

DISCIPLINE COMMITTEE OF THE COLLEGE OF KINESIOLOGISTS OF ONTARIO

IN THE MATTER of the *Regulated Health Professions Act*, 1991, S.O. 1991, c.18, as amended, and the regulations thereunder, as amended;

AND IN THE MATTER of the *Kinesiology Act*, 2007, S.O. 2007, c. 10, Schedule 0, as amended, and the regulations thereunder, as amended;

AND IN THE MATTER of allegations of professional misconduct/incompetence before the Discipline Committee of the College of Kinesiologists of Ontario as referred by the Inquiries, Complaints and Reports Committee against **Obrascovs**;

BETWEEN:

**COLLEGE OF KINESIOLOGISTS
OF ONTARIO**

)
)
) **Maya Pearlston**
) **Steinecke Maciura LeBlanc**
) for the College of Kinesiologists
)
)

GUNTIS OBRASCOVS
Registration No. 14469

) **Self-Represented**
)
)

) **Guntis Obrascovs**
) Not in attendance
)

) **Jennifer Hunter**
) Independent Legal Counsel
)

) **Heard: August 27, 2020**
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) **Decision Released: September 8, 2020**
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) **Written Decision Date: September 3, 2020**
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Panel Members:

Mary Pat Moore, Chair, Public Council Member

Teresa Bendo, Public Council Member

Leslee Brown, Public Council Member Council Member

Stefanie Moser, R. Kin., Professional Council Member

Pamela Paquette, R. Kin., Member at Large

DECISION AND REASONS FOR DECISION

I. INTRODUCTION

[1] This matter was heard by a panel of the Discipline Committee (“the Panel”) on August 27, 2020, in the format of a virtual hearing.

II. PROCEEDING IN ABSENCE OF THE MEMBER

[2] Independent Legal Counsel advised the panel that in s. 6 (1) of the *Statutory Powers Procedure Act*, RSO 1990, c S.22 (“*SPPA*”) the panel is required to notify a party of a hearing.

6. (1) The parties to a proceeding shall be given reasonable notice of the hearing by the tribunal. R.S.O. 1990, c. S.22, s. 6 (1).

In section 6 (3) of the *SPPA* the requirements for a Notice of Hearing are set out:

(3) A notice of an oral hearing shall include,

(a) a statement of the time, place and purpose of the hearing; and

(b) a statement that if the party notified does not attend at the hearing, the tribunal may proceed in the party’s absence and the party will not be entitled to any further notice in the proceeding. 1994, c. 27, s. 56 (13).

[3] Independent Legal Counsel added that where the College can show a Notice of Hearing for this matter contained the required statement of time, place and purpose of hearing and show that it was delivered, the panel may proceed.

[4] Counsel for the College agreed with Independent Legal Counsel's advice.

[5] College Counsel entered the Notice of Hearing as Exhibit 1 {see below in paragraphs 16 to 19}. Next, she entered the Affidavit of Service by Jennifer Evangelista as Exhibit 2.

[6] College Counsel reviewed paragraphs 3, 4, 7 and 8 of Ms. Evangelista's Affidavit of Service.

Paragraph 3. On August 19, 2019, Rebecca Durcan, counsel for the College, wrote to Mr. Obrascovs to serve him with a Notice of Hearing, Disclosure Brief of the College, and the Rules of Procedure of the Discipline Committee of the College, as well as a draft Agreed Statement of Facts and Admission of Professional Misconduct and a draft Joint Submission as to Penalty, by arranging for a process server, Canadian Process Serving Inc., to personally serve Mr. Obrascovs with the materials at his home address, 40 Preston Street, Guelph, Ontario, N1H 3C3. A copy of Ms. Durcan's letter and the Affidavit of Service of Daniel L. Bowmaster confirming that he served Mr. Obrascovs by leaving the above-noted materials with his wife, Greta Obrascovs, are attached as Exhibit "A".

Paragraph 4. On August 23, 2019, Ms. Durcan sent an additional letter to Mr. Obrascovs via regular mail to 40 Preston Street, Guelph, Ontario, N1H 3C3. Enclosed with this letter was the Notice of Hearing, Disclosure Brief of the College and the Rules of Procedure of the Discipline Committee of the College, as well as a draft Agreed Statement of Facts and a draft Joint Submission as to Penalty and Costs. A copy of Ms. Durcan's letter is attached as Exhibit "B".

Paragraph 7. On February 10, 2020, Ms. Durcan sent a letter to Mr. Obrascovs via regular mail to 40 Preston Street, Guelph, Ontario, N1H 3C3. In this letter, Ms. Durcan advised him that a hearing date had been set for Friday, April 3, 2020, at the College in Toronto. A copy of this correspondence is attached as Exhibit “E”. I am advised by reviewing our files and verily do believe that Mr. Obrascovs did not respond to Ms. Durcan’s letter of February 10, 2020.

Paragraph 8. On March 18, 2020, I was advised by the College via email that the hearing scheduled for April 3, 2020, would be postponed due to the COVID-19 pandemic. On July 7, 2020, I was advised by the College via email that the hearing was rescheduled for August 27, 2020. Mr. Obrascovs was copied on both of these emails. Copies of these emails are attached as Exhibit “F”.

At Exhibit “F” of the Affidavit of Service, there are emails from the College to the parties, including the Registrant alerting them to potential dates for a hearing that was finally resolved as August 27, 2020.

[7] College Counsel showed in the following paragraphs 9, 10, and 11 that the College reached out to the Registrant to advise him of the hearing date.

Paragraph 9. On July 9, 2020, Ms. Durcan sent a letter to Mr. Obrascovs via regular mail to 40 Preston Street, Guelph, Ontario, N1H 3C3. In this Letter, Ms. Durcan advised him that the hearing would be proceeding virtually on Thursday, August 27, 2020. A copy of this correspondence is attached as Exhibit “G”. I am advised by reviewing our files and verily do believe that Mr. Obrascovs did not respond to Ms. Durcan’s letter of July 9, 2020.

Paragraph 10. On July 17, 2020, I sent a letter from Ms. Durcan to Mr. Obrascovs via email to gobrasco@uguelph.ca. In this letter, Ms. Durcan reminded him of the upcoming hearing on August 27, 2020. A copy of this correspondence is attached as Exhibit “H”. I am advised by reviewing our files and verily do believe that Mr. Obrascovs did not respond to Ms. Durcan’s letter of July 17, 2020.

Paragraph 11. On August 26, 2020, I sent a letter from Maya Pearlston, Counsel for the College, to Mr. Obrascovs via email to gobrascov@uguelph.ca. In this letter, Ms. Pearlston reminded him of the upcoming hearing on August 27, 2020. Ms. Pearlston also advised that if Mr. Obrascovs did not attend the hearing, the College would request that the hearing proceed in his absence. A copy of this correspondence is attached as Exhibit “I”.

[8] College Counsel submitted that the member has been notified of the hearing and has chosen not to participate. The *SPPA* provides authority to proceed in the Registrant’s absence in Sec. 6 (3). She is satisfied that there was sufficient notice and is comfortable proceeding.

[9] Ms. Moore, Chair, asked Independent Legal Counsel to advise whether the Panel can proceed in the absence of the Registrant and his Counsel?

[10] Independent Legal Counsel advised that the *SPPA* provides authority to proceed. She pointed to the evidence with adequate notice of hearing and review of evidence in Affidavit of Service. The *SPPA* requires only the Notice of Hearing itself. There was additional notice to Registrant in the letters and emails from the College.

[11] Ms. Moore, Chair, commented on the need to hear the other side of any dispute.

[12] Independent Legal Counsel set out the factors to consider: duty of fairness, Registrant's ability to respond and provide a full answer and response. The role of the Panel is to protect the public. The panel must preserve the administration of justice and dispose of matters on a timely basis. The review of documents in Exhibits 1 and 2 support a timely notice of hearing.

[13] College Counsel agreed with Independent Legal Counsel's advice.

[14] A Member of the Panel commented on a spelling mistake. Ms. Hunter advised that in the Affidavit of Service, you can rely on evidence that the member received the notice. A spelling mistake may not be material.

[15] Having reviewed the provisions of the SPPA, reviewed the evidence in the Affidavit of Service by Jennifer Evangelista, and the submissions of Counsel, the Panel decided to proceed with the hearing in the Registrant's absence.

III. ALLEGATIONS

[16] College Counsel proceeded to her opening remarks. She reviewed the Notice of Hearing.

[17] The allegations against the member are set out in the Statement of Specified Allegations attached to the Notice of Hearing dated August 6, 2019 and are as follows:

Paragraph 3 - Member was required to comply with the requirements of the College's Quality Assurance Program which include self-assessment, continuing education and professional development activities annually.

- Paragraph 4 - Member shall undergo a peer and practice assessment (“PPA”) if the Member’s records do not demonstrate that the Member has engaged in adequate self-assessment, continuing education or professional development activities.
- Paragraph 5 - did not complete the 2017 self-assessment which is a mandatory component of the Quality Assurance program.
- Paragraph 6 - as a result, on or about September 28, 2018, the Member was advised that he was required to participate in the PPA.
- Paragraph 7 - failed to respond to numerous written queries and requests from the College regarding the PPA.
- Paragraph 8 - failed to complete the PPA.
- Paragraph 9 - the Member engaged in professional misconduct pursuant to the following paragraphs of section 51(1) (c) of the *Code*, as set out in on or more of the following paragraphs of section 1 of Ontario Regulations 316/12:
 - a. **Paragraph 40** - Contravening, by act or omission, a provision of the Act, a provision of the *Regulated Health Professions Act, 1991* or the regulations under either of those Acts.
 - b. **Paragraph 48** - Failing to reply appropriately and within a reasonable time to a written inquiry or request from the College: and/or

c. Paragraph 50 - Engaging in conduct or performing an act relevant to the practice of the profession that, having regard to all the circumstances, would reasonably be regarded by members as disgraceful, dishonourable, or unprofessional.

- Finally, in paragraph 9 - the Member engaged in professional misconduct pursuant to s.51 (b.0.1) of the Code as he failed to co-operate with the Quality Assurance Committee.

[18] Independent Legal Counsel advised that as the Registrant is not present, there are no admissions made by the Registrant. He has neither accepted nor admitted allegations.

[19] If the Registrant were at the Hearing, the Chair would receive his plea inquiry. As the Registrant was not in attendance, it is deemed the Registrant did not accept allegations set out in the Notice of Hearing.

IV. EVIDENCE

[20] The College introduced a number of documents in support of its position with respect to the allegations.

[21] The documents, pages 11-15 (labelled with a red letter) in the Exhibits Brief at Tab 6 are Exhibit 3 (pages 11-13) and Exhibit 4 (pages 14 and 15), together with the oral testimony of Peter Ruttan, an investigator for the College who reviewed the file and was familiar with the matter established the following:

On September 2018, the College notified the Registrant by e-mail:

- To participate in the Peer and Practice Assessment (“PPA”) on a mandatory basis because he had failed to complete 2017 Self-Assessment.
- To submit the completed Pre-Assessment Questionnaire for the PPA by October 2, 2018.
- On November 21, 2018, the College notified the Registrant that his matter was being referred to the Quality Assurance Committee due to his failure to complete the Self-Assessment and the Pre-Assessment Questionnaire which are components of the College’s Quality Assurance Program.
- To submit the completed Pre-Assessment Questionnaire for the PPA by October 2, 2018.
- The November 21, 2018 letter was delivered by the Canada Post Office on November 23, 2018.
- The Registrant’s matter was forwarded to the Inquiries, Complaints and Reports Committee due to his failure to complete components of the Quality Assurance Program.

[22] At conclusion of the evidence, the College Counsel submitted that it was clear from the evidence that the Registrant failed to submit the necessary information and documentation to the Quality Assurance Committee and the College as required.

V. DECISIONS ON FINDINGS

[23] Specifically, the Registrant failed to comply with the Quality Assurance program and failed to reply appropriately and within a reasonable time to a written inquiry from the College. The Registrant, therefore, has committed the actions of professional misconduct as set out in the Notice of Hearing:

[24] With respect to the allegations that the Registrant engaged in conduct that, having regard to all the circumstances, would reasonably be regarded by members as disgraceful, dishonourable or unprofessional, the Panel finds the Member's conduct to be unprofessional.

VI. REASONS FOR FINDING

[25] The Panel considered the evidence presented by the College and finds that the facts set out in that documents support findings of professional misconduct. Having reviewed Exhibits 3 and 4 (described above), the oral testimony, and having heard the submissions of counsel, the Panel finds that the College discharged its onus to prove the specified allegations on a balance of probabilities. Finally, with respect to the Panel's findings that the Member's conduct was disgraceful, dishonourable, and unprofessional, the Panel was satisfied that the Member's conduct was unprofessional. The Panel was satisfied that the Member's conduct was more than incompetent or careless.

[26] The Member knew or ought to have known that breaching a regulatory obligation by failing to complete the 2017 self-assessment (a mandatory component of the Quality Assurance program), ignoring advice that he was required to participate in the peer and practice assessment ("PPA"), failing to respond to numerous written queries and requests from the College, and finally, failing to complete the PPA to comply with the Quality Assurance program was a persistent disregard of professional standards and therefore, amounts to conduct which members of the profession would reasonably regard as unprofessional.

VII. SUBMISSIONS AS TO PENALTY AND COSTS

[27] Counsel for the College proposed an Order for Penalty and Costs. She presented an affidavit prepared by Brenda Kritzer setting out the costs for the investigation of the Registrant's actions and conducting the Discipline Committee hearing.

[28] The Counsel's submission as to Penalty and Costs provides as follows:

1. Requiring the Registrant to be reprimanded by the panel following the hearing.
2. Directing the Registrar to suspend the Registrant's Certificate of Registration for a period of at least five (5) months, commencing on a date to be selected by the Registrar, which suspension shall continue until the Registrant completes the term, condition and limitation set out in paragraph 3(a) of this Order.
3. Directing the Registrar to immediately impose the following specified terms, conditions and limitations on the Registrant's Certificate of Registration, all of which are to be completed at his own expense and within three (3) months of the date of this Order:
 - a. Requiring the Registrant to comply with any outstanding requirements of the College's Quality Assurance program;
 - b. Requiring the Registrant to successfully complete, to the satisfaction of the Registrar and at his own expense, a pre-approved ethics course, within three (3) months of the date of this Order; and
 - c. Requiring the Registrant to review all written College standards and provide written confirmation of review to the Registrar.
4. Requiring the Registrant to pay to the College costs in the amount of \$6,500.00 within one (1) month of the date of this Order. The Registrar is authorized to impose an installment plan to ensure regular and consistent payment of the costs order.

VIII. SUBMISSIONS ON ORDER

[29] Counsel for the College presented the Panel with a Brief of Legislation and Authorities which contained the relevant legislation and four (4) Decisions from Discipline Committees of health regulatory colleges. College's Counsel set out the primary principles of sanction that apply to any order on penalty include public protection, general deterrence for the profession, specific deference of the Member, and rehabilitation of the specific Member.

IX. REVISED ORDER BY PANEL

[30] The College's Counsel submitted a draft Order for the Panel's consideration. During its deliberations, the Panel changed the time period for the suspension to "a period no less than 5 months" and removed the redundant phrase "within three months of the date of this order" from paragraph 3 of the submitted order by College's counsel.

[31] The Panel makes an order as follows:

1. Requiring the Registrant to be reprimanded by the panel following the hearing.
2. Directing the Registrar to suspend the Registrant's Certificate of Registration for a period of no less than (5) months, commencing on a date to be selected by the Registrar, which suspension shall continue until the Registrant completes the term, condition and limitation set out in paragraph 3(a) of this Order.
3. Directing the Registrar to immediately impose the following specified terms, conditions and limitations on the Registrant's Certificate of Registration, all of which are to be completed at his own expense and within three (3) months of the date of this Order:

- a. Requiring the Registrant to comply with any outstanding requirements of the College's Quality Assurance program;
 - b. Requiring the Registrant to successfully complete, to the satisfaction of the Registrar and at his own expense, a pre-approved ethics course, and
 - c. Requiring the Registrant to review all written College standards and provide written confirmation of review to the Registrar.
4. Requiring the Registrant to pay to the College costs in the amount of \$6,500.00 within one (1) month of the date of this Order. The Registrar is authorized to impose an installment plan to ensure regular and consistent payment of the costs order.

X. REASONS FOR ORDER

[32] In deciding the appropriate Order in this case, we remind ourselves that the primary purpose of these proceedings is protection of the public. In addition, we must consider both the interests of the profession as a whole, as well as, the particular circumstances of the Registrant.

[33] In considering the public interest, we are mindful that the public must have confidence in the profession's ability to regulate itself effectively and in a manner that protects the public.

[34] When we consider the interests of the profession, we recognize that this Discipline Committee owes a duty to enforce and maintain the high standards of practice that the public expects of our members and that members expect of themselves. In each case, the

Discipline Committee must consider the extent to which a message to the profession is required to make it clear that the conduct in question will not be tolerated.

[35] We must consider the unique and particular circumstances of the Registrant. The order must be appropriate, fair, and reasonable to the Member's circumstances. He is a registered kinesiologist practising as a staff member at the University of Guelph. We considered the efforts made by the College to contact the Registrant, so that he was aware of the requirement to participate in the Quality Assurance Committee program. We noted his consistent failure to respond to the College's requests over a lengthy period. Despite the appropriate Notice of Hearing for this Discipline Committee hearing, the Registrant failed to participate.

[36] We make this order specifically to deter the Registrant from failing to co-operate with the College's Quality Assurance program and generally, to deter other Members from failing to co-operate with the Quality Assurance program.

[37] In reaching the decision, the Panel considered the submissions of the College's counsel.

I, Mary Pat Moore sign this Decision and Reasons for Decision as Chairperson of this Discipline Panel and on behalf of the panel members listed below:



September 8, 2020

Chairperson

Date

Teresa Bendo, Public Council Member

Leslee Brown, Public Council Member Council Member

Stefanie Moser, R. Kin., Professional Council Member

Pamela Paquette, R. Kin., Member at Large