrefaey is a 36-year old pharmacist who has been practicing in Alberta as a registered pharmacist (RPh) since March 2013. This is the first complaint against him.
2. The allegations were proven to have occurred on February 2, 2016.
3. At that time, [the complainant] was a young single mother who Mr. Alrefaey was aware was managing depression and having difficulty sleeping.
4. [The complainant] reported Mr. Alrefaey's conduct to the Calgary Police Service.
5. With respect to allegations 6 and 9, the Hearing Tribunal found that the allegations involved a serious boundary violation which amounted to conduct that undermined the integrity of the profession and "clearly fell below the standard expected of members of the pharmacy profession, and clearly constitute[s] unprofessional conduct".
6. With respect to allegation 8, the Hearing Tribunal found Mr. Alrefaey's conduct; "undermined the integrity of the profession; was contrary to accepted pharmacist practice and ethical standards; did not take sufficient and reasonably expected precautions to care for his patient; showed a serious disregard of his duties as a pharmacist to his patient, the Alberta College of Pharmacists and to the public which relies upon the integrity and competence of pharmacists as members of a self-regulating profession."
7. Pharmacists are granted the privilege of prescribing rights and administering drugs to patients. As the Hearing Tribunal recognized in its decision, these privileges must be exercised in accordance with the governing legislation and standards of the profession. Sanction orders that provide both general and specific deterrence are required to ensure that the profession as a whole, as well as Mr. Alrefaey, are made aware that similar conduct will not be condoned by the College.
8. The Complaints Director submits that the requested orders fall within the range of sanctions in similar cases. A recent decision of a Hearing Tribunal of the Alberta College of Pharmacists imposed similar orders after a finding of unprofessional conduct against [a pharmacist]. The [pharmacist's] sanctions included a three month suspension, of which one month would be served and the remaining two

months held in abeyance, an order to complete the PROBE course, a fine of \$1000, full costs of the investigation and an order that [the registrant] provide any pharmacy employer with a copy of the Hearing Tribunal's decision for a two year period. In that case, [the registrant's] conduct amounted to a professional boundary violation when he used a patient's health information to contact her at home in order to pursue a personal encounter.

9. The proposed sanction is consistent with the sanctions for serious boundary violations in other self-regulating health professions under the *Health Professions Act* such as the decisions of a Hearing Tribunal of the College of Physicians & Surgeons of Alberta in the matters regarding Dr. Delacruz and Dr. Taher.
10. With respect to costs, the Complaints Director submits that an order holding Mr. Alrefaey responsible for 75% of the costs of the hearing up to a maximum of \$45,000 to be paid on a 24-month schedule is reasonable. The Complaints Director considered the Jaswal factors and the guidance provided by the Alberta Court of Appeal in the Fitzpatrick case.
11. Mr. Alrefaey disputed the allegations in which the panel made a finding of unprofessional conduct. The matter required a full hearing, which took place over two days. Three witnesses were called to provide the necessary evidence for the tribunal to make its finding. On agreement of the parties, two additional witnesses were not required to attend, which saved time.
12. Following the hearing, allegations 1-9 were factually proven, with one exception being the full particular of allegation 6. Allegations 6, 8 and 9 were found to constitute unprofessional conduct. The Complaints Director submits that although the remaining allegations were proven but not found to constitute unprofessional conduct, they provided necessary context throughout the course of the Hearing and did not delay the proceedings.
13. Finally, the Complaints Director submits that 75% of the costs up to a maximum of \$45,000 appropriately acknowledge that Mr. Alrefaey has worked with the Complaints Director to reach the joint submission on sanction, which has avoided the requirement to hold an additional day of hearing to make oral submissions on sanction and the associated costs

Mr. Fitz provided a joint submission on behalf of Mr. Alrefaey. Mr. Fitz submitted that the written submission on sanctions by the Complaints Director summarizes the issues germane to a Hearing Tribunal when hearing joint submissions concerning sanction after unprofessional conduct has been found following a hearing. Mr. Fitz emphasized that the Hearing Tribunal is required by the Supreme Court of Canada to give considerable deference where, as here, a joint submission on sanction has been reached and to reject it only where acceptance would "bring the administration of justice into disrepute or would otherwise be contrary to the public interest"; the decision *R. v Anthony Cook*.

The reasons for the requested orders in this case presented by Mr. Fitz included:

1. With respect to allegations 6 and 9, the Hearing Tribunal concluded that a serious boundary violation had occurred, but since the Hearing Tribunal did not accept the complainants' evidence in its entirety. Mr. Alrefaey had consent for some of the physical contact with the complainant. This is not a situation where there was

no consent whatsoever for the contact that occurred. Accordingly, this is a factor that is relevant to the issue of the nature and gravity of the conduct that occurred.

2. With respect to allegation 8, it is acknowledged that pharmacists are granted the privilege of prescribing rights and administration drugs to patients. As such, and in recognition of the College's self-regulating guidelines, these privileges must be exercised in accordance with the governing legislation and standards of the profession. While Mr. Alrefaey did fail to document prescription of a schedule 1 medication as found by the Hearing Tribunal, it should be recognized that these prescribing rights have only recently been implemented and the status with respect to the provision of samples is not as clear under the legislation as might be desired. While ultimately that did not excuse Mr. Alrefaey's conduct, it nevertheless is a factor that is relevant for the Hearing Tribunal to consider in their assessment of the nature and gravity of the conduct and the appropriateness of the proposed sanctions.
3. In terms of the other factors that are of particular importance for the purpose of the Hearing Tribunal's consideration of the proposed joint submission, this is the first complaint against Mr. Alrefaey. In addition, he has demonstrated through the post-hearing discussions with the Complaints Director a willingness to avoid incurring further costs for either party by working towards the proposed agreement on joint sanctions.
4. There is no evidence of any repeat pattern of conduct and allegations 6, 8 and 9 all appear to have been an isolated occurrence.
5. Although the Complaints Director's Notice of Hearing raised allegations against Mr. Alrefaey on the basis of nine separate allegations, in fact only three were substantive allegations and the remaining six were merely contextual in nature and could not and did not give rise to any finding of unprofessional conduct.

IV. ORDERS

After considering the Joint Submission on Sanctions and the written submissions of the parties, the Hearing Tribunal decided to accept the Joint Submission, and hereby makes the following orders pursuant to section 82 of the *Health Professions Act*:

1. Mr. Alrefaey's practice permit shall be suspended for a period of 3 months, with 6 weeks to be served starting on a date acceptable to the Complaints Director and being no later than 30 days after the date of the Hearing Tribunal's decision on sanction, and the remaining 6 weeks of suspension being held in abeyance for a period of 24 months pending fulfillment of the conditions outlined below;
2. If the Complaints Director believes that the conditions are not fulfilled by Mr. Alrefaey, he may apply to the Hearing Tribunal, with notice to Mr. Alrefaey, requesting that some or all of the remaining 6 weeks of suspension be served by Mr. Alrefaey;
3. If after 24 months, the Complaints Director is satisfied that Mr. Alrefaey has fulfilled the conditions imposed on him, the Complaints Director shall advise Mr.

Alrefaey in writing of that determination and the period of suspension still held in abeyance shall then expire;

4. Mr. Alrefaey's practice permit shall be subject to the condition that he shall have a female chaperone in attendance during all times when he is in a private setting with a female patient, with the chaperone having been approved in advance by the Complaints Director;
5. Within nine months of the date of the Hearing Tribunal's sanction decision, Mr. Alrefaey shall attend and complete, at his own cost, the PROBE course on ethics and boundaries offered by the Center for Personalized Education for Physicians;
6. Mr. Alrefaey's practice permit shall be subject to the condition that he shall not administer any medication to a patient except for administering a medication by injection;
7. The practice permit conditions shall be reviewed by the Registrar, in consultation with the Complaints Director, annually when an application for renewal of the practice permit is submitted by Mr. Alrefaey. The initial annual review by the Registrar shall not occur prior to Mr. Alrefaey's successful completion of the PROBE course outlined in paragraph 5;
8. Mr. Alrefaey shall be responsible for 75% of the costs of the investigation and hearing to a maximum of \$45,000. Payment will occur in accordance with a reasonable monthly payment schedule as directed by the Hearings Director with the costs to be paid in full within 24 months from the date the Hearings Director sets the schedule and notifies Mr. Alrefaey about the first payment.

V. REASONS FOR ORDERS

The Hearing Tribunal carefully considered the Joint Submission on Sanctions and the submissions of the parties, including the factors referred to by the Court in *Jaswal*. The Hearing Tribunal determined that the penalty was appropriate to achieve the goal of sanction in the professional discipline context, which is to protect the public from future incidents of a similar nature.

The Hearing Tribunal finds that the penalties in the Joint Submission on Sanctions appropriately reflect the seriousness of the conduct in issue. A period of suspension is appropriate in light of the Hearing Tribunal's findings, and will serve to deter Mr. Alrefaey and other members of the profession from engaging in similar conduct in the future. In addition, the restrictions on Mr. Alrefaey's practice permit will also protect the public, as they remain in place for a period of time until they are reviewed by the Registrar. Finally, the PROBE course, referred to in the Joint Submission, provided by the Center for Personalized Education for Physicians, is a significant remedial component. It is used by many regulators for ethical issues around boundary violations. It is an intensive course where the content is personalized for each individual. It combines an

essay component as well as in person learning and discussions, which serves to ensure that Mr. Alrefaey has the opportunity to reflect on his actions and improve his practice. All of this will serve to protect the public.

The Hearing Tribunal noted that in the [recent pharmacist] decision, referred to on behalf of the Complaints Director, the tribunal ordered the member to pay 100% of the costs of the hearing. In this case, the parties jointly submitted that only 75% of the costs of the hearing (to a maximum of \$45,000) should be ordered. If the parties had not presented a Joint Submission on Sanctions, the Hearing Tribunal may have been inclined to order a greater proportion of the costs in this case. However, the Hearing Tribunal carefully considered the Supreme Court of Canada's decision in *R. v. Anthony Cook*, which establishes that in the criminal context, the trial judge should exercise a high degree of deference and should only reject a joint submission on sanction in rare circumstances. Although *Anthony Cook* is a criminal case, the Hearing Tribunal finds that the principles articulated in that decision are largely applicable in the context of professional discipline hearings. The Hearing Tribunal did not find that the Joint Submission on Sanctions was manifestly unjust or contrary to the public interest. Therefore, the Hearing Tribunal did not feel it was appropriate to seek to vary the Joint Submission on Sanctions in this case.

Signed on the 4th day of April 2018
on behalf of the Hearing Tribunal by the Chair

[Kevin Kowalchuk]

Per: Kevin Kowalchuk