Offering no evidence

Reference: DMA-3 Last Updated: 29/11/2021

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What is offering no evidence?

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We keep all cases under review while we prepare them for the Fitness to Practise Committee. Sometimes, as part of that review, it becomes clear to us that it wouldn't be in the public interest to carry on with all or part of the case. In limited circumstances it may be appropriate for us to use our power to 'offer no evidence'.[1] This means that we'll ask a full panel of the Fitness to Practise Committee to approve our decision not to continue with all or part of the case against a nurse, midwife or nursing associate. We will only offer no evidence in a particular case if it fits with our overarching objective.

We'll only apply to offer no evidence against a nurse, midwife or nursing associate in the following circumstances:

- When a particular part of the charge adds nothing to the overall seriousness of the case.
- When there is no longer a realistic prospect of some or all of the factual allegation being proved.
- When there is no longer a realistic prospect of a panel finding that the nurse, midwife or nursing associate's fitness to practise is currently impaired.

It will be up to the panel to decide whether it agrees that it's appropriate for us to offer no evidence, and not continue with all or part of the case against the nurse, midwife or nursing associate. When we ask a panel to do this and the case is at a hearing, we will open our case and fully explain the background, and our reasons for offering no evidence. If the case is being considered at a meeting we will set this out clearly in our statement of case.

In some circumstances we may apply to offer no evidence on part of the charge in a case where we've agreed a consensual panel determination with the nurse or midwife. If we are doing this we'll make it clear that we want to offer no evidence, and fully explain our reasons, in the text of the draft agreement between us and the nurse, midwife or nursing associate.

Where part of the charge doesn't make the case more serious

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If we're satisfied that one or more of the alleged facts against the nurse, midwife or nursing associate doesn't add anything to how serious the case against them is, we may decide to offer no evidence on those parts of the charge. We won't do this unless we're satisfied that the remaining parts of the charge properly reflect the extent of our concerns about the nurse, midwife or nursing associate's fitness to practise, and the evidence about them. We'll need to consider the risk of harm to patients, or the public's trust in nurses, midwives and nursing associates

that could arise from what the nurse, midwife or nursing associate is alleged to have done.

No realistic prospect of proving the facts of the case

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It's not in the public interest for us to pursue factual charges against a nurse, midwife or nursing associate if there isn't enough evidence to prove them. Offering no evidence because there isn't enough evidence to prove the facts, so that there's no longer a realistic prospect, will only be appropriate if:

- the state of the evidence has changed since case examiners made a finding of case to answer[2]
- it has become apparent that the case examiners' decision was made on an incorrect basis
- the charge relies on the evidence of a witness who cannot attend a hearing, and an application to rely on their statement as hearsay evidence has been rejected
- the case was referred directly to the Fitness to Practise Committee, and since then, our investigation has shown that it is no longer in the public interest to continue with the allegation or part of the allegation.

No realistic prospect of fitness to practise being impaired

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We'll only consider offering no evidence because there's no realistic prospect of the panel deciding that the nurse, midwife or nursing associate's fitness to practise is currently impaired if:

- it's become clear that the case examiners' decision was made on an incorrect basis, or
- new evidence about the nurse, midwife or nursing associate's current fitness to practise has emerged, for example evidence about the context in which the incident occurred or evidence of their insight and any steps they've taken to strengthen their practice.

The passage of time may be a relevant change in circumstances. However, the nurse, midwife or nursing associate would need to show that they have worked in a professional capacity, using their registration. They would need to produce evidence showing that they've addressed the issue with their practice, from which it's clear that offering no evidence would meet the aims of our overarching objective.

Informing the referrer about a decision to offer no evidence

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If we've decided to offer no evidence, we'll tell the person who first referred the nurse, midwife or nursing associate to us about this, if we can do so without risking any unfairness or prejudice at a future hearing (which could happen, for example, if that person was a witness in the case).

If that person is a witness in the case, we will decide what information we can give them. Our general approach is that we should give them as much information as we possibly can, while making sure the future hearing is fair. Ideally, we'll be able to explain our reasons for offering no evidence fully. We'll always tell them that the panel might decide to reject our application, and proceed with the charge of its own accord.

If the person who first referred the nurse, midwife or nursing associate to us provides us with any comments about our decision we will place these before the panel if they are relevant, and if it would be fair to do so.

There will be cases where it won't be possible for us to fully explain our decision to offer no evidence before the meeting or hearing. If this happens, we will let the person who referred the concerns to us know, before the meeting or hearing, that we have decided to offer no evidence. We will then give them a full explanation for our decision after the meeting or hearing.

Offering no evidence: the panel's decision making process

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If we're offering no evidence at a hearing, before the charges are read out, we will tell the panel that we intend to offer no evidence to all or part of the charges. This means that when the charges are read out, the panel won't ask the nurse, midwife or nursing associate for a response to the charge(s) we're offering no evidence on, until it has heard and decided our application.

When we offer no evidence, we'll invite the panel to consider the steps we've taken to obtain the evidence relevant to the facts, the nature of the evidence, and what evidence was considered by the case examiners. If the

case is being considered at a hearing our case presenter will give the panel a full opening statement so the panel clearly understands the case, and why we are offering no evidence on all or part of the charges. Often, the case presenter will provide a written opening of the case which fully and fairly summarises the evidence to the panel. In some situations the case presenter may decide it is more helpful for the panel to be provided with copies of some or all of the evidence to help it reach its decision. If the case is being considered at a meeting, we'll set out our reasoning in our statement of case.

We will always make the panel fully aware of the steps we took during the investigation, including any problems we encountered, and what we did about them. When we do this, we consider that we have a duty of good faith to fairly explain how serious the allegations were, and why we no longer intend to pursue them.

In very rare cases, the charges we want to offer no evidence on might be so serious that they would make it unfair for the same panel to go on and hear the rest of the case. If that happens, we will arrange for a separate panel to deal with the full hearing or meeting.

Where the case is being dealt with at a hearing, the panel will ask the nurse, midwife or nursing associate if they have anything they wish to say to the panel about our application. The panel will be given legal advice before they make a decision on our application.[3]

If the panel is not satisfied with the application to offer no evidence, it can still call evidence of its own motion.[4]

When it is considering whether to call evidence on its own, the panel may find that our guidance on directing further investigation during a hearing is helpful. If necessary, the panel would have to adjourn the hearing (or refer the case to hearing if it is at a meeting) to make sure witnesses can attend and give evidence. In some cases it may be appropriate for the panel to decide that this evidence will be heard by a different panel if this would be fairer to all parties.

What happens after the panel's decision?

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If the panel does not approve of us offering no evidence, and either calls evidence on its own or directs us to carry out further investigation, the hearing will proceed (possibly after an adjournment to allow us time to investigate or arrange for witnesses to attend).

If we have offered no evidence on the whole of the charge against the nurse, midwife or nursing associate, and the panel agrees with our application, the panel will decide that the allegation is not well founded, and give its reasons. That will bring the case against the nurse, midwife or nursing associate to an end, and no findings will be made against them. The charge can only then be re-opened if there is a successful appeal to the courts against the panel's decision.

If we have offered no evidence only on parts of the overall charge against the nurse, midwife or nursing associate, and the panel agrees with us, the panel will provide reasons for its decision. It can then amend the charge[5] to remove those parts of the charge on which it has approved our application to offer no evidence. The nurse, midwife or nursing associate will not then have to answer those parts of the charge, and they will no longer form part of the allegation against them.

1 PSA v NMC & X [2018] EWHC 20 (Admin) para 55-57

2 For example, a witness may refuse to attend a hearing. We may have been aware that the witness was reluctant to engage at the case examiner stage and the case examiners may still have found a case to answer. Where this happens, it is still likely to amount to a change in the state of the evidence because we will have had the opportunity to consider any reasonable adjustments or measures to address the witness' concerns and to encourage them to attend.

3 Legal advice is likely to refer to the case of PSA v NMC & X [2018] EWHC 70 (Admin). This case also makes clear at paragraph 56 that R v Galbraith [1981] 1 WLR 1039 is not relevant to this type of application.

4 Rule 22(5) of the Rules

5 Under rule 28(1) of the Rules