

**DISCIPLINE COMMITTEE
OF THE COLLEGE OF AUDIOLOGISTS AND
SPEECH-LANGUAGE PATHOLOGISTS OF ONTARIO**

B E T W E E N:

COLLEGE OF AUDIOLOGISTS
AND SPEECH-LANGUAGE PATHOLOGISTS OF ONTARIO

- and –

BRENDA BERGE

Panel Members:	Deb Zelisko Mary Suddick Karen Bright Ruth Ann Penny	Chair, Audiologist Speech-Language Pathologist Speech-Language Pathologist Public Representative
Present:	Bernie Le Blanc Courtney Campbell Morris Manning Brenda Berge Daniel Guttman Brenda Jones Luisa Ritacca	Counsel for the College Director of Professional Conduct Counsel for the Member Member Counsel for Attorney General, Ontario (did not take part in the hearing on Sanctions) Independent Legal Counsel to the Panel
Hearing Dates:	September 2, 2015	

DECISION AND REASONS on Sanctions and Costs

By decision dated March 31, 2015, this panel of the Committee of the College of Audiologists and Speech Language Pathologists of Ontario (the “College”) dismissed the Member’s motion to dismiss the Notices of Hearing and the allegations against her as set out therein. In our decision, the panel also found the Member to have engaged in professional misconduct within the meaning of paragraphs 16, 31, 34 and 37 of section 1 of Ontario Regulation 749/93 under the Audiology and Speech-Language Pathology Act, 1991.

On September 2, 2015, the parties appeared before the panel for a hearing on the issue of appropriate sanction and costs in light of the panel’s decision. The panel heard submissions from the College and the Member’s counsel, and received four additional exhibits.

Below, the panel sets out its decision and reasons with respect to sanction and costs.

Sanction

1. Position of the College

The College asked the panel to make an order on sanction, as follows:

- requiring the member to appear before the panel to be reprimanded;
- directing the Registrar to suspend the member’s certificate of registration for a period of three continuous months to commence on a date to be fixed by the Registrar, although such date being within three months of the order taking effect;
- directing the Registrar to impose specified terms, conditions and limitations on the member’s certificate of registration requiring the member to successfully complete, at her own expense and to the satisfaction of the Registrar, an ethics course; and
- directing the Registrar to impose specified terms, conditions and limitations on the member’s certificate of registration requiring the member to undergo 3 unannounced

inspections at the member's expense, to a total of \$500.00 per inspection, within 24-months following the order taking effect.

The position of the College was that there were general principles which should be applied in determining an appropriate sanction. The College submitted that the panel should consider denunciation, general and specific deterrence and rehabilitation.

The College presented a Book of Authorities on Penalties (Exhibit 26) and a Costs Record of the Responding Party, (Exhibit 27) which it provided as the basis for the sanctions requested. Included in Exhibit 27 was a letter from the College's then-Complaints Committee confirming that the Member had been cautioned about her misuse of the title "doctor" by that Committee in 2009.

2. Position of the Member

The Member argued that the sanction proposed by the College was unreasonable, not in keeping with earlier cases, and grossly unfair. The Member argued that the cases provided by the College were not relevant, as all of the cases cited involved members who held themselves out as having credentials which they did not in fact have. Here, the Member argued, there is no question that the Member has her Aud. D designation. The only issue here was whether she was allowed to use the title "doctor" (or an abbreviation) in providing health care to patients in Ontario. As such, the Member argued that the panel should not rely on the cases filed by the College in determining an appropriate sanction. Further, the Member argued that the sanction proposed by the College was disproportionate .

3. Decision of the Panel

The panel makes the following order with respect to sanction:

- (A) **THE DISCIPLINE COMMITTEE DIRECTS** the Member, Brenda Berge to appear before it to be reprimanded, on a date to be fixed.
- (B) **THE DISCIPLINE COMMITTEE DIRECTS** the Registrar to suspend Brenda Berge's certificate of registration for a period of three (3) continuous months, 1 month of which shall be

remitted. The suspension shall commence on a date to be fixed by the Registrar, although such date shall be within three months of the order taking effect.

(C) **THE DISCIPLINE COMMITTEE** directs the Registrar to impose a term, condition and limitation on the Member's certificate of registration,

- a. Requiring that she successfully complete a course in ethics, focussing in professional obligations, such as the ProBe course, to the satisfaction of the Registrar, and at the Member's own expense.
- b. Requiring that the Member is to undergo two (2) unannounced inspections per annum at the Member's expense, to a total of \$500.00 per inspection, over the course of 3-years for a total of six (6) unannounced inspections over the period.

Reasons for Sanction

The panel considered the principles of sanctioning when making its decision and also considered the risk to the public, and the importance of members upholding the basic tenets of self-regulation. The reprimand and suspension were based on the principles of Denunciation, and General and Specific Deterrence. It is the panel's view that in order for self-regulation to be effective, each member must abide by the current and relevant legislation. Further, each member must conduct themselves in a manner that is consistent with the expectations set by the College. While the member may disagree with a rule or expectation, he or she cannot simply ignore it. The reprimand and suspension also address the need to publicly denounce the Member's conduct and will act as both a deterrent for the Member and the membership at large. The panel agreed to remit a portion of the suspension because there was no evidence presented to suggest that the Member's misconduct had ever put the public in danger or at risk of harm. The panel did not find it necessary to attach the remittance to another term of the sanction ordered.

The requirement for the Member to complete an ethics course similar to the ProBe course addresses the principle of rehabilitation. The panel noted that despite a previous letter of caution, dated March 6, 2009, dealing with the similar issues before us on this hearing, the Member continued to engage in the same misconduct. The intent of the ethics course is to provide the

Member with a focus on the importance compliance in the area of self-regulation, and on the public safety and transparency requirements as set out in the governing legislation.

Finally, the panel ordered six inspections over the course of three years in order to provide some assurance to the College that the Member will remain compliant. Given the length of time that the Member continued to breach the regulations after receiving a letter of caution, the panel concluded that a longer inspection period than what the College had suggested was appropriate.

Costs

1. Position of the College

In support of its requests for costs, the College filed an Affidavit, enclosing the cost outlines prepared by prosecution counsel and independent legal counsel. The College also filed the cost outline of independent legal counsel who assisted with this matter, but who did not assist on the hearing itself.

At Exhibit 26, the College provided the panel with case law addressing when and at what rate costs are ordered in discipline cases at other health colleges in the province. It is clear from the case law that there are no clear rules regarding how costs should be assessed. It appears that in certain instances, the courts have found an order requiring a member to pay two-thirds of the total costs was appropriate. The panel also noted that the College of Physicians and Surgeons of Ontario (CPSO) has set in its Rules of Procedure a per diem levy used to assess costs against members in appropriate cases. No such rule or levy exists at this College.

The College argued that this panel has jurisdiction to order costs against the member, pursuant to section 53.1 of the Health Professions Procedural Code, which provides in part that, “in an appropriate case, a panel may make an order requiring a member who the panel finds has committed an act of professional misconduct or finds to be incompetent to pay all or part of the following costs and expenses...”. In this case, the College submitted that an order for costs against the Member was appropriate. While the College’s actual hearing costs were in the range of \$260,000.00, the College asked the panel to order the Member to pay \$100,000.00 in costs, payable over a one-year period.

The College argued that while it was within the Member’s right to dispute the allegations and to bring her various procedural motions, the College ought not to bear the entire cost of the protracted

proceedings. Further, the College noted that while the Member had a right to challenge the veracity and constitutionality of the legislation, she could have done so without engaging in professional misconduct.

2. Position of the Member

The Member argued that the costs incurred and the costs sought were unreasonable in the circumstances. The Member argued that the costs being sought by the College were very high and pointed out that the CPSO per diem levy would amount to a substantially lower sum. The Member also argued she had right to dispute the allegations and that order costs at all was akin to punishing her simply for asserting her rights.

Ultimately, the Member argued that no costs should be ordered and alternatively if costs were ordered they should be at a substantially reduced amount from the amount sought by the College.

3. Panel's Decision on Cost

Having considered the evidence filed and the parties submissions, the panel orders the Member to pay to the College \$97,595, payable over three years. The Member is ordered to pay the first \$15,000 within 60-days of this order being final and required to pay the remaining instalments of \$ 41,297.50 at twelve and twenty-four months later.

Reasons for Decision on Costs

The panel's reasons included the following:

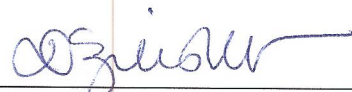
- The total cost of the hearing as provided by the College amounted to \$260,330.38
- The amount of \$574.21 which were expenses related to the original investigation was considered part of the standard work of the ICRC committee and was deducted from the total;
- The amount of \$11,336.50, which was noted to be costs incurred with sorting out documentation which the College indicated took longer than expected. As a result, the panel reduced this amount by half for a total of \$5,668.25;
- The remaining amount was \$254,087.92;

- The College did not ask for 2/3 of the costs, but a much smaller proportion. By applying the percentage of the costs that the College used in deriving the request of \$100,000 in costs (.3841), the panel derived an amount of \$97,595.
- In determining the payment period the panel took into account that the Member will be suspended for a two month period as well as the overall amount required for the Member to pay and the cost of the 6 visits.

The panel's rationale on ordering costs was based on the length and costs associated with the hearing. The Member chose to ignore the rules and expectations set forward by the College. While the Member had the right to take the steps that she did, she cannot do so expecting that she should not share in the costs incurred in this type of case.

I, Deb Zelisko, sign this Decision as Chairperson of this Discipline Panel and on behalf of the Panel members.

Date: October 25, 2015

Signed: 
Chair, Panel of the Discipline Committee