

ONTARIO PHYSICIANS AND SURGEONS DISCIPLINE TRIBUNAL

Citation: *College of Physicians and Surgeons of Ontario v. Bahrgard Nikoo*, 2022
ONPSDT 15
Date: April 25, 2022
Tribunal File No.: 21-003

BETWEEN:

College of Physicians and Surgeons of Ontario

- and -

Dr. Mohammad Javad Bahrgard Nikoo

FINDING AND PENALTY REASONS

Heard: March 14, 2022, by videoconference

Panel:

Ms. Shayne Kert (chair)
Dr. Roy Kirkpatrick
Mr. Paul Malette, Q.C.
Mr. Peter Pielsticker
Dr. Peeter Poldre

Appearances:

Ms. Carolyn Silver, for the College
Mr. Andrew Matheson, Ms. Glynnis Burt and Ms. Jessica Stansfield, for Dr. Bahrgard Nikoo

RESTRICTION ON PUBLICATION

The Tribunal ordered, under ss. 45-47 of the Health Professions Procedural Code, that no one may publish or broadcast the name or any information that would identify the complainant referred to during the Tribunal hearing or in any documents filed with the Tribunal. There may be significant fines for breaching this order.

Introduction

- [1] Dr. Bahrgard Nikoo (who goes by Dr. Nikoo) is an internal medicine and critical care physician in Ontario. He obtained his certificate of independent practice from the College of Physicians and Surgeons of Ontario in 2009, having practised general medicine outside Canada prior to that time.
- [2] Between 2014 and 2020, Dr. Nikoo was the Joint Chief of the Department of Critical Care Medicine at Hospitals A and B, and he was the Medical Director of the Medical Surgical Intensive Care Unit at Hospital B between 2013 and 2020. The complainant, Dr. X, is also a physician. During the material time Dr. X was a junior colleague of Dr. Nikoo at both hospitals.
- [3] At this hearing, the College alleged that Dr. Nikoo engaged in disgraceful, dishonourable or unprofessional conduct by engaging in a sexual relationship with Dr. X given his position as her immediate supervisor, their mentorship relationship, his influence over her shift schedule and her junior position on staff. The College also alleged that Dr. Nikoo failed to maintain the standard of practice of the profession by performing a medical procedure on Dr. X despite their sexual history and close personal relationship, and by prescribing medication for Dr. X after her care had been transferred to another physician.
- [4] The College provided a Statement of Uncontested Facts on the issue of liability, and the parties entered an Agreed Statement of Facts on penalty. Dr. Nikoo entered a plea of no contest, and the parties jointly submitted that the penalty should be a reprimand and a 12-month suspension of Dr. Nikoo's certificate of registration. They also agreed that Dr. Nikoo should pay costs to the College of \$6,000.
- [5] Based on the uncontested facts and Dr. Nikoo's plea of no contest, we made a finding of professional misconduct and decided that the proposed joint penalty was not contrary to the public interest. Our order suspended Dr. Nikoo's certificate of registration for 12 months commencing April 4, 2022. We also awarded costs as agreed by the parties. These are our reasons.

The Uncontested Facts

The Professional Relationship

- [6] In 2014, when Dr. X was in her first year of practice, she was recruited to work in internal medicine at Hospital A. She later began working shifts in the critical care medicine departments of Hospitals A and B. At the time, Dr. X was the most junior member of the critical care medicine team.
- [7] As the Joint Chief of Critical Care Medicine at both hospitals, Dr. Nikoo was Dr. X's immediate superior. In that role he was responsible for providing feedback to Dr. X and the other critical care physicians about their performance, and for addressing any internal complaints or quality of care issues that arose. Dr. Nikoo also provided formal feedback to the hospital regarding Dr. X's performance.
- [8] In addition to his supervisory role, Dr. Nikoo established a mentor relationship with Dr. X, providing her with detailed feedback and guidance regarding her performance. Dr. X was anxious to please Dr. Nikoo as his assessment of her performance was important to her professionally.
- [9] Dr. Nikoo's feedback toward Dr. X was different than toward others, demonstrating greater impatience and condescension. At times Dr. X worried that Dr. Nikoo had little regard for her professionally. She felt that he occasionally demeaned her in front of other doctors and that he scrutinized her performance more closely than others. In these ways, Dr. Nikoo undermined Dr. X's belief in the security of her role, her job and her critical care abilities.
- [10] To prove her worth, Dr. X took on more tasks and increased administrative responsibilities. Even so, Dr. Nikoo continued to imply that her role on the critical care team was not secure.
- [11] From 2014 through 2017, Dr. Nikoo was responsible for setting the ICU schedule at Hospital B. In 2019, he was responsible for setting the ICU schedule at Hospital A.
- [12] Between 2015 and 2017, Dr. X's schedule was complex and she relied heavily on Dr. Nikoo giving her access to shifts that would let her meet her professional responsibilities and goals. Overall, Dr. Nikoo accommodated Dr. X's scheduling

needs, but she worried that if he was not supportive of her, she might not be able to manage her schedule.

The Sexual Relationship

- [13] Early on in Dr. X's employment at Hospitals A and B, Dr. Nikoo displayed an interest in, and made comments about, Dr. X's personal life. He told her she was beautiful and that he found her physically attractive.
- [14] In approximately 2015, Dr. Nikoo began making sexual overtures to Dr. X. She initially deflected his sexual comments and approaches, but was concerned that if she refused his advances she risked losing his support within the department, that her schedule could be negatively affected or that she would face other forms of retaliation.
- [15] Beginning in 2015 or 2016, Dr. Nikoo engaged in sexual contact with Dr. X. These interactions took place in call rooms or offices at Hospitals A and B. Dr. X had difficulty rejecting Dr. Nikoo's advances, fearing for her position in the department and for her reputation should the situation come to light. The sexual contact between Dr. Nikoo and Dr. X ended sometime prior to April 2018.

Prescribing Medication/Providing Treatment to a Person Close to Him

- [16] In April 2018, after a trip abroad, Dr. X began feeling unwell. After she exchanged text messages with Dr. Nikoo about her symptoms, Dr. Nikoo prescribed medications to Dr. X.
- [17] The following day, when Dr. X was still feeling very unwell, she spoke to Dr. A, who was then the Chief of Medicine at Hospital A. Dr. A advised Dr. X to come to Hospital A immediately for a medical procedure, and told her that she would be admitted through the clinic where Dr. Nikoo was working that morning.
- [18] Dr. Nikoo saw Dr. X in the outpatient clinic, took over her initial care and ordered medication to assist her. Although another doctor was the attending physician after Dr. X's admission to hospital, and was her most responsible physician by default, Dr. Nikoo was also present. Dr. X requested that Dr. Nikoo perform the medical procedure. Dr. Nikoo gave a verbal order for sedation and performed the procedure but did not write a procedure note.

[19] Dr. X's treatment was transferred to another physician, who discharged her a few days later with a prescription for an opioid for pain. Shortly after, Dr. Nikoo called Dr. X to find out how she was feeling. He asked what she had been given for pain, advised her it was not enough to tide her over and wrote a prescription for a higher dose of the same opioid medication. Dr. Nikoo went to the pharmacy to have the prescription filled and delivered it to Dr. X's home.

[20] After Dr. Nikoo's treatment of Dr. X in April 2018, sexual contact between them resumed, becoming more frequent in March 2020. In June 2020, Dr. X complained about Dr. Nikoo to Hospitals A and B, as well as to the College, and her contact with Dr. Nikoo ended.

Findings of Professional Misconduct

[21] Based on the uncontested facts, we found that Dr. Nikoo committed professional misconduct by engaging in acts that would reasonably be regarded by members of the profession as disgraceful, dishonourable or unprofessional, and by failing to maintain the standard of practice of the profession.

[22] Dr. Nikoo acknowledged that given the power imbalance between him and Dr. X during the relevant time (resulting from his supervisory role, his influence over shift scheduling and her junior position on staff), his sexual advances toward, and sexual contacts with Dr. X were inappropriate, unprofessional and could be perceived as unwelcome and difficult to refuse.

[23] We agree. Dr. Nikoo's conduct involving Dr. X was inconsistent with expectations set out in College policies, including those that address maintaining appropriate boundaries and physician behaviour in the professional environment. Among other things, physician responsibilities to other health care professionals include ensuring a healthy work environment by working respectfully with other members of the health care team and fostering a culture of respect within their workplace. Dr. Nikoo's conduct toward Dr. X also violated hospital workplace policies, including expectations relating to sexual harassment, discrimination and disruptive behaviour.

[24] Dr. Nikoo also breached the College policy regarding physician treatment of persons close to the physician. To ensure that a physician's ability to maintain the

necessary amount of emotional and clinical objectivity is not compromised (thereby potentially impacting the quality of care), the policy prohibits physicians from providing treatment to persons who have a personal or close relationship with them. The exception is for treatment of a minor condition or in an emergency situation, and only when another qualified health care professional is not readily available. That was not the case here. In treating Dr. X (with whom he had a prior sexual relationship) outside the limited circumstances permitted by the College policy, Dr. Nikoo violated that policy.

[25] Dr. Nikoo's treatment of Dr. X was problematic in other respects. As outlined by Dr. Noel Gibney, the expert who reviewed the care that Dr. Nikoo provided to Dr. X, in failing to write a procedure note or an order for the sedation used for the medical procedure, Dr. Nikoo's care fell below the standard of care of an internist. After completing the procedure, and in the absence of an ongoing therapeutic relationship with Dr. X, it was also inappropriate for Dr. Nikoo to prescribe for Dr. X, one of his clinical colleagues who also reported to him. It was particularly inappropriate for him to prescribe a higher dose of opioids to Dr. X, particularly as her treating physician had been tapering the dose.

[26] Lastly, in June 2020, when Dr. Nikoo used crude and sexualized language during a critical care team meeting regarding a dispute with another department of the hospital, he failed to demonstrate the professional behaviour expected of physicians in their work environment.

Evidence on Penalty

Admissibility of Dr. X's Impact Statement

[27] This hearing began on Monday morning. On the Friday afternoon prior to the start of the hearing, counsel for Dr. Nikoo were provided with a victim impact statement (VIS) prepared by Dr. X that the College proposed to file on penalty. After reviewing the VIS over the weekend, counsel for Dr. Nikoo objected to much of its contents. When the parties could not agree on redaction, the panel was asked to rule on the admission of the statement.

[28] The parties agreed that the panel should be guided by the decision of the Superior Court in *R. v. Gabriel*, 1999 CanLII 15050, in which the court considered the limits

of a victim impact statement in the context of a criminal case. In *Gabriel*, the court noted at para. 35 that impact statements “should describe the harm done to, or the loss suffered by, the victim arising from the commission of the offence. The statements should not contain criticisms of the offender, assertions as to the facts of the offence, or recommendations as to the severity of punishment.” Both parties also agreed that the panel had the ability to redact or edit the VIS to comply with the principles articulated in *Gabriel*.

[29] College counsel argued that while the panel was not required to consider the VIS in this case, Dr. X’s statement should be admitted. She submitted that as the VIS dealt almost exclusively with the impact of Dr. Nikoo’s conduct on Dr. X, it contained relevant and probative information that far outweighed any potential prejudice to Dr. Nikoo. Counsel submitted that Dr. X deserved to be heard and that if we found that any portion of her statement did not comply with *Gabriel*, the panel had two options – redact the statement and then admit it in redacted form, or disregard the portions of the statement that were improper or irrelevant: *College of Physicians and Surgeons of Ontario v. Mrozek*, 2018 ONCPSD 69; *College of Physicians and Surgeons of Ontario v. Phipps*, 2019 ONCPSD 45.

[30] Dr. Nikoo’s counsel objected to the admission of the statement. He submitted that while it is a legal requirement that patient impact statements must be considered in cases of sexual abuse, it is unusual (though not unprecedented) for impact statements to be considered in cases involving other forms of misconduct, particularly where, as here, the parties have arrived at a joint submission on penalty.

[31] Dr. Nikoo’s counsel submitted that Dr. X’s statement included impermissible criticisms of Dr. Nikoo and assertions about facts beyond those contained in the Statement of Uncontested Facts. Counsel argued any part of the VIS beyond descriptions of the impact of Dr. Nikoo’s conduct on Dr. X should be excluded. Relying on *College of Physicians and Surgeons of Ontario v. Pilarski*, 2016 ONCPSD 41, Dr. Nikoo’s counsel suggested that, once properly redacted, the value of Dr. X’s statement would be minimal and would be outweighed by the potential prejudice to Dr. Nikoo.

[32] After reviewing the VIS, we agreed that portions of the statement did not accord with the guidance provided by the caselaw regarding victim impact statements. The proposed VIS included criticism of Dr. Nikoo and statements that added to (or were inconsistent with) the uncontested facts. In short, we found that aspects of Dr. X's statement exceeded the scope and limits of what is generally accepted as admissible through a victim impact statement. We also found that, properly redacted, the VIS offered Dr. X a meaningful way to convey to us the impact of Dr. Nikoo's misconduct on her, and that her redacted statement should be admitted in evidence.

[33] We advised the parties of our decision and asked them to provide us with an edited version of the VIS showing any redactions that they agreed upon, as well those about which they disagreed. We accepted the redactions on which the parties agreed, made some of the further requested edits and admitted the redacted version of Dr. X's statement as an exhibit.

Findings on Penalty and Costs

[34] As this was a joint submission on penalty, the public interest test established by the Supreme Court of Canada in *R. v. Anthony-Cook*, 2016 SCC 43, applies: *Bradley v. Ontario College of Teachers*, 2021 ONSC 2303. The public interest test requires that joint submissions are to be accepted unless "the proposed penalty is so 'unhinged' from the circumstances of the case that it must be rejected": *Bradley* at para. 14; *Anthony-Cook* at para. 34. In the context of this Tribunal, a joint submission will only be contrary to the public interest if it is "so markedly out of line with expectations of reasonable persons aware of the circumstances of the case that they would view it as a break down in the proper functioning" of the College's professional discipline process: *Anthony-Cook* at para. 33.

[35] We are satisfied that, in the circumstances, the proposed penalty is not contrary to the public interest. This is so for several reasons.

[36] A 12-month suspension is well within the range of penalties suggested by the jurisprudence in similar circumstances. In *College of Physicians and Surgeons of Ontario v. Abawi*, 2014 ONCPSD 10, after a contested hearing on liability, the panel found that Dr. Abawi led a nurse with whom he worked into a bathroom at the hospital, tried to hug and kiss her and briefly blocked her exit from the room. On

penalty the parties jointly proposed, and the panel agreed, that a four-month suspension was appropriate.

- [37] In *College of Physicians and Surgeons of Ontario v. Abouelnasr*, 2006 ONCPSD 28, the physician, a psychiatrist, provided incidental medical treatment (including providing prescriptions) to a woman (the complainant) with whom he was having an affair. When the sexual relationship was disclosed, Dr. Abouelnasr tried to manipulate the situation to his advantage by offering to prescribe medication to the complainant's husband, though he was not his physician. In that case the panel agreed that in view of the seriousness of the conduct, the joint submission of a six-month suspension was appropriate.
- [38] In *College of Physicians and Surgeons of Ontario v. Mukherjee*, 2019 ONCPSD 16, the physician engaged in an intimate relationship with his employee, an individual over whom he had power and control. As their relationship deteriorated, Dr. Mukherjee exploited the complainant's reliance on him by threatening to end her employment. He was charged criminally and found guilty of mischief (after damaging the front door of the complainant's house and driving his car into hers) and of uttering threats to cause death or bodily harm to her. He received a conditional discharge and engaged in considerable therapy. The panel accepted a joint submission on penalty that included a six-month suspension and further rehabilitative measures.
- [39] The proposed 12-month suspension takes into account many of the features considered in prior cases involving elements of similar misconduct, including the seriousness of the misconduct, its impact on Dr. X, the remedial work that Dr. Nikoo has done since the complaint was made in June 2020 and the fact that he has no discipline history.
- [40] The misconduct in this case was serious. As Joint Chief of Critical Care Medicine at Hospitals A and B, Dr. Nikoo's role included providing leadership, mentorship and guidance to the other critical care physicians on his team and promoting a culture of support and respect within the work environment. In his conduct toward Dr. X, Dr. Nikoo failed in respect of these obligations. He undermined Dr. X's confidence in her critical care abilities and the security of her job. He misused his position of

power over her to make sexual advances toward her, which she had difficulty rejecting due to his role.

[41] The letters of support for Dr. Nikoo filed on penalty were written by a variety of his colleagues (including nursing staff), all of whom had read the Statement of Uncontested Facts and were aware of the misconduct allegations. Overall, the letters attest to Dr. Nikoo's significant medical skills, professional manner and excellent leadership and collegiality. While the letters suggest, and we accept, that Dr. Nikoo's misconduct in respect of Dr. X was an aberration in the context of his overall career, it was nonetheless a serious one that materially impacted Dr. X. As is plain from her VIS, Dr. X was deeply affected by Dr. Nikoo's inappropriate behaviour toward her. She experienced irreparable strain on her personal life and relationships, her belief in the security of her job was eroded and her confidence in her critical care abilities was profoundly undermined.

[42] Since that time, Dr. Nikoo has taken significant steps toward remediation and rehabilitation. Upon learning of the complaint against him in June 2020, Dr. Nikoo voluntarily agreed not to exercise his hospital privileges. He returned to work in late April 2021 with restrictions on his hospital privileges. He has engaged in four sessions of 1:1 counselling regarding professionalism and ethics in the workplace, successfully completed the PROBE Ethics and Boundaries Program and completed the McMaster University module on Professionalism in Clinical Learning.

[43] Finally, by pleading no contest to the allegations upon which the College proceeded, and agreeing to a joint submission on penalty, Dr. Nikoo saved the College the time and expense of the scheduled 12-day hearing and avoided the necessity of calling the complainant to testify.

[44] Balancing the relevant facts and caselaw, we are satisfied that the proposed penalty is appropriate and not contrary to the stringent public interest test. The costs proposed are also reasonable.

Order

[45] For the reasons provided we ordered and directed that:

- i. Dr. Nikoo attend before the panel to be reprimanded;

- ii. the Registrar suspend Dr. Nikoo's certificate of registration for 12 months commencing April 4, 2022; and
- iii. Dr. Nikoo pay the College costs of \$6,000 by April 14, 2022.

ONTARIO PHYSICIANS AND SURGEONS DISCIPLINE TRIBUNAL

Tribunal File No.: 21-003

BETWEEN:

College of Physicians and Surgeons of Ontario

- and -

Dr. Mohammad Javad Bahrgard Nikoo

The Tribunal delivered the following Reprimand
by videoconference on Wednesday, April 20, 2022.

*****NOT AN OFFICIAL TRANSCRIPT*****

Dr. Nikoo,

Your professional misconduct was an abuse of power by a physician against a younger colleague who trusted you as a mentor and over whom you had senior leadership and supervisory responsibility.

You misused your position of power and authority and engaged in a sexual affair in inappropriate circumstances.

The deleterious impact of your reckless, insensitive and selfish actions are well-manifested in the victim impact statement.

You ignored the College policy on providing care for those who are close to you. The fact that you were asked by the complainant to perform a medical procedure is not an excuse. You should have known better. Furthermore, you interfered with the care provided by the responsible physician by inappropriately prescribing a large number of high potency opioid tablets. You failed to meet the standard of care expected of you.

Your actions were disgraceful, dishonourable and unprofessional. Particularly given your senior position, you failed to act in a manner that encourages respect for the medical profession.

This Tribunal acknowledges your rehabilitative efforts to date and expects that the significant one-year suspension of your certificate of registration will provide you with a further opportunity to reflect on your professional misconduct and the way in which such misconduct impacts the public's confidence in physicians.