Conduct and Competence Committee
Substantive Meeting
6 June 2017
Nursing and Midwifery Council, 2 Stratford Place, Montfichet Road, London, E20 1EJ

Name of Registrant Nurse: David Piers Wynburne
NMC PIN: 78A4201E
Part(s) of the register: RN1, Registered Nurse (Sub Part 1) – Adult – April 1981
Area of Registered Address: England
Type of Case: Lack of Competence
Panel Members: Andy Thompson (Chair Lay member)  
Wendy Warren (Registrant member)  
Thomas Woods (Lay member)
Legal Assessor: Anne Brown
Panel Secretary: Caroline Pringle
Facts proved by admission: All
Facts not proved: None
Fitness to practise: Impaired
Sanction: Suspension order – 9 months
Interim Order: Interim suspension order – 18 months
Details of charge

That you, a registered nurse, while employed by Shepton Mallet NHS Treatment Centre, working in the outpatient department failed to demonstrate the standard knowledge, skill and judgement required for practice without supervision as a Registered Nurse in that:

1) On the 17 November 2014 did not record whether a urine sample had been taken for Patient 1.

2) On the 19 November 2014 did not follow the correct procedure regarding Patient 2 in that, you:
   a) Did not refer Patient 2 to their GP regarding hypertension;
   b) Did not ask Patient 2 to return to the clinic in three weeks’ time and/ or did not record such a discussion.

3) On the 19 November 2014 you did not document that Patient 3 had a latex allergy.

4) On the 29 November 2014 regarding your assessment of Patient 11 you:
   a) Advised Patient 11 to stop taking warfarin for 7 days instead of 4 days;
   b) Assessed Patient 11 as fit for surgery when their blood pressure was too high;
   c) Did not contact Patient 11’s GP in relation to a potential clexane prescription.

5) On the 29 November 2014 regarding your assessment of Patient 13 you:
   a) Did not advise Patient 13 to stop taking candesartan prior to surgery or record that such advice was given;
   b) Assessed Patient 13 as fit for surgery when their blood pressure was too high;
   c) Did not record that urine analysis had been performed.

6) On the 29 November 2014 regarding your assessment of Patient 14 you:
   a) Did not undertake blood tests and/ or record that such tests were undertaken;
   b) Did not ensure that a urine assessment was performed and/ or record that such an assessment was performed.
7) On the 1 December 2014 did not obtain and/or record blood tests results for Patient 15 in your assessment.

8) On the 1 December 2014 did not obtain and/or record blood test results for Patient 16 in your assessment.

9) On the 1 December 2014 regarding your assessment for Patient 17 you:
   a) Did not advise Patient 17 to stop taking Losartan or in the alternative, record that such advice was given;
   b) Recorded that Patient 17 was both not fit for surgery and fit for surgery.

10) On the 2 December 2014 regarding your assessment of Patient 18 you:
    a) Did not take Patient 18’s full blood count and group screen blood tests and/ or did not record that such tests were taken;
    b) Did not undertake an ECG on Patient 18 or alternatively record the results of the ECG.


12) On the 28 November 2014 failed to take Patient 22’s GAMMA blood test when the patient’s alcohol intake indicated that one was needed and/ or failed to record that such a test was undertaken.

13) On the 4 December 2014 regarding your assessment of Patient 25, you did not inform the ward that Patient 25 required an overnight stay after surgery.

14) On the 4 December 2014 you did not accurately record Patient 26’s MRSA swab results in the investigations tab.

15) On the 10 December 2014 you did not record in Patient 32’s medication information that Patient 32 was taking rivaroxaban.
16) On the 26 November 2013 when Patient 37 presented with raised blood glucose, you did not order further investigations prior to surgery.

17) On 27 December 2013 regarding Patient 38 you:
   a) Did not undertake or order investigations when Patient 38’s heart rate was elevated;
   b) Failed to ask an anaesthetist to review Patient 38.

18) On the 7 August 2014 did not advise Patient 39 to stop taking:
   a) Aspirin;
   b) Candesartan.

19) On 24 October 2013 when Patient 40 had a BMI of 40.57 you:
   a) Did not refer Patient 40 to a GP;
   b) Did not ask Patient 40 to return to nurses’ clinic in three weeks’ time.

20) Between 16 June 2014 and 13 July 2015 you did not adequately carry out 95% of pre surgery assessments reviewed for the week commencing:
   a) Week commencing 16 June 2014
   b) Week commencing 23 June 2014
   c) Week commencing 23 July 2014
   d) Week commencing 1 – 16 August 2014
   e) Week commencing 21 August 2014
   f) Week commencing 8 September 2014
   g) Week commencing 15 September 2014
   h) Week commencing 19 September 2014
   i) Week commencing 31 October 2014
   j) Week commencing 7 November 2014
   k) Week commencing 10 November 2014
   l) Week commencing 17 November 2014
   m) Week commencing 23 February 2015
   n) Week commencing 2 March 2015
Week commencing 9 March 2015
p) Week commencing 23 March 2015
q) Week commencing 30 March 2015
r) Week commencing 13 April 2015
s) Week commencing 20 April 2015
t) Week commencing 28 April 2015
u) Week commencing 19 June 2015
v) Week commencing 29 June 2015
w) Week commencing 6 July 2015
x) Week commencing 13 July 2015

And that, in light of the above, your fitness to practise is impaired by reason of your lack of competence.

**Decision on service of notice of meeting**

The panel considered whether notice of this meeting had been served in accordance with the rules. Rules 11A and 34 of the *Nursing and Midwifery Council (Fitness to Practise) Rules 2004*, as amended state:

‘**11A.(1)** Where a meeting is to be held in accordance with rule 10(3), the Conduct and Competence Committee or the Health Committee shall send notice of the meeting to the registrant no later than 28 days before the date the meeting is to be held.

**34.(3)** Any other notice or document to be served on a person under these Rules may be sent by—

(a) ordinary post’

The panel accepted the advice of the legal assessor.

It noted that the letter of notice of this substantive meeting was sent to Mr Wynburne’s address on the register by both first class post and recorded delivery on 28 April 2017.
informing him that this meeting would take place on or after 3 June 2017. Royal Mail “Track and Trace” also confirms that notice was delivered to Mr Wynburne’s registered address on 29 April 2017 and signed for in the printed name of “WYNBURNE”. The panel was satisfied that the notice was sent more than 28 days in advance of this meeting. The panel therefore found that notice had been served in accordance with the Rules.

Background
Mr Wynburne was referred to the NMC by the Clinical Performance Operations Manager at Shepton Mallet NHS Trust Centre (“the Centre”) on 11 September 2015. The referral contained allegations that Mr Wynburne had a range of sustained competency failings including problems with assessment, documentation, pre-operative investigations and effective communication over a significant period of time.

At the relevant time, Mr Wynburne was employed by the Centre as a registered nurse, working within the Outpatients’ Department (“the Department”). He was responsible for performing pre-operative assessments of patients prior to surgery. Following frequent and varied errors relating to patient assessment and advice, Mr Wynburne’s line manager initiated the Centre’s informal capability procedure on 16 May 2014. Despite ongoing training, supervision and support, concerns regarding Mr Wynburne’s competency continued. On 27 January 2015 Mr Wynburne was placed on a formal capability procedure but after assessments on 8 April 2015 and 29 July 2015 he was considered to be below the required standard of performance and, on 3 September 2015, was dismissed on capability grounds.

Decision on the findings on facts and reasons
Prior to this meeting Mr Wynburne completed the NMC’s Standard Directions Form, dated 19 March 2017, in which he indicated that he admitted all of the charges.

The panel accepted the advice of the legal assessor.

The panel therefore found the charges proved by way of admission.
Decision on lack of competence and impairment

The panel next considered whether on the basis of the facts found proved, Mr Wynburne’s fitness to practise is currently impaired. This is a two stage process. The panel must first determine if Mr Wynburne’s actions and omissions amount to a lack of competence. If a lack of competence is found, the panel must then consider whether Mr Wynburne’s fitness to practise is currently impaired as a result of that lack of competence.

When coming to its decision the panel took into account all of the facts found proved and the documentary evidence before it. It noted Mr Wynburne’s admission that his fitness to practice was impaired, but was aware that it had to reach an independent decision based on its own professional judgement.

The panel accepted the advice of the legal assessor which included references to the cases of Cohen v GMC [2008] EWHC 581 (Admin) and Council for Healthcare Regulatory Excellence v (1) Nursing and Midwifery Council (2) Grant [2011] EWHC 927 (Admin).

Decision on lack of competence

When determining whether the facts found proved amount to a lack of competence the panel had regard to the terms of The code: Standards of conduct, performance and ethics for nurses and midwives 2008 (“the Code”). The panel did note that charges 20(r) – 20(x) occurred after 31 March 2015 when the new 2015 version of the Code was in force however it considered it appropriate to refer to the 2008 Code as this was the version in force at the time of charges 1 – 19 and the remaining 17 sub charges of charge 20.

The panel, in reaching its decision, had regard to the public interest and accepted that there is no burden or standard of proof at this stage and exercised its own professional judgement.
The panel was informed that the definition of lack of competence, as taken from the NMC ‘Reporting lack of competence: A guide for employers and managers’, is:

A lack of knowledge, skill or judgment of such a nature that the registrant is unfit to practise safely and effectively in any field in which the registrant claims to be qualified or seeks to practice.

The panel has taken into account the following paragraphs of the Code:

**The people in your care must be able to trust you with their health and wellbeing**

*To justify that trust, you must:*

- …
- work with others to protect and promote the health and wellbeing of those in your care, …
- provide a high standard of practice and care at all times
- …

As a professional, you are personally accountable for actions and omissions in your practice, and must always be able to justify your decisions…

**Keep your skills and knowledge up to date**

38 You must have the knowledge and skills for safe and effective practice when working without direct supervision.

40 You must keep your knowledge and skills up to date throughout your working life.

**Keep clear and accurate records**

42 You must keep clear and accurate records of the discussions you have, the assessments you make, the treatment and medicines you give, and how effective these have been.

**Uphold the reputation of your profession**

61 You must uphold the reputation of your profession at all times.
In considering whether the facts found proved amount to a lack of competence, the panel concluded that Mr Wynburne breached the aforementioned paragraphs of the Code, which is the standard by which every registered nurse is measured. The panel bore in mind, when reaching its decision, that Mr Wynburne should be judged by the standards of the reasonable average registered nurse and not by any higher or more demanding standard.

The panel considered that Mr Wynburne’s failings related to basic areas of nursing practice which persisted despite extensive and thorough support and mentoring from his employer through the Centre’s capability procedure. The panel therefore concluded that Mr Wynburne’s practice was below the standard that one would expect of the average registered nurse acting in the role that he was in. In all the circumstances, the panel determined that Mr Wynburne’s performance demonstrated a significant lack of competence.

**Decision on impairment**

The panel next went on to decide if, as a result of this lack of competence, Mr Wynburne’s fitness to practise is currently impaired.

Nurses occupy a position of privilege and trust in society and are expected at all times to be professional and to maintain professional boundaries. Patients and their families must be able to trust nurses with their lives and the lives of their loved ones. To justify that trust, nurses must be honest and open and act with integrity. They must make sure that their conduct at all times justifies both their patients’ and the public’s trust in the profession. In this regard the panel considered the judgment of Mrs Justice Cox in the case of *Council for Healthcare Regulatory Excellence v (1) Nursing and Midwifery Council (2) Grant* [2011] EWHC 927 (Admin) in reaching its decision, in paragraph 74 she said:

*In determining whether a practitioner’s fitness to practise is impaired by reason of misconduct, the relevant panel should generally consider not*
only whether the practitioner continues to present a risk to members of the public in his or her current role, but also whether the need to uphold proper professional standards and public confidence in the profession would be undermined if a finding of impairment were not made in the particular circumstances.

Mrs Justice Cox went on to say in Paragraph 76:

I would also add the following observations in this case having heard submissions, principally from Ms McDonald, as to the helpful and comprehensive approach to determining this issue formulated by Dame Janet Smith in her Fifth Report from Shipman, referred to above. At paragraph 25.67 she identified the following as an appropriate test for panels considering impairment of a doctor’s fitness to practise, but in my view the test would be equally applicable to other practitioners governed by different regulatory schemes.

Do our findings of fact in respect of the doctor’s misconduct, deficient professional performance, adverse health, conviction, caution or determination show that his/her fitness to practise is impaired in the sense that s/he:

a. has in the past acted and/or is liable in the future to act so as to put a patient or patients at unwarranted risk of harm; and/or
b. has in the past brought and/or is liable in the future to bring the medical profession into disrepute; and/or
c. has in the past breached and/or is liable in the future to breach one of the fundamental tenets of the medical profession; and/or
d. …

The panel found that in this case Mr Wynburne did act in such a way so as to put patients at unwarranted risk of harm, as a failure to properly carry out pre-operative assessments or act appropriately on results has the potential to cause serious harm to
patients when they undergo surgery. The panel also found that his actions and omissions brought the profession into disrepute and breached a fundamental tenet of the nursing profession.

Regarding insight, the panel acknowledged that Mr Wynburne has demonstrated some insight by making full admissions to the charges against him. However, the panel was not satisfied that he has demonstrated a sufficient level of insight into the impact of his actions on his patients, colleagues and the wider nursing profession. Further, it was concerned by the evidence of Ms 1, Operations and Clinical Performance Manager at the Centre, who said that throughout the capability process Mr Wynburne had been reluctant to accept feedback from his mentors and supervisors regarding his nursing practice and appeared to “lack self-awareness about how his actions could affect patient safety.”

The panel had no evidence before it of any remediation undertaken by Mr Wynburne since his referral to the NMC. It had regard to the fact that the Centre had supported him to improve his practice for approximately 18 months but that, during this time, Mr Wynburne had not fully engaged with the process and the support which was offered to him and his practice had not improved.

The panel did have regard to the positive testimonial from Mr Wynburne’s current employer, which spoke highly of his work ethic and compassion. However the panel noted that Mr Wynburne is currently working as a care assistant, not as a registered nurse, and the testimonial does not go to the issues in the charges.

The panel was therefore of the view that due to Mr Wynburne’s limited insight and lack of remediation there is a risk of repetition. The panel therefore decided that a finding of impairment is necessary on the grounds of public protection.

The panel bore in mind that the overarching objectives of the NMC are to protect, promote and maintain the health, safety and well-being of the public and patients, and to uphold/protect the wider public interest, which includes promoting and maintaining public confidence in the nursing and midwifery professions and upholding the proper
professional standards for members of those professions. The panel therefore determined that, in this case, a finding of impairment on public interest grounds was required to uphold professional standards and maintain public confidence in the profession.

Having regard to all of the above, the panel was satisfied that Mr Wynburne’s fitness to practise is currently impaired.

**Determination on sanction**

The panel considered this case and decided to make a suspension order for 9 months. The effect of this order is that the NMC register will show that Mr Wynburne’s registration has been suspended.

In reaching this decision, the panel had regard to all the evidence that has been adduced in this case. The panel accepted the advice of the legal assessor. The panel bore in mind that any sanction imposed must be appropriate and proportionate and, although not intended to be punitive in its effect, may have such consequences. The panel had careful regard to the Indicative Sanctions Guidance (“ISG”) published by the NMC. It recognised that the decision on sanction is a matter for the panel, exercising its own independent judgement.

The panel considered that the aggravating factors in this case were:

- Mr Wynburne’s failings relate to basic nursing practice;
- The identified failings occurred frequently and repeatedly over a long period of time, despite intensive support and supervision from the Centre;
- There is no evidence of remediation;
- Patients were put at potential risk of harm;
- Both patients and colleagues were inconvenienced by cancelled operations as a result of Mr Wynburne’s failings.

The panel considered that the mitigating factors in this case were:

- Mr Wynburne’s admissions to the charges are evidence of some recent insight;
• During the time of the charges he had been assessed by Occupational Health and was recognised to have a [PRIVATE];
• The positive reference from Mr Wynburne’s current employer;
• Mr Wynburne’s long career in nursing.

The panel first considered whether to take no action but concluded that this would be inappropriate in view of the seriousness of the case. The panel decided that it would be neither proportionate nor in the public interest to take no further action.

Next, in considering whether a caution order would be appropriate in the circumstances, the panel took into account the ISG, which states that a caution order may be appropriate where ‘the case is at the lower end of the spectrum of impaired fitness to practise and the panel wishes to mark that the behaviour was unacceptable and must not happen again.’ The panel considered that Mr Wynburne’s lack of competence was not at the lower end of the spectrum and that a caution order would be inappropriate in view of the seriousness of the case. The panel decided that it would be neither proportionate nor in the public interest to impose a caution order.

The panel next considered whether placing conditions of practice on Mr Wynburne’s registration would be a sufficient and appropriate response. The panel is mindful that any conditions imposed must be proportionate, measurable and workable. The panel took into account the ISG, in particular:

64.8 It is possible to formulate conditions and to make provision as to how conditions will be monitored

Although Mr Wynburne’s failings may be remediable the panel was mindful that he had already been subject to an extensive and supportive capability procedure for approximately 18 months which had not resulted in an improvement in his practice. Further, given Mr Wynburne’s apparent unwillingness to engage fully with the Centre’s capability procedure the panel had significant doubts about his willingness to engage or comply with any conditions of practice order it may put into place. In light of this, the panel determined that there were no practical or workable conditions that could be
formulated at this time which would adequately address the concerns in this case and protect the public.

The panel then went on to consider whether a suspension order would be an appropriate sanction. It had regard to ISG paragraph 68 which indicates that a suspension order may be appropriate:

68.6 In cases where the only issue relates to the nurse or midwife’s lack of competence, there is a risk to patient safety if they were allowed to continue to practise even with conditions.

The panel determined that, although there were clear concerns about Mr Wynburne’s competency and level of insight, there was a public interest in allowing otherwise experienced nurses to remain on the register. As such, the panel determined that a suspension order would protect the public for the time it was in force, protect the public interest and afford Mr Wynburne a further opportunity to develop his insight regarding the consequences and impact of his failings and re-evaluate his attitude towards retraining and feedback.

The panel noted that, as this was a case concerning lack of competence, a striking-off order was not an available sanction and therefore it did not consider it.

The panel considered that a suspension order for a period of 9 months was necessary to mark the seriousness of this case, the importance of maintaining public confidence in the profession, and to send to the public and the profession a clear message about the standard of behaviour required of a registered nurse.

At the end of the period of suspension, another panel will review the order. At the review hearing the panel may revoke the order, or it may confirm the order, or it may replace the order with another order. Any future panel would be assisted by evidence of:

- A written reflective piece from Mr Wynburne addressing:
  - the impact of his actions and omissions on patients, his colleagues, the public and the wider nursing profession;
○ the importance of engaging with, and responding positively to, training, supervision and constructive feedback as a nurse;

○ Evidence of training courses undertaken or any other evidence of how he has kept his nursing knowledge and skills up-to-date;

○ Up-to-date references and/or testimonials from his current employer.

**Determination on Interim Order**

The panel next considered if an interim order was required on the grounds that it was necessary for the protection of the public and is otherwise in the public interest.

The panel accepted the advice of the legal assessor.

The panel was satisfied that an interim suspension order is necessary for the protection of the public and is otherwise in the public interest. The panel had regard to the seriousness of the facts found proved and the reasons set out in its decision for the substantive order in reaching the decision to impose an interim order. To do otherwise would be incompatible with its earlier findings.

The period of this order is for 18 months to allow for the possibility of an appeal to be made and determined.

If no appeal is made, then the interim order will be replaced by the substantive suspension order 28 days after Mr Wynburne is sent the decision of this hearing in writing.

That concludes this determination.