

**Nursing and Midwifery Council
Fitness to Practise Committee
Substantive Order Review Hearing**

11 September 2020

Virtual Hearing

Name of registrant:	Stephen Michael Cooney
NMC PIN:	83Y3859E
Part(s) of the register:	Registered Nurse (Sub Part 1) Adult Nursing – July 1996 Registered Nurse (Sub Part 2) Adult Nursing – August 1985
Area of Registered Address:	Gloucestershire
Type of Case:	Misconduct
Panel Members:	Andrew Gell (Chair, Lay member) Anna Guildford (Registrant member) Bernard Herdan (Lay member)
Legal Assessor:	Oliver Wise
Panel Secretary:	Caroline Pringle
Mr Cooney:	Not present and not represented
Nursing and Midwifery Council:	Represented by David Claydon, NMC Case Presenter
Order being reviewed:	Suspension order (12 months)
Fitness to Practise:	Impaired
Outcome:	Order to lapse upon expiry in accordance with Article 30(1), namely at the end of 19 October 2020

Service of Notice of Hearing

This reviewing panel was informed at the start of this hearing that Mr Cooney was not in attendance and that the notice of hearing had been sent electronically to Mr Cooney's e-mail address on 13 August 2020.

The panel noted that under the recent amendments made to the Nursing and Midwifery Council (Fitness to Practise) Rules Order of Council 2004 (as amended) ("the Rules") during the Covid-19 emergency period, a notice of hearing may be sent to a registrant's registered address by recorded delivery and first class post or to a suitable email address on the register.

The panel took into account that the notice of hearing provided details of the substantive order being reviewed, including the time and date of the hearing and the video conferencing details required to join the hearing. It also included information about Mr Cooney's right to attend, be represented and call evidence, as well as the panel's power to proceed in his absence.

Mr Claydon, on behalf of the Nursing and Midwifery Council (NMC), submitted that it had complied with the requirements of Rules 11 and 34 of the Rules and invited the panel to find that there had been good service.

The panel accepted the advice of the legal assessor.

In the light of all of the information available, the panel was satisfied that Mr Cooney had been served with notice of this hearing in accordance with the requirements of Rules 11 and 34.

Proceeding in absence

The panel then considered proceeding in the absence of Mr Cooney. The panel was mindful that the discretion to proceed in absence is one which must be exercised with the utmost care and caution.

The panel considered all of the information before it, together with the submissions made by Mr Claydon, on behalf of the Nursing and Midwifery Council (NMC). The panel accepted the advice of the legal assessor.

Mr Claydon invited the panel to proceed in the absence of Mr Cooney. Mr Claydon referred the panel to recent emails from Mr Cooney and submitted that this correspondence makes it clear that Mr Cooney will not be attending today. Mr Claydon submitted that there has been no application for an adjournment and no reason to believe that an adjournment would secure Mr Cooney's attendance. Mr Claydon further submitted that there was a strong public interest in proceeding today, so that the current suspension order could be reviewed before its expiry.

The panel decided to proceed in the absence of Mr Cooney. It had regard to an email from him, dated 9 September 2020, in which he states that he retired from the nursing profession almost four years ago, does not intend to practise as a nurse again, and will not be communicating any further with the NMC. The panel considered that both the content and tone of Mr Cooney's email made it clear that he had voluntarily absented himself from the hearing. It noted that Mr Cooney has not requested an adjournment and considered that any adjournment would, in any event, be highly unlikely to secure his attendance. Having weighed the interests of Mr Cooney with those of the NMC and the public interest in an expeditious disposal of this hearing the panel determined to proceed in Mr Cooney's absence.

Decision and reasons on review of the current order

The panel decided to make a finding of current impairment and then take no further action at the sanction stage and allow the current suspension order to expire at the end of 19 October 2020 in accordance with Article 30(1). This will bring these fitness to practise proceedings to an end, Mr Cooney's registration will lapse and he will no longer be able to practise as a nurse.

This is the second review of a suspension order originally imposed by a Fitness to Practise panel on 20 September 2018 for 12 months. The order was reviewed and

extended for a further 12 months on 5 September 2019. The current order is due to expire at the end of 19 October 2020.

The panel is reviewing the order pursuant to Article 30(1) of the Order.

The charges found proved which resulted in the imposition of the substantive order were as follows:

'That you:

- 1) *Whilst employed by Sunnymead Manor, between 15 and 24 April 2014, did not make a safeguarding referral when it would have been appropriate to do so.*
- 2) *Whilst employed by Wickwar Care Home, prior to 17 February 2016, provided details of the wrong resident to a GP when seeking medical advice.*
- 3) *Whilst employed by Brockworth House Care Home:*
 - a) *between 14 and 19 May 2016:*
 - i) *did not sign two MAR charts to indicate that you had administered prescribed medication.*
 - ii) *did not check said MAR charts accuracy in circumstances where the apparent creator had not signed off the same.*
 - b) *on one or more of the dates given in Schedule 1 did not administer Hydroxycarbomide to Resident LA as prescribed.*

- c) *on or around 07 November 2016 did not sign one or more MAR chart(s) to indicate you had administered prescribed medication.*

- d) *on 30 November 2016:*
 - i) *did not conduct rolling stock counts when dispensing boxed medication.*
 - ii) *did not document returned/destroyed medication in the returned/destroyed medication book.*

- e) *On one or more occasions prior to 30 November 2016 did not conduct rolling stock counts when dispensing boxed medication.*

- f) *On one or more of the dates given in Schedule 2 did not conduct a wound check and/or dressing change in respect of a wound Resident KT was suffering with.*

Or, in the alternative

- g) *...*

AND in light of the above, your fitness to practise is impaired by reason of your misconduct.

SCHEDULE 1

1. *30 May 2016*
2. *01 June 2016*
3. *02 June 2016*
4. *03 June 2016*
5. *04 June 2016*
6. *05 June 2016*

SCHEDULE 2

1. 25 December 2016
2. 30 December 2016
3. 03 January 2017
4. 05 January 2017
5. 07-09 January 2017'

The last reviewing panel determined the following with regard to impairment:

'The panel had regard to the substantive hearing decision, and what it considered a future reviewing panel might be assisted by. It considered the misconduct identified to be serious, multiple and wide-ranging, and to have related to fundamental aspects of nursing practice.

The panel noted that since the imposition of the suspension order for 12 months, the NMC has only had limited engagement with Mr Cooney

The panel noted from the notice of meeting that Mr Cooney was given until 30 August 2019 to provide any written evidence he would like it to take account of at this review meeting. However, the panel had no evidence provided to it by Mr Cooney as he did not respond to this request.

In light of this, the panel had no new information before it to allay the concerns identified by the original panel at the substantive hearing. It had no evidence to suggest that Mr Cooney had developed his insight further, or attempted to remediate his misconduct. It did not have any current testimonials or correspondence from Mr Cooney outlining what steps he was taking in an attempt to return to safe and effective nursing practice.

The panel was satisfied that it had no new information to demonstrate that Mr Cooney no longer posed a risk to patient safety. Therefore, the panel considered there to be a real risk of repetition of the misconduct

found proved, together with a risk of harm to patients in Mr Cooney's care, should he be permitted to practise as a registered nurse without some form of restriction.

In the absence of significant and pertinent new information, the panel determined that a finding of continuing impairment is necessary on the grounds of public protection.

The panel bore in mind the overarching objective of the NMC: to protect, promote and maintain the health, safety and well-being of the public and patients and 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 was of the view that the public interest elements of this case had been satisfied by the suspension order that had been imposed on Mr Cooney's nursing registration for the last 12 months. It determined that it was no longer necessary to find Mr Cooney's fitness to practise as a registered nurse to be impaired on the ground of it being in the public interest.

For these reasons, the panel finds that Mr Cooney's fitness to practise remains impaired on public protection grounds alone.'

The last panel determined the following with regard to sanction:

'The panel first considered whether to take no action but concluded that this would be inappropriate in view of the public protection concerns identified, the risk of repetition and the seriousness of the case.

The panel then considered whether to impose a caution order but concluded that this would be inappropriate in view of the public protection concerns identified, the risk of repetition and the seriousness of the case.

The panel then considered whether to replace the current suspension order with a conditions of practice order. The panel noted that Mr Cooney has not worked as a registered nurse for a significant period of time, and had previously given an indication of a desire to be removed from the NMC register. Whilst the concerns identified are capable of remediation, the panel had no new information demonstrating that Mr Cooney was actively attempting to remediate his misconduct, or develop his insight further. There was no evidence to suggest that Mr Cooney would be willing to comply with a conditions of practice order, or that workable conditions could be formulated. On this basis, the panel concluded that a conditions of practice order is not an appropriate or proportionate sanction.

The panel considered the imposition of a further period of suspension. It was of the view that another suspension order would allow Mr Cooney further time to fully reflect on his misconduct, remediate his nursing practice, and provide an indication as to whether he intended on returning to nursing at some point in the future. Despite the original panel at the substantive hearing making recommendations for Mr Cooney to follow, this panel had no information before it to demonstrate that he had addressed the concerns identified, and now possessed comprehensive insight.

The panel concluded that a further suspension order for a period of 12 months would be the appropriate and proportionate response. A substantive order for this period of time would afford Mr Cooney adequate time to further develop his insight, provide evidence of remediation, or indicate to another reviewing panel what his future intentions are.

The panel considered striking Mr Cooney's name off of the NMC register, but concluded that this sanction would be disproportionate at this stage.

In the absence of the substantive and urgent reassurance sought by this panel, a reviewing panel may deliberate on this matter further.

The panel considered a striking-off order to be disproportionate and unduly punitive at this stage. However, should Mr Cooney continue to disengage with the NMC or reiterate his desire to be removed from the NMC register, a future reviewing panel may consider this to be the appropriate sanction.

This order will be reviewed by another panel shortly before its expiry.

Any future panel may be assisted by evidence of:

- an indication from Mr Cooney as to his future intentions for the nursing profession;*
- any reflection from Mr Cooney, on the effect of his misconduct on patients, colleagues, employers, and the reputation of the profession;*
- evidence of training and or having kept his nursing practice up to date;*
- up to date testimonials; and*
- Mr Cooney's engagement with the NMC, and his attendance at the review hearing whether in person, by telephone, or any other means.'*

Decision on current fitness to practise

The panel considered carefully whether Mr Cooney's fitness to practise remains impaired. Whilst there is no statutory definition of fitness to practise, the NMC has defined it as a registrant's suitability to remain on the register without restriction. In considering this case, the panel carried out a comprehensive review of the order in light of the current circumstances. It noted the decision of the last panel. However, it exercised its own judgment as to current impairment.

The panel had regard to all of the documentation before it, including the decision and reasons of previous panels and the emails received from Mr Cooney on 9 and 10 September 2020. It also took account of the submissions made by Mr Claydon on behalf of the NMC.

Mr Claydon outlined the background of the case. He submitted that there had been no material change in circumstances since the last review hearing and therefore Mr Cooney's fitness to practise remains impaired. Mr Claydon submitted that, in light of Mr Cooney's recent correspondence with the NMC, a further period of suspension was unlikely to serve any useful purpose. He submitted that the panel should give consideration to removing Mr Cooney from the NMC register, either by allowing the current order to lapse, or by making a striking-off order.

The panel accepted the advice of the legal assessor.

In reaching its decision, the panel was mindful of the need to protect the public, maintain public confidence in the profession and to declare and uphold proper standards of conduct and performance.

The panel considered whether Mr Cooney's fitness to practise remains impaired.

The only new information that the panel had was the recent email correspondence from Mr Cooney, sent to the NMC on 9 and 10 September 2020. The first of his emails, dated 9 September 2020, set out that:

- This would be Mr Cooney's last communication with the NMC.
- He retired from the nursing profession nearly four years ago after '*three decades of serving humanity*'.
- His decision to retire was the result of a number of personal issues relating to his health and that of his family.
- He has repeatedly informed the NMC since January 2017 that he does not want to practise as a nurse or in social care.
- He has been working as a lorry driver for the past three years.

The panel noted that the original misconduct charges found proved relate to medicines administration and safeguarding. The last reviewing panel had no evidence of any insight or remediation into these issues. This panel was in the same position. Since the last review hearing Mr Cooney has provided no further evidence of any relevant training, remediation or reflection, beyond an expression of regret and remorse in his email dated 9 September 2020. The panel bore in mind that, at this stage, there is a persuasive burden on Mr Cooney to demonstrate that he is no longer impaired. The panel considered that in the absence of any new information from him to show that he has remediated his previous misconduct, there remains a risk of repetition and therefore a finding of current impairment continued to be required on both public protection grounds and now also on public interest grounds due to the further passage of time without the issues having been addressed.

Determination on sanction

Having found Mr Cooney's fitness to practise currently impaired, the panel then considered what, if any, sanction it should impose in this case. The panel noted that its powers are set out in Articles 29 and 30 of the Order. The panel also took account of the NMC's Sanctions Guidance and the guidance on allowing an order to expire, and bore in mind that the purpose of a sanction is not to be punitive.

The panel noted that Mr Cooney has not worked as a nurse for approximately four years, the period of which started well before his substantive hearing in September 2018. He has also clearly stated that he has no intention of returning to the nursing profession and has secured alternative employment outside of the health and social care sector. It is therefore highly unlikely that Mr Cooney will be in a position to remediate his misconduct in the future. In these circumstances, the panel considered that it was neither in the public interest, Mr Cooney's interest, or the interest of the NMC to continue to prolong these regulatory proceedings and that it had a duty to resolve his case in a fair and proportionate way while also ensuring that the public remains protected.

The panel noted that Mr Cooney's registration is currently only active by virtue of these fitness to practise proceedings, and would otherwise have lapsed in August 2017. The

panel therefore had regard to the NMC's guidance on *'Allowing orders to expire when a nurse or midwife's registration will lapse'*, specifically:

'In certain circumstances allowing a suspension or conditions of practice order to expire following a finding of current impairment may actually be the best way to protect the public from concerns about a nurse or midwife's practice.'

Taking this option is likely to be appropriate if:

- the nurse or midwife's registration is only active because of the substantive order being in place,*
- the nurse or midwife doesn't want to continue practising, and*
- the public are protected because the panel have made a clear finding that the nurse or midwife's fitness to practise is currently impaired so that this can be drawn to the attention of any future decision-maker if the nurse or midwife attempts to re-join the register.*

Mr Cooney did not pay his registration fee in August 2017 and did not revalidate in August 2018. His registration has therefore only been kept active for the past three years by virtue of these fitness to practise proceedings. If the panel were to take no action and allow the current order to expire at the end of 19 October 2020 then this would result in the lapse of Mr Cooney's registration. He therefore could not practise as a registered nurse and these proceedings would be brought to an end.

At the time of his substantive hearing in September 2018, Mr Cooney was not practising as a registered nurse. Mr Cooney has alternative employment as a lorry driver and has clearly stated that he has no plans to return to the nursing profession. While the panel had no other evidence to support this, Mr Cooney's position has remained consistent.

The panel was therefore satisfied that Mr Cooney does not wish to practise as a nurse and is highly unlikely to seek readmission to the NMC register in the future.

However, in the event that Mr Cooney changed his mind and decided to re-join the register, he would have to successfully complete a Return to Practice course and then apply for readmission to the NMC register. The registrar, in considering his application, would also be able to take this panel's finding of current impairment into account and consider whether Mr Cooney had satisfactorily remediated his misconduct, such that he is able to practise safely and effectively without restriction.

The panel considered that this course of action was the most appropriate and proportionate sanction which would protect the public, whilst also balancing Mr Cooney's interests. Imposing a caution order would, theoretically, allow him to practise unrestricted which could leave the public exposed to a risk of harm. A conditions of practice order would be unworkable in the absence of engagement from Mr Cooney. A further suspension order would protect the public but, in the panel's view, would serve no other useful purpose. Given that Mr Cooney has left the profession, a further period of suspension is highly unlikely to result in any further remediation and would only serve to prolong these proceedings to no useful end.

The panel noted that a striking-off order would achieve the same practical outcome as taking no further action. However, the panel decided that this sanction would be disproportionate in the circumstances. Mr Cooney's original misconduct was not fundamentally incompatible with ongoing registration and the panel did not consider that the passage of time had aggravated it. While the panel noted that the tone of Mr Cooney's recent emails was unprofessional and indicative of a considerable level of anger and frustration with the regulatory process, the panel did not think that this amounted to a deep-seated attitudinal problem that would justify a striking-off order.

In these circumstances, the panel considered that it would be disproportionate and punitive to make a striking-off order, when public protection could be achieved by a less restrictive course of action.

Taking account of all of the above, the panel determined that the most appropriate and proportionate outcome, which achieved the panel's overarching objective of public protection, was to take no further action and allow the current suspension order to expire at the end of 19 October 2020. This will bring these fitness to practise proceedings to an end. Mr Cooney's NMC registration will lapse and he will no longer be able to practise as a registered nurse.

This decision will be confirmed to Mr Cooney in writing.

That concludes this determination.