

The FHSAA and National Disqualification

This article, written by barrister Nicholas Peacock, considers the imposition of orders for National Disqualification (ND) against performers on Primary Care Trust (PCT) lists by the Family Health Service Appeal Authority (FHSAA).

The FHSAA: its powers and procedures

The FHSAA was established with effect from 14th December 2001. Technically, it is an independent tribunal non-departmental public body. In practice, it hears appeals against various PCT decisions (including in particular discretionary removals from the list and refusals to admit to the list) and certain PCT applications (in particular seeking an order for ND).

The FHSAA, and only the FHSAA, can impose on a performer an order for ND, meaning that the performer is disqualified from inclusion in any or all of PCT performers' lists nationally.

The FHSAA's powers to impose orders for ND on performers arise in two main situations: (a) where a Primary Care Trust (PCT) makes an application of its own for such an order following a removal/refusal decision and the performer does not appeal. There is a three month time limit for the PCT to make such an application; (b) where the FHSAA dismisses a performer's appeal from a removal/refusal decision of the PCT - it is good practice for the PCT to adhere to the same three-month time limit if it wishes to seek an order for ND.

The FHSAA can review an order for ND but, except in certain circumstances, an order for ND will not be reviewed before the expiry of two years from the date on which it was made.

The FHSAA has strict procedural rules (see FHSAA (Procedure) Rules 2001) and has issued (limited) procedural guidance to PCTs who make an application for an order for ND.

Relevant factors in seeking ND (1): guidance

The starting point must be the statutory regulations themselves, in this case the NHS (Performers Lists) Regulations 2004. However, the Department of Health has published extensive guidance in: "Primary Medical Performers Lists – Delivering Quality in Primary Care" and, for dentists, "Delivering Quality in Primary Care – General Dental

Practitioners”. The guidance recommends that PCTs give consideration to seeking an order for ND unless the grounds for its decision were essentially local:

Decisions of an individual PCT can only have effect in the area for which that PCT is responsible. As a result there is a risk that a doctor who has been removed from the list of one PCT may go on to offer his services to PCTs in turn in the hope that he will find one prepared to accept his services as a performer...This additional sanction is necessary in the most serious cases... Unless the grounds for a removal or refusal to admit decision were essentially local, it would be normal to give serious consideration to such an application.

The dental guidance adds:

PCTs are reminded of the benefits of a national disqualification both for protecting the interests of patients and for saving NHS resources.

PCTs are therefore expected to act in the wider interests of the NHS and the public (notwithstanding the additional cost implications of seeking advice on and making an application for an order for ND). The motto is probably: “Do as you would be done by”.

Relevant factors in seeking ND (2): previous decisions

Many FHSAA decisions, including those where an order for ND has been imposed are available on its website at www.fhsaa.nhs.uk/fhsaa/index.html. PCTs can refer to these cases in deciding whether to seek an order for ND, noting that they should be read with some caution, as they are all decided on their own particular facts.

Often the decision will be clear-cut, for example where the performer has been convicted of a criminal offence or been sanctioned by their professional disciplinary body. However, cases involving clinical inadequacy may well be less easy for PCTs to decide. Previous FHSAA decisions dealing with clinical inadequacy have involved performers found (whether by the National Clinical Assessment Authority and/or after local performance review and/or by the FHSAA) to have been in wholesale breach of their clinical duties and responsibilities.

To date only one FHSAA decision (which included an order for ND) has been reviewed

in the High Court. The High Court stressed the importance to the efficiency of the NHS of honesty on the part of PCT performers.

In deciding whether to seek an order for ND, PCTs should give particular consideration to: (i) whether the reasons for refusal/removal are local only; (ii) whether there is any risk to patient safety in allowing the performer to make an application to another PCT; (iii) whether the performer shows any insight into their failings. Examples of local issues include: (i) the adequacy of a particular reference, which may be remedied at a further application and (ii) failure to provide documents in support of an enhanced CRB check.

Conclusions

Whenever a PCT removes a performer from its list (or refuses to include him) it must consider whether the reasons for removal or refusal are merely local or whether they are likely to apply equally to any other PCT in the event of a different application by the performer. What goes around, comes around! It is good practice for a PCT to include an application for an order for ND in its response to an appeal by a performer against removal or refusal rather than inviting the FHSAA to consider ND at any appeal hearing. The procedures for making an application are relatively complicated; legal advice should be sought when considering whether, and how, to make any application for an order for ND.

To date, the cases in which the FHSAA has imposed an order for ND have been fairly clear-cut. Orders for ND are likely to be made where there is clear evidence of: professional misconduct or serious criminal convictions; lack of honesty on the part of the performer; wholesale clinical incompetence and in particular lack of insight, particularly where there is a real risk to patients safety.

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