



Name of Registrant: Norma Lowe Klein

Date of Hearing: July 17, 2013

Decision and Reasons

In a hearing held on January 18, 2013, a Panel of the Discipline Committee found Ms. Norma Lowe Klein guilty of professional misconduct in that she contravened the *Dental Hygiene Act, 1991*, or the regulations thereunder and engaged in conduct that was disgraceful, dishonourable or unprofessional in that she failed to comply with a direction of a panel of the College.

The facts and admission were set out in the Statement of Agreed Facts, as follows:

1. Norma Lowe Klein (“Ms. Klein”) is a duly registered dental hygienist registered to practise in Ontario.
2. At the material times, Ms. Klein practised dental hygiene in Toronto, Ontario.
3. That in or about January 2011, the Inquiries, Complaints and Reports Committee (“ICRC”) of the College of Dental Hygienists of Ontario (the “College”) received a referral from the Quality Assurance Committee of the College regarding allegations relating to Ms. Klein.
4. The ICRC undertook an investigation that included a review of thirty (30) of Ms. Klein’s client records covering the period from August 2010 to January 2011. The investigation included obtaining an expert opinion regarding the client records. Ms. Klein obtained her own expert opinion which was also reviewed by the ICRC.
5. After considering the results of the investigation into the matter and the member’s submissions, the ICRC rendered a decision dated November 21, 2011. The decision reached was that to “address the areas of practice with which the ICRC Panel has concerns, Ms. Klein is required to complete a SCERP”.

6. In its decision, the ICRC required Ms. Klein to successfully complete, at her expense, a Specified Continuing Education and Remediation Program (SCERP) which included meeting with a Monitor assigned by the College for monitoring and subsequent chart audits. The SCERP required Ms. Klein to participate in remediation for a period of nine (9) months from the date of the decision. The monitoring would be on a weekly basis for the first 30 days, but thereafter Patricia Gallinger, the Monitor appointed, had the discretion to decide whether the monitoring was on a weekly, bi-weekly or monthly basis.
7. By email dated January 6, 2012, the College responded to questions from counsel to Ms. Klein regarding the SCERP.
8. By email dated January 9, 2012, counsel to Ms. Klein advised the College that it was seeking instructions from Ms. Klein on how to proceed. By email dated January 13, 2012, the College advised counsel to Ms. Klein of the options available to her.
9. By email dated January 15, 2012, counsel to Ms. Klein advised that Ms. Klein's husband was ill. By email dated January 16, 2012, the College advised counsel to Ms. Klein that the matter could be delayed for a few weeks.
10. Ms. Klein's counsel set out in a letter dated January 30, 2012, the objections Ms. Klein had to the SCERP.
11. By letter dated February 9, 2012, the Deputy Registrar reviewed the elements of the SCERP as ordered by the ICRC and advised counsel to Ms. Klein that if Ms. Klein did not comply with the SCERP the matter would be referred to a panel of the ICRC for their consideration.
12. The parties agree that the above conduct constitutes professional misconduct on the part of Ms. Klein pursuant to paragraph 45 (failing to comply with an order or direction of a Committee or a panel of a Committee of the College); and paragraph 52 (disgraceful, dishonourable or unprofessional conduct) of section 15 of Ontario Regulation 218/94 under the *Dental Hygiene Act, 1991*, S.O. 1991, c.22.

Penalty Submissions

As there was no agreement between the parties on penalty, the Panel considered the documentary evidence and oral testimony regarding penalty and considered the submissions made by counsel for the College and counsel for Ms. Lowe Klein.

Submissions on Penalty by the College

College counsel submitted that the following would be appropriate:

- Ms. Lowe Klein will receive a reprimand, the fact of which shall be recorded on the College register.
- The Registrar will be directed to suspend Ms. Lowe Klein's certificate of registration for a period of six (6) months, beginning immediately and running consecutively.
- The Registrar will be directed to impose a specified term, condition and limitation on Ms. Lowe Klein's certificate of registration requiring her to successfully complete the Specified Continuing Education and Remediation Program (SCERP) ordered by the Inquiries, Complaints, and Reports Committee (ICRC) of the College by decision dated November 21, 2011, within a nine-month timeframe contemplated by the ICRC in its decision. The timeframe of the SCERP will begin as soon as Ms. Lowe Klein's suspension has been served, or if Ms. Lowe Klein does not return to the active practice of the profession at the completion of her suspension, it will begin upon Ms. Lowe Klein's return to active practice of the profession.
- The Registrar will be directed to impose a specified term, condition and limitation on Ms. Lowe Klein's certificate of registration requiring her to successfully complete an ethics course approved by the Registrar within nine (9) months of the date of the Discipline Panels' order.

The College argued that there should be an element of sanction in addition to the requirement that Ms. Lowe Klein complete the SCERP ordered by the ICRC.

Submissions on Penalty by Ms. Lowe Klein

The Counsel for Ms. Lowe Klein submitted that Ms. Lowe Klein has already been punished by having to go through the discipline process and having the referral to discipline published on the College's website. In addition, her counsel argued that the original SCERP was unreasonable and any penalty would not change the fact that Ms. Lowe Klein would be unable to comply with the ICRC order. In her submission counsel acknowledged that since the ICRC order was the result of a referral from Quality Assurance and not a complaint, Ms. Lowe Klein had the ability to challenge the ICRC's decision by applying for judicial review; however, Ms. Lowe Klein chose not to take this action. Instead Ms. Lowe Klein did not comply with the ICRC order and asked the Discipline Committee Panel not to require her to complete the outstanding order of the ICRC.

Order on Penalty

The Panel made the following order on penalty:

1. The Registrar is directed to suspend Ms. Lowe Klein's certificate of registration for a period of four (4) months, beginning immediately and running consecutively. The suspension is to be reduced by one month should Ms. Lowe Klein provide evidence of successful completion of an ethics and jurisprudence course approved by the College and satisfy the College of her intent to begin the SCERP ordered by the ICRC as soon as she returns to active practice in the profession.
2. Ms. Lowe Klein is to appear before the Panel to receive a reprimand, the fact of which shall be recorded on the College register.
3. The Registrar is directed to impose a specified term, condition and limitation on Ms. Lowe Klein's certificate of registration requiring her to successfully complete an ethics & jurisprudence course approved by the Registrar within four (4) months of the date of the Discipline Panel's order.
4. The Registrar is directed to impose a specified term, condition and limitation on Ms. Lowe Klein's certificate of registration requiring her to successfully complete the

Specified Continuing Education and Remediation Program (SCERP) ordered by the Inquiries, Complaints, and Reports Committee (ICRC) of the College by decision dated November 21, 2011, within a nine-month timeframe contemplated by the ICRC in its decision. The timeframe of the SCERP will begin as soon as Ms. Lowe Klein's suspension has been served, or if Ms. Lowe Klein does not return to the active practice of the profession at the completion of her suspension, it will begin upon Ms. Lowe Klein's return to active practice of the profession.

Reasons for the Order on Penalty

The Panel is of the opinion that the penalty imposed appropriately addresses the principles that must be considered in assessing a penalty which include public protection, general deterrence and specific deterrence.

The mandate of the College is to protect the public and it does so by regulating the practice of dental hygienists. In situations where a registrant chooses not to comply with an order of the College or one of its statutory committees (ICRC), the College is no longer able to fulfill its public protection responsibility. The Panel finds that the actions of Ms. Lowe Klein demonstrate a disregard for the College's authority. The suspension ordered addresses the principles of public protection by removing Ms. Lowe Klein from practice for a period of time thereby allowing her time to reflect on her actions and to complete an ethics and jurisprudence course prior to returning to practice.

The suspension also acts as a general deterrent to all registrants as it reinforces the authority of the College to regulate the practice of dental hygiene. The suspension will also act as a specific deterrent for Ms. Lowe Klein.

Requiring Ms. Lowe Klein to complete an approved ethics and jurisprudence course is a specific deterrent as it will allow her to review her obligations to the public and the College. It will reinforce the fact that expectations of an employer are secondary to these obligations. This condition protects the public as it ensures that Ms. Lowe Klein will fully understand her obligations as a dental hygienist prior to returning to active practice.

The Panel is of the view that a reprimand will act as a specific deterrent against such misconduct taking place in the future. The reprimand will give the Panel the opportunity to express its disapproval of the misconduct and convey the severity of the situation to Ms. Lowe Klein and its expectations that Ms. Lowe Klein comply with orders of the College and its Committees. Awareness of the reprimand within the profession and the fact that it will be recorded on the College register will also serve as a general deterrent to other registrants.

In its penalty the Panel has made it a condition on the registration of Ms. Lowe Klein that she complete the order of the ICRC requiring the completion of the SCERP. The Panel wants it to be clear that it is not an investigating body and does not have before it the record that the ICRC had in making the SCERP order. This Panel does not have the expert opinions and other materials the ICRC had in deciding upon an appropriate remedial order. Furthermore, this Committee does not sit in appeal from an order imposed by another statutory committee of the College that resulted from a thorough investigation. The Panel wants to affirm that the discipline process will not be used to appeal or challenge orders made by the ICRC. There are mechanisms in place for a registrant to challenge an order; in this case any challenge of the SCERP should have followed the appropriate channel. If the registrant could not persuade the ICRC to change the order, the appropriate channel would be for the registrant, after making its case fully before the ICRC, to apply for judicial review, if of the view that he/she was being treated unfairly either in the process followed or by the imposition of an unreasonable order that could not be complied with. The Panel wants to ensure that Ms. Lowe Klein and indeed all registrants recognize that failing to comply with an order from the ICRC of the College is professional misconduct. It is in the public's best interest to ensure Ms. Lowe Klein is held accountable for failing to comply with an educational order from the College. A SCERP is not punitive: it is a remedial order directed at educational upgrading which the ICRC makes when, in its opinion, it is appropriate, after considering all the material filed by the parties.

The Panel considered the following mitigating factors in this case:

- Ms. Lowe Klein pleaded guilty to the allegation of professional misconduct.

- Ms. Lowe Klein has cooperated with the College throughout the disciplinary process.
- This is Ms. Lowe Klein's first appearance before a Discipline Panel, and there is no record of prior misconduct.

The Panel also considered the following aggravating factors in this case:

- Ms. Lowe Klein chose not to challenge the ICRC order she disagreed with through a judicial review because she did not believe it would succeed. Instead Ms. Lowe Klein attempted to use the discipline process to challenge the ICRC order through the back door. The Panel considers this a misuse of College resources.
- Ms. Lowe Klein argued she could not comply with the SCERP ordered by the ICRC because of constraints imposed by her employer implying that if she needed to make a choice she would work according to her employer's expectations rather than compliance with the College's orders. It is the College's role to establish and enforce standards of practice and to institute where appropriate educational and remedial processes for dental hygienists in Ontario, in the best interest of the public. Dental hygienists are accountable to the public through compliance with remedial orders made by the College.
- It was suggested that incomplete records do not have any bearing on client safety and that none of the registrant's clients have been harmed because of incomplete records. The Panel does not have details of the ICRC investigation regarding Ms. Lowe Klein's records; however, the Panel knows that incomplete records can pose a risk of harm to clients. Treating clients without documentation of complete assessments can result in inappropriate treatment and/or, over or under treatment of existing conditions and/or, lack of appropriate referrals and, inability to monitor the client's oral health over time. The Panel is of the view that the registrant does not know if any of her clients have been harmed because she is not completing and documenting according to current standards as required by the College.

Cost Submissions

According to 53.1 of the Health Professions Procedural Code, a Panel may make an order requiring a member who is found to have committed an act of professional misconduct to pay costs and expenses incurred by the College related to legal fees, investigation and conducting the hearing. As there was no agreement between the parties on costs, the Panel considered the evidence before it and heard and considered submissions from counsel for the College and counsel for Ms. Lowe Klein.

Submission on Costs by the College

In its submission the College indicated it has incurred costs of \$43,798.00 in legal costs relating to the investigation of this matter and conducting the hearing. The College asked that costs of \$29,000.00 (which is approximately 2/3 of the costs claimed) be awarded. In its submission the College argued that the case was prolonged unduly and it was unreasonable to expect that all registrants of the CDHO cover the entire cost of the proceedings.

Submission on Costs by Ms. Lowe Klein

Counsel for Ms. Lowe Klein submitted that due to personal circumstances any requirement for Ms. Lowe Klein to pay costs would be a financial hardship. Counsel asked the Panel not to award costs and pointed out in some of the cases filed that cost orders were based on a \$3,650.00 per diem amount used by some other colleges for a 1 day hearing, suggesting that the amount in costs sought by the College was excessive.

Order on Costs

The Panel made the following order on costs:

1. Costs to be paid by Ms. Lowe Klein to the College in the amount of \$14,500.00.
2. Payment of costs to begin six (6) months after Ms. Lowe Klein returns to active practice.
3. Payment is to be made in a lump sum or over time according to a reasonable payment schedule agreeable to the College. The Panel will retain its jurisdiction to determine a

time schedule for payment if there is no agreement between the parties on a payment schedule.

Reasons for the Order on Costs

The Panel is of the opinion that ordering the payment of costs is appropriate given the serious nature of the finding of professional misconduct and the inappropriate use of the discipline process to challenge a remedial SCERP order.

The Panel considered the following factors in assessing the matter of costs:

- Ms. Lowe Klein's personal circumstances are financially challenging even if the Panel was not persuaded that the SCERP order could not be complied with by her.
- Ms. Lowe Klein will be unable to practise dental hygiene during her suspension.
- The amount of \$14,500.00 is a fair balance between the amount of \$29,000.00 asked for by counsel for the College and an amount based on a per diem approach to determining quantum.
- College resources are funded through registrants' fees and the Panel is of the opinion that it would be unreasonable to expect registrants to assume the total cost of the proceedings given the finding and the inappropriate use of the discipline process. In the Panel's opinion, Ms. Lowe Klein should be required to pay a portion of the expenses incurred by the College.