

**Reasons for the substantive hearing  
of the Conduct and Competence Committee panel  
held at**

**Grange Fitzrovia Hotel, London**

**On**

**Wednesday 16 February, Thursday 17 February, Friday 18 February 2011**

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**Name:** Josiah Foeka Amara  
**PIN:** 90Y1879E  
**Part (s) of register:** Registered nurse (sub part 1) Mental Health –  
November 2000

**Facts proved:** 1, 2, 3  
**Facts not proved:** n/a  
**Fitness to practise:** Impaired  
**Sanction:** Striking off order  
**Interim Order:** Interim suspension order – 18 months

**Reason for proceeding in the registrant's absence:**

The panel accepts the advice of the legal assessor that the notice of hearing has been served in accordance with the NMC (Fitness to Practise) Rules 2004.

The panel went on to consider whether it should exercise its discretion to proceed in the absence of the registrant. The panel was reminded by the legal assessor that the registrant has a right to take part in these proceedings, but in this case the panel was informed that the registrant contacted the NMC on 11 February 2011 by telephone to confirm that he had received the notice of hearing and that he did not wish to attend the hearing and was happy for it to proceed in his absence. In those circumstances, the panel is satisfied that the registrant has voluntarily waived his right to take part in this hearing and that it is therefore in the interests of justice that it should proceed today. The registrant has asked that certain documents should be placed before the panel and the case presenter has indicated that he is happy to accede to that request.

**Charges read as follows:**

That you, on or around 19 December 2005, whilst working as a Staff Nurse on Vincent Ward at the Gordon Hospital ('the Ward'), Bloomberg Street, London SW1V 2RH:

1. Purchased crack cocaine in the company of Patient A, a patient on the Ward
2. Took crack cocaine with Patient A
3. Had sexual intercourse with an unknown female when Patient A was also present

**Charges read as follows:**

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

**Miscellaneous reasons: hearing in private**

The panel has heard an application made in private by the NMC case presenter for the evidence of Dr Grewal to be heard in private. Dr Grewal is a consultant psychiatrist, who will give evidence that the registrant has a crack cocaine addiction. According to Dr Grewal's evidence, the registrant has been a crack cocaine addict since 2003, which covers the period which is the subject of the charges in this case. In fact, Dr Grewal referred the registrant to the NMC independently of these charges on the ground of this addiction.

The NMC case presenter has made his application pursuant to an assurance given to the registrant that such an application would be made.

The panel accepts the advice of the legal assessor that the starting point of our deliberations should be that any individual has a right to confidentiality in respect of matters relating to his personal health, but that the panel must weigh that right against the public interest in having evidence in regulatory proceedings heard in public. It was strenuously argued by press representatives that in this case the public interest in knowing the details of Dr Grewal's evidence outweighs the right of the registrant to have details of his personal health kept private. It was argued by the press that the registrant's alleged use of crack cocaine was a criminal offence, as well as amounting to misconduct contrary to the NMC Code of Conduct and that the fact of his addiction was very closely related to these charges, such that it was in the public interest for Dr Grewal's evidence to be made public.

The panel has considered this application very carefully, but it is not persuaded that the registrant's normal right to confidentiality is outweighed by the public interest in the evidence of Dr Grewal. The press will still be entitled to report all the factual evidence relating to the charges in this case, which is where the public interest in this case really lies. Only the expert evidence of Dr Grewal relating to the registrant's health condition will be kept out of the public domain. The panel is satisfied that this is the right way to strike the balance between the competing interests in this case.

**Miscellaneous reasons: use of Dictaphone**

The press representatives have themselves made an application for permission to record this hearing with the use of a Dictaphone. It was argued in support of this application that this is the only sensible way of ensuring that they obtain a fair and accurate report of the evidence given at the hearing so that they are fully protected against libel proceedings brought by the registrant or by anyone else who claims to have been defamed by any press report of this case. The background to this application is that the law of defamation only grants absolute privilege to defeat a claim for defamation in respect of court or regulatory proceedings if a press report is fair and accurate. It was

**Miscellaneous reasons: use of Dictaphone**

said that press shorthand speed is only about 100 wpm, whereas witnesses giving evidence are likely to speak at speeds of 180 wpm (which was said to be the speed of a television newsreader) or more.

Enquiries made in the course of the hearing of the application established that the verbatim record produced by the shorthand writer employed by the NMC would be made obtainable by the press within a few weeks of the hearing on payment of an appropriate fee. However, it was said by the press representative that this was too late to be of any assistance, because by that time the case would already have been reported, either accurately or not.

The panel is not unsympathetic to this application and would not say, without obviously deciding the point, that it would never be appropriate to authorise the use of a Dictaphone at a hearing, for example in a case that was very strongly contested by the registrant and where libel proceedings were a serious prospect. However, the panel does not wish to establish a precedent that members of the press (or other interested parties) should be allowed to make their own private recordings of NMC proceedings in any case. In this particular case, in which the registrant is not present and there appears to be no serious prospect of libel proceedings, the panel is not satisfied that the press has made out a case for using a Dictaphone in order to make a verbatim recording. Therefore, the application for permission to use a Dictaphone is refused.

Before leaving the application, the panel would like to record its appreciation of the courtesy of the press representatives in making this application in an open manner.

**Miscellaneous reasons: admission of Patient A's witness statement**

The NMC case presenter has made an application to admit in evidence a witness statement made by Patient A, who is the complainant in this case. Patient A is not present at the hearing, although efforts have been made by the NMC to secure his attendance.

The panel was reminded by the legal assessor that Rule 31 of the NMC (Fitness to Practise) Rules 2004 allows written evidence to be adduced at this hearing, subject only to the requirements of relevance and fairness. There is no dispute that the evidence of Patient A is relevant. Indeed, it is crucial to the conduct of the hearing from the NMC point of view. Thus, the only real issue is whether it is fair to admit this evidence.

The panel is satisfied that the NMC has made all reasonable efforts to secure the attendance of Patient A by enlisting the support of his care coordinator and by writing to him notifying him of the date of the hearing. In view of his mental condition and the advice received from his care coordinator not to attempt to make more direct contact, there was no more that could reasonably have been done by the NMC in this case. The panel is equally satisfied that it would serve no useful purpose to adjourn this hearing, because it does not

### **Miscellaneous reasons: admission of Patient A's witness statement**

believe it is likely that Patient A would attend on another occasion.

The panel has taken into account the fact that it will be advised by the legal assessor as to the weight (if any) that it is appropriate to give to this evidence, if it is admitted. The panel was advised that the witness statement was made only in July 2008, but it has exhibited to it notes of other, earlier meetings attended by Patient A at which he described the alleged incident that is the subject of these charges. The application extends to the hearsay evidence of Patient A contained in these notes as well.

After careful consideration, the panel is satisfied that fairness dictates that both the witness statement of Patient A and hearsay evidence of Patient A contained in notes of earlier meetings exhibited to that witness statement should be admitted in evidence. The registrant has chosen not to attend this hearing, so no objection has been taken by him to this application.

Fairness under Rule 31 covers fairness to the NMC as well and it would be unfair to the NMC, in the panel's opinion, to deny it the opportunity to put forward Patient A's evidence at this hearing. As already indicated, it remains to be seen what weight (if any) should be given to this evidence, but the panel grants the NMC's application to admit it in evidence.

### **Reasons for accepting application to amend Charge 3:**

*Proposed amendment:*

*Charge 3: had sexual intercourse with an unknown female while Patient A was also present in your flat.*

Immediately before the panel retired to make its findings of fact, the NMC case presenter made an application to amend charge 3 to add the words 'in your flat' at the end of the charge. It was suggested by the case presenter that this is implied in the existing wording of the charge, but the panel does not accept this, as the present wording is ambiguous in the opinion of the panel, as to whether it is alleged that the incident took place in the same room as Patient A or merely in the same flat.

The panel was reminded that, under Rule 28 of the NMC (Fitness to Practise) Rules 2004, an application can be made at any time before it makes its findings of fact, unless, having regard to the merits of the case and the fairness of the proceedings, the required amendment cannot be made without injustice.

The panel accepts the submission of the case presenter that no injustice would be caused to the registrant by allowing this amendment, because his defence is that the incident did not take place, not that he disagrees with the circumstances in which the incident is alleged to have occurred. Therefore, this amendment would not cause the registrant to alter his defence in any way. In addition, the panel was informed that the registrant was sent a letter

### **Reasons for accepting application to amend Charge 3:**

at an earlier stage of the proceedings, in which charge 3 was differently worded, so as to include the allegation that the incident took place in the registrant's flat. Therefore, it cannot be a surprise to the registrant that this amendment is being made. Accordingly, the amendment is allowed.

### **Reasons for the finding of facts (public)**

The panel was reminded by the legal assessor that the burden of proving this case rests on the NMC and that the standard of proof is the balance of probabilities, that is to say that the panel should not find the case proved, unless it is satisfied that the evidence establishes that the facts alleged in each charge are more likely than not to have occurred. The panel was also reminded that it should consider each charge separately.

At the time of the charges, the registrant was working as a Band 5 staff nurse on Vincent Ward at the Gordon Hospital in London. Patient A was a long term patient on Vincent Ward detained under section 3 of the Mental Health Act 1983 and the registrant was his key worker. The charges all arise out of Patient A's unauthorised absence from the hospital during the night of 19/20 December 2005. The allegations against the registrant are that, during that night, he purchased crack cocaine in the company of Patient A, took crack cocaine with Patient A and had sexual intercourse with an unknown female when Patient A was present in the registrant's flat.

This case is highly unusual in the sense that all three charges concern the alleged events of one night which were witnessed by only two individuals whose evidence is before the panel, neither of whom has given oral evidence to the panel and one of whom, the complainant, Patient A, suffers from an enduring mental condition. Patient A's evidence was available to the panel only in the form of a witness statement made in July 2008, which had annexed to it notes of three earlier accounts given by Patient A, whereas the registrant's version of events is revealed only in the oral evidence that he gave to the internal disciplinary hearing conducted by his employer and in references to the evidence he gave to the Employment Tribunal after his dismissal contained in the Tribunal's judgment.

In this regard, the panel accepted the advice of the legal assessor that it should consider very carefully what weight (if any) it should attach to evidence that was available only in written form and which was not tested by cross examination, which applies to both the evidence of Patient A and that of the registrant.

In considering how to assess Patient A's evidence, the panel found it helpful to have regard to the approach advocated by the Employment Tribunal in paragraphs 5.1 to 5.3 of its judgment. In particular, the panel has had regard to the possibility that Patient A's evidence was the product of his mental illness in the sense of being an instance of delusional or irrational behaviour on the part of Patient A. Alternatively, the panel was alert to the possibility that Patient A's evidence was the result of an improper motive on his part.

## **Reasons for the finding of facts (public)**

The panel was also advised by the legal assessor that it is not bound by any of the decisions made by the internal disciplinary hearing of the registrant's employer or by the Employment Tribunal and that it had to make its own findings of fact based on the evidence which was presented to this hearing. That evidence differed from the evidence called at the Employment Tribunal in a number of respects, notably that Patient A made a witness statement that was not available to the Tribunal and that there was evidence regarding the medical condition of Patient A, both from his treating consultant and in his detailed medical notes. There was also evidence of the registrant's use of crack cocaine dating back to 2003. None of this evidence was available to the Employment Tribunal.

The evidence of Dr Michael Bellew, who is a consultant psychiatrist who was responsible for the care of Patient A at the time of the alleged incident, was that Patient A's delusions generally involved persecution and figures in authority and only involved people known to him personally when they featured as minor figures in one of these delusions. Dr Bellew said that the allegations made against the registrant in this case do not fit into this pattern. In the light of this evidence, the panel concluded that this made it unlikely that Patient A's evidence can be explained as arising out of his delusional behaviour.

The evidence of the registrant's medical specialist from whose team the registrant sought treatment in 2009 and 2010 is that the allegations made by Patient A are consistent with what is known to be registrant's medical condition.

The panel conducted a careful weighing exercise as to the appropriate weight to be given to the evidence of Patient A on the one hand and that of the registrant on the other.

The panel found several aspects of Patient A's evidence compelling. It was his evidence that he was aware of the registrant's abuse of crack cocaine and that the registrant often complained to Patient A that he was penniless and in need of money for his drugs habit. Patient A states in his witness statement that he had developed an inappropriate friendship with the registrant, which involved lending money to and sharing cigarettes, alcoholic drink and 'weed' with the registrant. Patient A's allegations as to what happened on the night of 19<sup>th</sup>/ 20<sup>th</sup> December 2005 are entirely consistent with this evidence. Patient A also states in his witness statement that on the day of the incident he had just received a back payment of £8-900 in disability living allowance, which he had intended to give to his children for Christmas. On the same day, the registrant records in Patient A's medical notes that Patient A had an argument with his daughter because she had demanded money from him and she had put the telephone down on him, which had made him angry. Patient A records in his witness statement that he saw the registrant on the ward in the afternoon (which the registrant's note confirms to be accurate) and they agreed to meet after the registrant's shift in order to smoke some crack

### **Reasons for the finding of facts (public)**

cocaine and that Patient A ended up taking out £300 for this purpose. The panel also found it persuasive that Patient A was able to describe the whereabouts and the external appearance of the registrant's flat, which suggests that he is telling the truth when he claims he visited it on the night of the incident. In saying this, the panel has not overlooked the Employment Tribunal's criticism of the internal disciplinary panel for placing excessive reliance on this aspect of the evidence, but the panel treats it as part only of an overall body of evidence that is supportive of Patient A's version of events. The panel also noted that the registrant did not significantly challenge the detailed description given by Patient A of the interior of the registrant's flat at his employer's internal disciplinary hearing, which the panel would have expected him to do, if it was inaccurate.

One aspect of Patient A's evidence requiring explanation is the fact that he waited for 10 months before making any disclosure against the registrant and gave a different explanation for his absence on his return to the hospital the next day. The panel has given very careful thought to this aspect of the case and it has concluded that Patient A's reasons for this delay are convincing, namely that he did not think he would be believed and felt dependent on the registrant (and other staff members against whom he made other allegations) and that he only made the disclosure when he discovered that another member of staff had taken his Freedom Pass without his permission and this complaint was taken seriously.

The panel has taken account of the evidence given by Mrs Ward, to whom Patient A made his initial disclosures, and by Ms Harris, who was appointed as investigating officer in relation those disclosures, that Patient A appeared to be a clear and compelling witness who was telling the truth in relation to the allegations made against the registrant. The Employment Tribunal criticised the registrant's employers for failing to take account of the inconsistencies that it noted in the early accounts of events given by Patient A. However, the Employment Tribunal did not have the benefit of reading Patient A's witness statement which in the panel's opinion gives a convincing account of the incident as a whole. The panel also feels that the Employment Tribunal may have overemphasised the differences between Patient A's early accounts and found inconsistencies in statements that are better described as incomplete accounts. Having regard to the very difficult circumstances in which these accounts were produced, the panel does not accept that they indicate that Patient A is unreliable as a witness.

While dealing with Mrs Ward's evidence, the panel would like to record the fact that it heard evidence that was not available to the Employment Tribunal that Patient A was asked whether he had made any allegations against Mrs Ward, as the registrant claimed he had done, and Patient A denied that he had done so. The panel did not therefore find that the registrant's claim that Patient A had made a false allegation against Mrs Ward undermined Patient A as a witness, because there was no evidence to support the registrant's claim that this other allegation had ever in fact been made by Patient A.

### **Reasons for the finding of facts (public)**

It is the registrant's case (as recorded in paragraph 4.18 of the Employment Tribunal judgment) that Patient A engaged in a deliberate plan to produce a false story against him because Patient A had a grudge against him for failing, as his advocate, to represent his interests strongly enough in relation to his level of medication. The registrant contended that Patient A might have found out the whereabouts of his flat by following him home one day or by asking one of his nursing colleagues with whom he had had a relationship which had ended acrimoniously. The panel accepts the advice of the legal assessor that it should not draw any adverse inference from the fact that the registrant has not attended this hearing and has therefore not given oral evidence to the panel. However, it is an inescapable consequence of his absence that the only evidence from the registrant that is available to the panel is the transcript of the evidence that he gave to the internal disciplinary hearing conducted by his employer and the references in the Employment Tribunal's judgment to the evidence that he gave to that Tribunal. This is very limited and does not address many of the questions arising out of the registrant's case. For example, if Patient A was really intent on making false allegations against the registrant, why did he first give another explanation for his absence on the night in question that made no mention of the registrant and then wait 10 months before giving a different explanation that implicated the registrant for the first time? The panel notes one reference in Patient A's medical notes on 22<sup>nd</sup> September that might be said to support the registrant's claim that Patient A had a motive for making false allegations, but overall the panel finds insufficient evidence to support the registrant's case that Patient A was making false accusations against him, either for vindictive reasons or for reasons relating to his health.

Having conducted the weighing exercise between the account given by Patient A and that given by the registrant, the panel finds Patient A's account, supported as it is by other medical and non-medical evidence, to be more likely than not to be accurate. By contrast, the panel finds the registrant's account unlikely to be true.

Therefore, the panel is satisfied that, on all the evidence that is now available, the NMC has established that the registrant did purchase crack cocaine in the company of Patient A and did then take crack cocaine with Patient A on the night in question and that the facts of Charges 1 and 2 are made out to the required standard.

In relation to Charge 3, as amended, the panel accepts Patient A's evidence that he was in the registrant's flat on the same night when the registrant had sexual intercourse with an unknown female who came to the flat while the two men were there with the intention of providing sexual services.

The panel would have been satisfied that this charge was proved on the evidence of Patient A alone, but it was further supported by the registrant's own evidence reported to his medical specialist.

### **Reasons for the finding of impairment:**



### **Reasons for the finding of impairment:**

The panel finds that the registrant's fitness to practise is impaired. The registrant was plainly guilty of misconduct and his fitness to practise was impaired at the time of these charges. By providing crack cocaine to Patient A and by consuming it himself, the registrant showed a total disregard for the protection of a vulnerable patient for whom he had a special responsibility as his key worker. By his actions, the registrant was in breach of paragraph 2.3 of the NMC Code of Conduct in failing to maintain appropriate boundaries with Patient A, in breach of paragraph 1.2 of the Code in failing to act in such a way as to justify the trust and confidence of the public and in breach of paragraph 7.1 of the Code in failing to behave in such a way as to uphold the reputation of the nursing profession.

The panel has seen no evidence that the registrant's fitness to practise is not still impaired. Indeed, it has heard from a medical practitioner that the registrant was definitely still impaired for the same reasons in 2009 and 2010.

Accordingly, the panel is satisfied that the registrant's fitness to practise remains impaired.

### **Reasons for the sanctions**

In considering the issue of sanction, the panel has had regard to the NMC Indicative Sanctions Guidance and has started with the least serious sanction and only considered more serious sanctions when satisfied that the lesser sanction would not be appropriate in all the circumstances of this case. The panel began by considering taking no action, but it regarded the charges as much too serious to make it appropriate to take this course.

Next, the panel considered a caution. However, very few (if any) of the factors which it is suggested in the NMC Indicative Sanctions Guidance might justify a caution are present in this case. The panel also felt that the charges were too serious to make it appropriate to impose a caution, especially in a case in which the registrant has taken no part in the proceedings.

The panel went on to consider imposing a conditions of practice order, but it decided that this form of order would not be workable in this case, given that the registrant has not engaged with the process and there is no prospective employer who would be willing to co-operate in their implementation. In any event, the panel considered that a conditions of practice order would not be a sufficient sanction, bearing in mind the seriousness of the charges found proved against the registrant.

The panel then considered a suspension order, but it decided that the facts found proved against the registrant, insofar as they involved encouraging a vulnerable patient to take crack cocaine while he was detained in hospital under the Mental Health Act 1983 and putting his own personal gratification in front of the best interests of his patient, was fundamentally incompatible with his continued registration as a nurse, especially as he has maintained his

**Reasons for the sanctions**

denial of the charges and has taken no part in the proceedings. Therefore, the panel concluded that the only appropriate order is a striking off order, given the very serious departure from proper standards of conduct shown by the registrant and the fact that confidence in the NMC would be undermined if the registrant were not struck off.

**Reasons for the interim order**

The panel has decided that it should impose an interim suspension order in this case on all three statutory grounds, namely for public protection and in the public interest and in the registrant's own interests, bearing in mind the seriousness of the charges and the risk of repetition.