

**BEFORE THE FITNESS TO PRACTISE COMMITTEE
OF THE GENERAL OPTICAL COUNCIL**

GENERAL OPTICAL COUNCIL

F(11)19

AND

LYNDON CLARKE (SD-3865)

DETERMINATION OF THE INQUIRY: 24 JANUARY 2012

Service

The Committee is satisfied that all reasonable efforts have been made to notify the registrant of the hearing. The Committee further determined that it would be in the public interest for the hearing to proceed in the registrant's absence.

ALLEGATION

The Council alleges that in relation to you, Lyndon Clarke (a registered student dispensing optician):

1. On 29 October 2005 you urinated in the street, for which you received a fixed penalty notice for disorder.
2. On 9 March 2007 at Cardiff Magistrates' Court you were convicted of driving a motor vehicle after consuming so much alcohol that the proportion of it in your breath, namely 88 micrograms of alcohol in 100 millilitres of breath exceeded the prescribed limit contrary to Sections 5(1)(A) of the Road Traffic Act 1988 and Schedule 2 to the Road Traffic Offenders Act 1988.
3. On 19 February 2010 at Barry Magistrates' Court you were convicted of assault by beating (battery) contrary to Section 39 of the Criminal Justice Act 1988.

And by virtue of the matters set out above your fitness to undertake training is impaired by reason of your:

- a) conviction (in relation to paragraphs 2 and 3 above)
- b) misconduct (in relation to paragraph 1 above).

DETERMINATION

Findings in relation to the particulars of the allegation

The Committee finds the facts alleged in paragraphs 1–3 of the Notice of Inquiry proven. In doing so it had regard to the burden and standard of proof. It has also noted that the Registrant has indicated at the procedural stage of this hearing that he admitted those facts.

Findings in relation to the convictions

The Committee has had sight of the memorandum of convictions and therefore found the convictions proved.

Findings in relation to misconduct

The Committee has heard submissions on behalf of the Council and the Registrant. It has accepted the advice given to it by the Legal Adviser.

The Committee notes in relation to paragraph 1 of the allegation that the event took place in October 2005 and involved urinating in the street whilst in an intoxicated condition in the early hours of the morning. Whilst it involved clearly unacceptable behaviour, in itself that event would not represent misconduct of a sufficiently serious degree to found an allegation of misconduct. However it does not stand alone.

The Committee found Lyndon Clarke guilty of misconduct subject to that qualification.

Findings regarding impairment

The Committee has heard submissions on behalf of the Council and the Registrant. It has accepted the advice given to it by the Legal Adviser.

In addition to the penalty notice incident and the conviction for drinking and driving with excess alcohol the Committee has had to consider the impact of the additional conviction in February 2010 and has looked at the three allegations as a whole.

In doing so the Committee has borne in mind that the drink drive conviction was declared and considered by the Registrar when the Registrant applied for student status on the Register in June 2009. The Committee note that the conviction gave rise to a disqualification for 2 years and involved driving with a level of excess alcohol which was more than twice the legal limit. Again the Committee accept that in the light of the Registrar's determination this episode alone although it involved a very serious act of misconduct, does not represent a conviction which, in itself, would entitle the Committee to find impairment.

However the additional impact of the February 2010 conviction is, in the Committee's view, significant and substantial. It was a conviction for assault by beating his partner. It gave rise to a Community Order and a Restraining Order, the latter Order still being in force today. It also arose in the context of significant consumption of alcohol. The Registrant himself told the police that he had drunk between 6–8 pints before the incident.

In considering the issue of impairment the Committee has therefore looked at the allegations collectively and has asked itself whether they give rise to impairment. The Registrant has not appeared and the Committee has no evidence as to his conduct or insight since these events other than the contents of the reports in Bundle R1 both dated

in April 2011. Redacted it cannot escape comment and concern when considering the Registrant's overall fitness to practise that each of these three separate incidents has indicated a lack of self control connected with the excessive consumption of alcohol. The Committee has also noted the assertions in the reports redacted. These assertions have not been supported or updated by oral evidence. They do not appear to convey a cogent degree of insight bearing in mind his pleas of guilty to the two conviction matters and the fact that the assault conviction arose from an incident in November 2009.

The Committee conclude overall that a finding of impairment should be made to reflect the need to uphold public confidence in the standards of behaviour of this profession. In the light of the Registrant's pattern of conduct, a finding of impairment is also appropriate, in the Committee's judgment, to reflect its continuing and unresolved concern regarding the need to maintain confidence that patients will be protected from departures from those standards.

The Committee therefore found that the fitness of Lyndon Clarke to undertake training as a dispensing optician is impaired.

Sanction

The Committee considered the sanctions available to it from the least necessary to the most severe.

In doing so the Committee has again considered the evidence provided by the Council in bundle C1 and the reports in R1. The assertions made in those reports are now 9 months old and have not been verified, updated or tested. There is no evidence before the Committee whatsoever as to the Registrant's current conduct, employment or professional activities. The failure of the Registrant to attend and take an active part in these proceedings increases the concerns which the Committee has formed in its determination on impairment.

In these circumstances the Committee considered that the seriousness of this matter and the concerns referred to warranted a substantive sanction and that neither a financial penalty nor conditions were appropriate or in the case of conditions, feasible. Not only would it be difficult to devise conditions which were workable and appropriate to address the nature of the Registrant's past misconduct but his failure to appear before the Committee or provide evidence other than the reports referred to makes that task inappropriate.

The Committee has therefore determined that a sanction of suspension is appropriate and proportionate. Not only do the allegations represent a pattern of misconduct but the Committee are mindful that the Registrant has, despite ample opportunity to do so, made no real effort to demonstrate that he has put this behaviour firmly behind him, or that it does not indicate deep seated personality or attitudinal problems. Nor in these circumstances can the Committee form an objectively based conclusion that there is no persisting risk of repetition of his past behaviour. In short the Committee concludes that in the light of insufficient evidence of either insight or remediation a period of suspension for 9 months is appropriate and proportionate.

In reaching this determination the Committee has considered the possible sanction of erasure. Although serious, the Committee concluded that such a sanction would be unduly punitive and disproportionate.

The Committee direct that there should be a review hearing held before the end of that period. At that hearing the Committee will need to consider the factors outlined in the GOC Indicative Sanction Guidance, page 24; namely that the registrant has fully appreciated the gravity of his conduct, has not re-offended, and has maintained his aptitude for undertaking training, and finally, that his re-instatement to the register will not place patients at risk.

Immediate order

The Committee has determined that an immediate order of suspension should be made. It repeats and takes into account the findings which it has already made in relation to its concerns and it considers therefore that that such an order is desirable both to protect patients and in the public interest.

Chairman of the Committee: Margaret Wall

Signed _____

Date 24 January 2012

FURTHER INFORMATION
<p>Transcript</p> <p>A full transcript of the hearing will be made available via the GOC website in due course.</p>
<p>Appeal</p> <p>Any appeal against an order of the Committee must be lodged with the relevant court within 28 days of the service of this notification. If no appeal is lodged, the order will take effect at the end of that period. The relevant court is shown at section 23G(4)(a)-(c) of the Opticians Act 1989 (as amended).</p>
<p>Council for Healthcare Regulatory Excellence</p> <p>This decision will be reported to the Council for Healthcare Regulatory Excellence (CHRE) under the provisions of section 29 of the NHS Reform and Healthcare Professions Act 2002. CHRE may refer this case to the High Court of Justice in England and Wales, the Court of Session in Scotland or the High Court of Justice in Northern Ireland as appropriate if they decide that a decision has been unduly lenient and/or should not have been made, and if they consider that referral is desirable for the protection of the public. CHRE is required to make its decision within 40 days of the hearing (or 40 days from the last day on which a registrant can appeal against the decision, if applicable) and will send written confirmation of a decision to refer to registrants on the first working day following a hearing. CHRE will notify you promptly of a decision to refer. A letter will be sent by recorded delivery to your registered address (unless CHRE has been notified by the GOC of a change of address).</p> <p>Further information about the CHRE can be obtained from its website at www.chre.org.uk or by telephone on 020 7389 8030.</p>
<p>Effect of orders for suspension or erasure</p> <p>To practise or carry on business as an optometrist or dispensing optician, to take or use a description which implies registration or entitlement to undertake any activity which the law restricts to a registered person, may amount to a criminal offence once an entry in the register has been suspended or erased.</p>
<p>Contact</p> <p>If you require any further information, please contact the Council's Hearings Manager at 41 Harley Street, London, W1G 8DJ or, by telephone, on 020 7580 3898.</p>