

Guidance for case examiners on the withdrawal of referrals under Rule 28

Introduction

- 1 This guidance sets out the factors that should be considered by a case examiner when deciding whether or not to withdraw all or part of a matter which has been referred to an **investigation committee**, a **medical practitioners tribunal** or an **interim orders tribunal** following a referral by the Registrar under Rule 28 of the Fitness to Practise Rules 2004 (as amended). The aim of the guidance is to promote consistency and transparency in decision-making in relation to withdrawals of referrals to the investigation committee, medical practitioners tribunals or interim orders tribunals.

Legislative framework

- 2 Rule 28(1) allows the Registrar to refer a case to a case examiner, before the **investigation committee** hearing has opened, to decide whether or not the matter (or part of it) should be withdrawn. The Registrar may do so if:
 - a the doctor withdraws their request for an oral hearing; or
 - b it appears to the Registrar that for some other reason, the hearing should not be held.
- 3 Rule 28(2) allows the Registrar to refer a case to a case examiner, before the **medical practitioners tribunal** or **interim orders tribunal** hearing has opened, to decide whether or not the matter (or part of it) should be withdrawn. The question of possible withdrawal may arise either from an application by the doctor, or because it has become apparent to those investigating the concerns that the hearing should not be held.
- 4 When considering whether to withdraw a matter referred to the **investigation committee** or a **tribunal**, the case examiner may decide under Rule 28(3) that:
 - a all or part of the matter should be withdrawn; or

b in the case of a matter that has been referred to a **medical practitioners tribunal**, other than a non-compliance matter, the tribunal should not proceed and the matter should be referred to a medical and lay case examiner under Rule 10 or Rule 11 to consider whether to propose undertakings or issue a warning, respectively.

5 Rule 28 is not intended as an avenue for appeal against an earlier decision to refer a doctor to the investigation committee or a tribunal.

Considering a withdrawal

6 The decision to withdraw all or part of a matter referred to the investigation committee or a tribunal is made by a medical or lay case examiner (normally, subject to availability, one of the case examiners who made the original decision to refer the case to the investigation committee or a tribunal).

7 Although the criteria for withdrawing all or part of a matter are broadly drafted, withdrawal will normally only be appropriate where new information becomes available which shows that it is no longer necessary or appropriate for the investigation committee or a tribunal to consider all or some of the allegations.

Investigation committee

8 The vast majority of referrals to the investigation committee withdrawn under Rule 28 result from the doctor withdrawing their request for an oral hearing and deciding to agree to a warning that they had initially declined to accept.

9 Material change, such as fresh evidence or advice which calls into question whether a warning may still be appropriate, may also prompt the Registrar to refer a case to a case examiner for possible withdrawal. In these cases, the case examiner must consider carefully whether the new information or advice they are considering means that the doctor's behaviour no longer represents such a serious departure from the standards expected as to warrant a warning.¹

Medical practitioners tribunal

10 New evidence may become available suggesting that referral of all or part of a case to a tribunal may no longer be appropriate. New evidence may take the form of additional expert evidence, witness statements or other evidence that was not available at the time of the decision to refer. Withdrawal will be appropriate where

the additional evidence indicates clearly that all or some of the allegations do not meet the realistic prospect test.²

- 11** There will be instances where it is no longer possible to establish some or all of the case evidentially at a hearing. This might be because a complainant withdraws their complaint or refuses to give evidence or to co-operate with the investigation. Additionally, it may be that legal advice suggests some or all of the case cannot be proven. The legal adviser leading the investigation will normally advise on these issues. Where the issues relate to difficulties in obtaining evidence from certain sources, the advice should cover any alternative sources of evidence (e.g. other witnesses or corroborative evidence, admissions made by the doctor to the GMC or in other fora). Legal advice may need to cover issues such as whether there would be any merit in seeking to summons a witness or whether there are any other avenues for investigation.
- 12** In considering whether to withdraw a matter (or part of it), the case examiner should be mindful that tribunals have broad powers to admit evidence under Rule 34(1).
- 13** The Medical Act does not require a complaint to be brought by a complainant or a public body (section 35C). It is not appropriate to withdraw a matter referred to a medical practitioners tribunal simply on the basis that a complaint has been withdrawn, without consideration of whether the GMC should proceed in the public interest.
- 14** When considering a withdrawal, the case examiner might consider that the tribunal should not proceed but that a warning or undertakings may be more appropriate. In such cases, the case examiner can withdraw the matter (or part of it) from the tribunal and refer the case (or part of it) to a medical and lay case examiner to consider whether to issue a warning¹ or recommend undertakings³.
- 15** When considering whether to withdraw a matter (or part of it), the case examiner should bear in mind that they can request further information, reports or legal advice.
- 16** If we are considering withdrawal, we will normally seek representations from the doctor. The Registrar and case examiner will take into account any representations which are relevant to the evidence in the case and the application of the realistic prospect test.
- 17** The case examiner will need to carefully consider any representations which argue that the withdrawal should not be agreed. The case examiner should bear in mind that there is a public interest in the ventilation before a tribunal in public of complaints which do have a realistic prospect of establishing impaired fitness to practise.

Interim orders tribunal

- 18** The case examiner should consider carefully whether the new information they are considering means that it is no longer necessary for the interim orders tribunal to consider making an order while the allegations against the doctor are investigated⁴. The key factor is the potential risk posed by the doctor to patients, the public interest and the doctor's own interests. Case examiners should make a careful assessment of whether the new information addresses or diminishes this risk to such an extent that it is no longer necessary for the interim orders tribunal to consider making an order.
- 19** It is important to remember that the remit of an interim orders tribunal does not include the making of findings of fact or resolving disputes of evidence and a referral should not be withdrawn simply because the doctor disputes the information on which it is based.
- 20** Examples of when it may be appropriate to withdraw a referral under Rule 28 include where:
- information is received to suggest the doctor has been wrongly identified and had no role, or only a peripheral role, in the concerns referred to a tribunal
 - evidence is received to show the concerns referred to an interim orders tribunal are not as serious as originally thought and the test for an order is unlikely to be met
 - the referral was based on the fact of a criminal investigation which is then closed with no further action and, although the GMC's investigation into the underlying conduct may be continuing, the threshold for a referral to an interim orders tribunal is no longer met⁵
 - the referral was made in the doctor's own interests on the basis of concerns about their health, but new evidence suggests the doctor is receiving appropriate treatment and following advice such that an order no longer needs to be considered.

Deciding on a withdrawal

Legal advice

- 21** The case examiner can request legal advice to assist with the decision in relation to a withdrawal application.

Reason for decision

- 22** Rule 28(4) provides that when a matter (or part of it) is withdrawn, the Registrar is required to inform both the doctor and the complainant of the case examiner's decision and the reasons for it. The decision should briefly summarise the allegations against the doctor, as often this is necessary in order to understand the decision adequately. The reasons should make clear the grounds for withdrawing the matter, including any new evidence or factors that have been taken into consideration. The reasons should also refer to any legal advice that has been taken into account.
- 23** As with every decision made by the case examiner, the decision to withdraw all or part of a referral to the investigation committee or a tribunal must be carefully considered and clearly justified.

¹ Please refer to the [guidance on warnings](#) for a full overview of the factors to consider in determining when it is appropriate to issue a warning

² Please refer to the [realistic prospect test guidance](#) for a more detailed exploration of the test and its application

³ Please refer to the [guidance on undertakings](#)

⁴ Please refer to the [guidance for decision makers on referral to an interim orders tribunal](#)

⁵ It is important to note that in some cases, the allegations could still warrant a referral to the interim orders tribunal. Please refer to the [guidance on police cases resulting in acquittal/decision not to proceed to trial](#) -