

DISCIPLINE COMMITTEE  
OF THE COLLEGE OF NURSES OF ONTARIO

**PANEL:**

Carly Gilchrist, RPN	Chairperson
Mary MacNeil, RN	Member
Ian McKinnon	Public Member
Patricia Sullivan-Taylor, RN	Member

**BETWEEN:**

COLLEGE OF NURSES OF ONTARIO	)	<u>NICK COLEMAN</u> for
	)	College of Nurses of Ontario
- and -	)	
	)	
CARMEN VERDE-BALAYO	)	<u>PHILIP ABBINK</u> for
REGISTRATION NO. 0213520	)	Carmen Verde-Balayo
	)	
	)	<u>CHRISTOPHER WIRTH</u>
	)	Independent Legal Counsel
	)	
	)	Heard: October 22, 2021

**DECISION AND REASONS ON PENALTY**

In its Decision and Reasons on Liability released on August 18, 2021, this panel of the Discipline Committee (the “Panel”) made findings of professional misconduct against Carmen Verde-Balayo (the “Member”). In particular, the Panel found that the Member committed acts of professional misconduct as alleged in paragraphs 1, 2, 3, 4 and 5 in the Notice of Hearing. As to allegation #5, the Panel found that the Member engaged in conduct that would reasonably be considered by members of the profession to be dishonourable and unprofessional.

The Panel reconvened on October 22, 2021, via videoconference for the penalty hearing. The Panel’s decision and reasons on penalty are set out below.

## **Penalty**

### **College Counsel Submissions**

College Counsel submitted Exhibit #4, a Partial Joint Submission on Order dated June 20 and 21, 2021 which reads as follows:

THE COLLEGE OF NURSES OF ONTARIO (“CNO”) AND CARMEN VERDE-BALAYO (THE “MEMBER”) JOINTLY SUBMIT THAT, in view of the facts and admissions set out in the Agreed Statement of Facts and the findings of professional misconduct, the Panel of the Discipline Committee (the “Panel”) should make an Order:

1. Requiring the Member to appear before the Panel to be reprimanded within 3 months of the date that this Order becomes final.
2. Directing the Executive Director to impose the following terms, conditions and limitations on the Member’s certificate of registration:
  - a) The Member will attend 2 meetings with a Regulatory Expert (the “Expert”), at her own expense and within 6 months from the date that this Order becomes final. To comply, the Member is required to ensure that:
    - i. The Expert has expertise in nursing regulation and has been approved by the Director of Professional Conduct (the “Director”) in advance of the meetings;
    - ii. At least 7 days before the first meeting, the Member provides the Expert with a copy of:
      1. the Panel’s Order,
      2. the Notice of Hearing,
      3. the Agreed Statement of Facts,
      4. this Partial Joint Submission on Order, and
      5. if available, a copy of the Panel’s Decision and Reasons;
    - iii. Before the first meeting, the Member reviews the following CNO publications and completes the associated Reflective Questionnaires, online learning modules, decision tools and online participation forms (where applicable):
      1. *Professional Standards*,
      2. *Ethics*, and
      3. *Code of Conduct*;

- iv. At least 7 days before the first meeting, the Member provides the Expert with a copy of the completed Reflective Questionnaires, and online participation forms;
  - v. The subject of the sessions with the Expert will include:
    - 1. the acts or omissions for which the Member was found to have committed professional misconduct,
    - 2. the potential consequences of the misconduct to the Member's patients, colleagues, profession and self,
    - 3. strategies for preventing the misconduct from recurring,
    - 4. the publications, questionnaires and modules set out above, and
    - 5. the development of a learning plan in collaboration with the Expert;
  - vi. Within 30 days after the Member has completed the last session, the Member will confirm that the Expert forwards his/her report to the Director, in which the Expert will confirm:
    - 1. the dates the Member attended the sessions,
    - 2. that the Expert received the required documents from the Member,
    - 3. that the Expert reviewed the required documents and subjects with the Member, and
    - 4. the Expert's assessment of the Member's insight into her behaviour;
  - vii. If the Member does not comply with any one or more of the requirements above, the Expert may cancel any session scheduled, even if that results in the Member breaching a term, condition or limitation on her certificate of registration;
- b) For a period of 12 months from the date this Order becomes final during which the Member is engaged continuously in the practice of nursing (i.e. not including the period during which the Member's certificate of registration is suspended), the Member will notify her employers of the decision. To comply, the Member is required to:
- i. Ensure that the Director is notified of the name, address, and telephone number of all employer(s) within 14 days of commencing or resuming employment in any nursing position;

- ii. Provide her employer(s) with a copy of:
  - 1. the Panel's Order,
  - 2. the Notice of Hearing,
  - 3. the Agreed Statement of Facts,
  - 4. this Partial Joint Submission on Order, and
  - 5. a copy of the Panel's Decision and Reasons, once available;
- iii. Ensure that within 14 days of the commencement or resumption of the Member's employment in any nursing position, the employer(s) forward(s) a report to the Director, in which it will confirm:
  - 1. that they received a copy of the required documents, and
  - 2. that they agree to notify the Director immediately upon receipt of any information that the Member has breached the standards of practice of the profession.
- 3. All documents delivered by the Member to the CNO, the Expert or the employer(s) will be delivered by verifiable method, the proof of which the Member will retain.

College Counsel urged the Panel to accept the Partial Joint Submission on Order unless to do so would bring the administration of justice into disrepute. College Counsel then proceeded to make submissions on the issue of the appropriate suspension for the Member considering the findings of professional misconduct.

College Counsel submitted that the Member's conduct warrants a suspension of three and up to four months, with the exact length to be determined by the Panel. College Counsel submitted that the suspension should reflect the seriousness of the misconduct, send a strong message of general deterrence to members of the profession, and also demonstrate that the College can regulate the profession by protecting the public interest. The suspension is important to help maintain public confidence and demonstrate that the misconduct is taken seriously. College Counsel submitted that remediation and rehabilitation are addressed in the Partial Joint Submission on Order through two meetings with a Regulatory Expert and also via employer notification which supports the Member to not reoffend.

College Counsel submitted that deterrence has two elements. Specific deterrence is directed to the member as a sharp reminder to not commit an act of professional misconduct. General deterrence conveys a broad message of condemnation for the conduct and dissuades members of the profession from committing similar acts. College Counsel submitted that general deterrence was particularly important in this case as fraudulent benefit claims are widespread. College Counsel submitted that eight other similar cases of benefit fraud at St. Michael's Hospital and six cases at University Health Network Hospital have been submitted to the College's Disciplinary Committee for review. Sixty-seven other cases have been referred to the College's Inquiries, Complaints and Reports Committee ("ICRC") and nine are still under investigation. College Counsel

submitted that the large number of cases suggest there is a significant problem with respect to benefit fraud within the profession and therefore requires a sharp reminder to members of the profession that conduct related to benefit fraud will not be condoned. A suspension of three and up to four months would send a strong message of general deterrence.

College Counsel submitted that the aggravating factors included the seriousness of the conduct. The benefit fraud continued over a number of years and was not an isolated incident. The benefit fraud amounted to almost \$8,000.00, involving a significant number of improper claims. The Member was also an active participant in the fraud, falsifying documents that she knew would be supported by other false documents and receipts. The fraud also involved a second individual who directed funds to the Member for the Member's financial benefit. Additionally, the Member only stopped when management investigated and held her to account; she did not voluntarily cease her conduct. While the Member lost her employment at St. Michael's Hospital, she was hired at Sunnybrook Health Sciences Centre. Since the misconduct was discovered in February 2017, the Member has not repaid the fraudulent claims nor made efforts toward restitution. College Counsel submitted that these were serious and aggravating factors.

College Counsel submitted that the mitigating factors are important to review to ensure the penalty order is consistent and proportional with similar conduct. In this case, the Member admitted to the misconduct when confronted by management, she accepted responsibility per the Agreed Statement of Facts and also agreed to some of the allegations. The Member had no prior discipline with the College, but College Counsel submitted that a clean discipline record is expected of all members.

Regarding prior decisions involving similar conduct, College Counsel submitted that there are no precedent cases dealing with this kind of benefit fraud. Guidance from other decisions is limited to analogous misconduct of somewhat similar cases. Many of the submitted cases are one-off cases without consideration for widespread occurrence in general practice and also without any particular emphasis on general deterrence.

College Counsel submitted cases for consideration, indicating that not all involved benefit fraud, but included comparable acts of dishonesty. College Counsel submitted that the cases presented are limited to those involving theft in relation to an employer or facility whereas patient theft may be considered a higher level of misconduct with regards to unprofessional, dishonourable and disgraceful conduct.

*CNO v. Kartisch* (Discipline Committee, 2000): In this case, the member falsified time sheets receiving payment for thirteen shifts she did not work. The member's employment was terminated and restitution was paid. The penalty included an oral reprimand, a suspension for 60 days and terms, limitations and conditions on the member's certificate of registration requiring the member to pay restitution to the Hospital and complete a course in ethics. College Counsel submitted that there was no concern in this case regarding a widespread practice of falsified time sheets.

*CNO v. Craig* (Discipline Committee, 1998): In this case, the member was criminally charged and pled guilty to theft of \$200.00 from the Victorian Order of Nurses. The member received a conditional discharge and was required to pay restitution. Her employment was also terminated. The penalty included an oral reprimand and a three-month suspension, but the suspension was remitted pending certain conditions. College Counsel submitted this was a case of one aberrant act with criminal consequences where restitution was made. There was no emphasis on general deterrence.

*CNO v. Fellows-Smith* (Discipline Committee, 2006): In this case, the member made false claims for sick leave and sick benefits and falsified documents related to return to work reports. The penalty included an oral reprimand, the member's certificate of registration was suspended for two months and she was required to pay a fine of \$2,500.00. The member was terminated from her employment and made repayment of the sick benefits to the hospital which was approximately \$347.00. College Counsel submitted that this case had no particular issue of general deterrence.

*CNO v. Cuppage* (Discipline Committee, 2005): In this case, the member submitted false documents and received approximately \$1,300.00 in sick benefits. The penalty included an oral reprimand, the member's certificate of registration was suspended for three months and there was 12 months of employer notification.

*CNO v. Mohamed* (Discipline Committee, 2008): In this case, the member made false claims of sick leave and also falsified a medical report. As a result of the member's action, the facility sustained a financial loss of \$16,581.12. The penalty included an oral reprimand, suspension of the member's certificate of registration for four months, a meeting with a professional counsellor in Ethics, no independent practice in the community until the member had completed the remedial terms, conditions and limitations, payment of a fine in the amount of \$2,500.00 and 18 months of employer notification. College Counsel submitted that there was no particular emphasis regarding false claims being widespread and no other cases pending, yet the suspension was four months.

College Counsel submitted that the *CNO v. Cuppage* and *CNO v. Mohamed* cases are the most appropriate analogous precedents setting cases and therefore present the most appropriate range of suspension for the Panel to consider.

*CNO v. Calvano* (Discipline Committee, 2015): In this case, the member, without consent or authorization, inappropriately accessed 338 electronic health records over a two-year period. College Counsel submitted broad misuse of electronic records was an aggravating factor. The penalty included an oral reprimand, a three-month suspension, two meetings with a Nursing Expert and 18 months of employer notification. College Counsel submitted a similar concern exists in this case, i.e. there is broad misconduct involving benefit fraud over multiple years.

*CNO v. Codinha* (Discipline Committee, 2008): In this case, the member falsified a New Hire Statement affirming to his employer that he had not been convicted of a criminal offence when in fact he had been convicted of impaired driving. The member also forged a Police Information Search Letter for Individuals Working with Vulnerable Persons. The member also failed to keep patient records as required. The penalty included an oral reprimand, suspension of the member's

certificate of registration for six months, a meeting with a Practice Consultant, a course in nursing ethics and 24 months of employer notification.

*CNO v. Charania* (Discipline Committee, 2014): In this case, the member was found guilty of fraudulently using a computer with the intent to commit an offense. The member also submitted false information on job applications. The penalty included an oral reprimand, suspension of the member's certificate of registration for a period of four months, two meetings with a Nursing Expert and 24 months of employer notification.

*Ontario College of Teachers v. Mackenzie* (Discipline Committee, 2019): This case involved benefit fraud over several years whereby the teacher received payment in the amount of or about \$13,280.00. The penalty included an oral reprimand, a nine-month suspension and a course regarding ethics. The teacher had also made full restitution to the insurer.

*College of Physicians & Surgeons (Ontario) v. Moore* (Divisional Court, 2003): The physician pleaded guilty of defrauding OHIP of \$75,000.00 over three years. The physician was criminally convicted and received a penalty of licence revocation for twelve months. The physician also had to pay a \$5,000.00 fine plus costs in the amount of \$2,500.00. If the fine and costs were paid within six months the revocation was suspended by six months, thereby making the net effect of the suspension to be six months. College Counsel submitted that in the reasons for penalty, the discipline committee wanted the penalty to serve as an appropriate general deterrent considering health care fraud was becoming a significant problem. The discipline committee's decision was appealed alleging the discipline committee had overemphasized the concept of general deterrence and did not adequately consider the principle of proportionality. The Divisional Court dismissed the appeal, indicating the penalty that had been imposed did not over emphasize general deterrence at the expense of proportionality. College Counsel submitted this case indicates that general deterrence can be given special emphasis if there is a widespread problem.

*Hogan v. British Columbia (Securities Commission)* (Court of Appeal, 2005): This case concerned a broker participating in improper trading practices whereby the broker profited by \$41,752.00. The regulator ordered restrictions on the broker's licence and imposed a \$25,000.00 administrative fine. General deterrence was a significant factor in the decision. The broker appealed the penalty alleging the fine was disproportionate compared to other cases involving more serious conduct. College Counsel submitted that the British Columbia Court of Appeal dismissed the appeal recognizing that general deterrence loomed large in the decision and also that the fine was not unreasonable.

College Counsel submitted that a discipline committee's ability to impose a harsher penalty than previous cases does not apply in this case. The Panel is deciding a case of first impression and determining the initial bar for suspension for this type of misconduct. College Counsel submitted that the suspension set by the Panel will have considerable significance to the profession.

*CNO v. Velasquez* (Discipline Committee, 2021): College Counsel submitted that this case proceeded by way of an Agreed Statement of Facts and a Joint Submission on Order. The Joint

Submission on Order was substantially identical to the Partial Joint Submission on Order in the case before this Panel, but in addition included a three-month suspension. The Velasquez case involved similar benefit fraud that took place over several years and allowed the member to receive at least \$11,080.00 in false claims. The member remained employed within the facility but entered into a payment agreement with the facility whereby the member paid back the amount received.

Finally, College Counsel asked the Panel to accept the Partial Joint Submission on Order and include a suspension of at least three and as much as four months. College Counsel also asked the Panel to ensure that the suspension would become effective on the day the Panel's decision became final.

### **Member's Counsel Submissions**

The Member's Counsel submitted that the Partial Joint Submission on Order should be accepted by the Panel providing it does not bring the administration of justice into disrepute.

The Member's Counsel submitted that the remaining issue of dispute is the length of suspension the Member should serve. The Member's Counsel submitted that the length of suspension is academic as any suspension is serious since it includes a public record of the suspension as well as a loss of income.

The Member's Counsel submitted mitigating factors for the Panel to consider.

The Member's Counsel submitted that the Member has been practicing since 2002, almost twenty years, and with no prior disciplinary history with the College. Although the Member's employment was terminated, the Member's manager had no concerns with the Member's practice or conduct. The Member was employed at St. Michael's Hospital between 2002-2017 and had no reported practice concerns during that time.

The Member's Counsel submitted that the benefit fraud scheme was spearheaded by [the Porter], a co-worker. [The Porter] did not offer names of conspirators, but when asked by facility investigators, the Member admitted to being involved. The Member formally admitted to the facts and that her conduct was unprofessional. The Member's Counsel submitted that the Member lost her job, lost her seniority and was out of work for nine months before securing her current employment. The Member pled guilty to save time and expense for witnesses as well as resources to prepare and adjudicate the case. In acknowledging her wrongdoing, the Member demonstrates strong potential for rehabilitation. The Member also agreed to meet with an expert and participate in employer notification which supports the remedial aspect of penalty. The Member's Counsel submitted that the Member's denial of some of the allegations should not be considered as an aggravating factor in the Panel's decision.

The Member's Counsel submitted that there were no clinical implications because of the misconduct. As well, no clients or individuals were defrauded, but rather a large institution.



The Member's Counsel submitted that the Member is willing to pay restitution and that restitution had been offered but no follow up occurred. An appropriate amount of restitution would be one-half the total since the benefits were split with [the Porter]. The Member's Counsel submitted that the restitution would be relatively modest compared to other cases. The intent of reducing the amount of restitution does not minimize that dishonest conduct is a significant problem.

The Member's Counsel submitted that the Panel should ensure the length of suspension considers the public interest, considering we remain in a pandemic. A suspension would remove the Member from practice at a time when there is a nursing shortage and for misconduct that is unrelated to clinical duties. Depriving the public of a nurse during a pandemic has consequences related to protecting the public. The Member's Counsel submitted that the Panel can consider contextual factors in deciding the length of suspension and to do so would increase the confidence of the public that the Panel can make decisions in the public interest. The Member's Counsel submitted legal principles and previous cases, as well as legislation, supporting this submission:

Chapter 3 from *The Law of Witnesses and Evidence in Canada* (Sankoff) which supports the Panel's ability to take judicial notice of contextual factors.

*CNO v. Pedzinski* (Discipline Committee, 2020): The penalty proceeded by way of a Joint Submission on Order. The member's certificate of registration was suspended for one month, but the suspension did not take effect until six weeks after the hearing. The impact of the COVID-19 pandemic and time to make arrangements for resident care were noted.

*CNO v. Rogers* (Discipline Committee, 2020): The penalty proceeded by way of a Joint Submission on Order. The member's certificate of registration was suspended for three months, but the suspension did not take effect until almost three months after the hearing. Pandemic related factors were implicated in suspending the suspension.

*CNO v. Carter* (Discipline Committee, 2021): The penalty proceeded by way of a Joint Submission on Order. The member's certificate of registration was suspended for two months. Upon request from the member and member's employer, the panel agreed to exercise its discretion to suspend the suspension until the following year. The current COVID-19 pandemic and strains on the health care system were noted.

The Member's Counsel also submitted that a lesser penalty is warranted because of the pandemic and an appropriate suspension would be one month. Should the Panel determine a longer suspension is warranted, then the Member's Counsel submitted that the Panel should suspend application of the suspension for anything longer than a month, contingent on compliance with the rest of the Order. The Member's Counsel submitted a number of documents supporting this submission:

The *Health Professions Procedural Code* (the "Code") of the *Nursing Act* subsection 51(2) sets out the sanctions a panel can impose on a member. In subsection 51(4) of the *Code*, a panel may suspend the effect of all or part of an order made under subsection 51(2) for a specified period and on specified conditions.

*CNO v. Lacroix* (Discipline Committee, 2007): The panel had concerns about a lengthy five-month suspension but since the suspension had been part of a Joint Submission on Order, the panel accepted the Joint Submission on Order without changes.

*College of Physicians & Surgeons (Ontario) v. Kohari* (Divisional Court, 1983): The College of Physicians & Surgeons appealed a decision of its own discipline committee to suspend a twelve-month suspension of one of its members. The appeal was denied. The Member's counsel submitted this case was an example of a suspension being suspended.

The Member's Counsel also submitted cases that were relevant and related to the duration of suspension penalties:

*CNO v. Varona* (Discipline Committee, 2009): The member in this case ran a fictional investment scheme that defrauded colleagues. The member was charged with six counts of fraud over \$5,000.00 and one count of fraud under \$5,000.00. The member was also charged with another criminal offence. Part of sentencing included restitution in the amount of \$21,450.00. The member also failed to disclose the criminal charges to the College. A Joint Submission as to Penalty included a two-month suspension. The Member's Counsel submitted this case as an example of a severe breach of *Professional Standards* that only received a two-month suspension.

*CNO v. Ritchie* (Discipline Committee, 2005): In this case, the member was convicted of four counts of fraud under \$5,000.00 in a scheme that she had participated in over the course of a year. A Joint Submission on Penalty included a two-month suspension. The Member's Counsel submitted that the member was criminally charged and that the fraud involved individuals, not a large institution. Therefore, the case was more severe.

*CNO v. Nolan* (Discipline Committee, 2006): The member falsified records that directly related to her practice, making clinical entries about events that did not occur and also falsifying time sheets. The Member's Counsel submitted that the amount of money defrauded is not included. The member's certificate of registration was suspended for two months.

*CNO v. Balog* (Discipline Committee, 2006): The member claimed to have assessed patients and also falsified patient documentation. The case proceeded by way of a Joint Submission as to Penalty. The member's certificate of registration was suspended for six weeks.

*CNO v. Stromme* (Discipline Committee, 2005): On or about five different days, the member collected sick benefits under false pretences and also forged a letter from a physician. The case proceeded by way of a Joint Submission as to Penalty. The member's certificate of registration was suspended for one month.

*CNO v. Khalill* (Discipline Committee, 2006): In this case, the member was criminally charged with fraud over \$5,000.00 and also failed to report the charges to the College. The member received Social Services benefits amounting to \$37,697.61 that he was not entitled to. The case proceeded by way of a Joint Submission as to Penalty. The member's certificate of registration was suspended for forty-five days.

The Member's Counsel submitted that suggesting the penalty suspension should be significant to reinforce that benefit fraud is widespread and needs to be stopped has no basis in evidence. In *CNO v. Calvano* multiple cases of inappropriate electronic health record ("EHR") access were submitted, the earliest case from 2006. Nine years of cases that addressed inappropriate EHR access justified a more significant penalty. In the case before this Panel, there are no similar cases. *CNO v. Velasquez* was most similar to the case before this Panel but was also only heard recently. The Member's Counsel also submitted that no evidence has been presented regarding other similar benefit fraud cases from St. Michaels's Hospital and University Health Network. Referrals to ICRC are also not part of the public record. Investigations by ICRC are also incomplete. The Member's Counsel submitted that it would be highly prejudicial for the Panel to rely on College Counsel's submissions regarding cases before ICRC.

The Member's Counsel submitted that the Panel cannot assume a suspension of three months is the appropriate penalty. *CNO v. Fellows-Smith* resulted in a two-month suspension plus a fine. The member was also able to keep her job. In *CNO v. Kartisch*, the member was given a 60-day suspension. In *CNO v. Craig*, the member was given a three-month suspension, but the suspension was remitted pending certain conditions. In *CNO v. Cuppage*, the member's certificate of registration was suspended for three months. In *CNO v. Mohamed* the larger dollar amount of financial loss distinguishes it from the case before this Panel.

The Member's Counsel also submitted that a lengthy suspension or a suspension at this time would not be in the public's interest.

### **College Counsel's Reply**

College Counsel submitted that a suspension of one to two months is entirely inadequate in light of the dishonesty of the Member in the circumstances and the fact that the benefit fraud continued over many years. It would also be the wrong message to send to the public or members of the profession. College Counsel recommended a three-to-four-month suspension.

College Counsel submitted that to suspend the suspension would be preposterous. The Member participated in benefit fraud over four years amounting to almost \$8,000.00. The Member had a co-conspirator and she falsified documents that she knew would be used in the fraud. She was caught and stopped; she did not have remorse during the fraud and did not stop on her own accord. The Member lost her job but found another. College Counsel submitted that there was no evidence submitted regarding how long or vigorously the Member looked for work and therefore the Panel cannot give weight to the nine month claim of searching for work. College Counsel submitted that the Member should have paid restitution but failed to do so. As well, to suspend the sentence would send a message that minimizes the consequence of professional misconduct.

College Counsel submitted that the Member had been terminated four years ago and has still not paid the hospital the amount defrauded. College Counsel submitted that the Member is only offering to pay restitution if ordered and only half the amount of the fraudulent claims.

College Counsel reviewed cases related to suspending a suspension:

*CNO v. Lacroix* (Discipline Committee, 2007): The five-month suspension was issued as part of a Joint Submission on Order, but the panel suggested they may have made a different decision. The misconduct in this case was related to substance abuse and a mental health disability. The member sought treatment and was in recovery. College Counsel submitted that there were no such factors in the case before this Panel. The Member's conduct was informed by greed and there was no treatment or recovery. College Counsel submitted that the *CNO v. Lacroix* case does not support the argument to suspend a suspension.

*College of Physicians & Surgeons (Ontario) v. Kohari* (Divisional Court, 1983): The College of Physicians & Surgeons appealed a decision of its own discipline committee to suspend a twelve-month suspension of one of its members. The appeal was denied. College Counsel submitted that the member's circumstances (i.e. minimal financial benefit and seventy years of age) influenced the decision. College Counsel submitted that there are no special circumstances in the case before this Panel and to consider any would send the wrong message.

With regard to deferring a suspension, College Counsel asked the Panel to review *CNO v. Pedzinski*, *CNO v. Rogers* and *CNO v. Carter*. College Counsel submitted two of the three cases were in the early stages of the pandemic crisis and suspensions were deferred for a number of months to accommodate needs related to the crisis. In *CNO v. Carter* the member was a nurse on Manitoulin Island and therefore it may have been difficult to replace her. College Counsel submitted that these cases were heard when the pandemic was at a high point which is not the case currently. There has also been no request from Sunnybrook Health Sciences Centre, the Member's current employer, to suspend the suspension due to staffing requirements. There has also been no suggestion from the Member's Counsel regarding what the duration of a suspended suspension should be. College Counsel submitted that the suspension should happen on the date the Panel's decision becomes final.

College Counsel submitted that the cases submitted by the Member's Counsel all featured restitution and that the type of conduct was not endemic which required a stronger message of general deterrence. *CNO v. Mohamed* (four months suspension plus fine) and *CNO v. Velasquez* (three months suspension) are also the closest precedents.

College Counsel submitted that there are no cases specifically related to general deterrence and did not suggest that because the case is precedent setting that a stronger penalty is indicated. Rather, College Counsel submitted that benefit fraud is known to be a significant problem, based on the fourteen cases already submitted to the Discipline Committee for review. *CNO v. Calvano* referenced similar cases of EHR inappropriate access, most had a one-month suspension including the member in *CNO v. Hooker* (Discipline Committee, 2006). College Counsel submitted that had the panel in *CNO v. Hooker* known there was a backlog of cases, a longer suspension would have been given.

College Counsel submitted that one month is not long enough for general deterrence and requested a suspension of three to four months. College Counsel submitted that there are no grounds to defer or suspend the suspension.

### **Independent Legal Counsel (“ILC”)**

ILC advised the Panel that the primary goal of the Panel in determining penalty is not to punish the Member but rather to protect the public and provide both specific and general deterrence as well as an opportunity for rehabilitation and remediation. Penalties from other similar cases should be considered. The Partial Joint Submission on Order is missing the suspension but ILC advised that a Partial Joint Submission on Order should be considered using similar principles as a Joint Submission on Order i.e., the Panel should accept it unless to do so would bring the matter of justice into disrepute.

Regarding the length of suspension, ILC advised that the combined effect of subsections 51(2), (3) and (4) of the *Code* gives discretion to panels to change the length or to delay the commencement of a suspension. Section 16 of the *Statutory Powers and Procedures Act*, also gives jurisdiction for tribunals to take notice of the pandemic and its impact on the health care system.

With regard to the issue of general deterrence, ILC advised that the Panel not consider the cases currently being reviewed by the ICRC and not yet referred to the Discipline Committee. ILC did highlight that the thirteen cases which have been referred to the Discipline Committee are eligible as evidence to consider. ILC submitted that the admission of misconduct is a mitigating factor and that the Panel should not consider a higher penalty because the Member contested two of the allegations.

The Panel asked ILC if it has jurisdiction to make an order to pay restitution or could restitution be considered with regards to the length and/or suspending part of the suspension. ILC responded by referencing subsection 51(2) of the *Code* that the Panel only has jurisdiction to revoke or suspend registration. The Panel does not have jurisdiction to directly order the Member to pay restitution, but it could be considered as a condition of reducing a suspension. Additionally, ILC noted that any restitution should be limited to the amount of the false claims.

Both College Counsel and the Member’s Counsel provided the Panel with written submissions on ILC’s advice. In the written submissions, College Counsel submitted there is nothing in subsection 51(2) of the *Code* that provides for a panel to make an order requiring a member to pay restitution. Both College Counsel and the Member’s Counsel submitted that panels do have jurisdiction under subsection 51(3) to impose specific terms, conditions and limitations on a member’s certificate of registration for a specified time, such as removing the suspension if the member paid restitution. College Counsel did not support the Panel exercising this authority considering the seriousness of the misconduct and the message a suspended suspension would send to the profession. The Member’s Counsel submitted that both subsection 51(3) and 51(4) of

the *Code* gives the Panel the authority to suspend all or a portion of the suspension and for it to be contingent on some action by the Member, such as repayment to the facility of the amounts defrauded.

### **Penalty Decision**

The Panel accepts the Partial Joint Submission on Order. The Panel also considered the issue of suspension. After careful deliberation, the Panel makes the following order:

1. The Member is required to appear before the Panel to be reprimanded within 3 months of the date that this Order becomes final.
2. The Executive Director is directed to suspend the Member's certificate of registration for 4 months. This suspension shall take effect from the date that this Order becomes final and shall continue to run without interruption as long as the Member remains in a practicing class.
3. The Executive Director is directed to impose the following terms, conditions and limitations on the Member's certificate of registration:
  - a) The Member will attend 2 meetings with a Regulatory Expert (the "Expert"), at her own expense and within 6 months from the date that this Order becomes final. To comply, the Member is required to ensure that:
    - i. The Expert has expertise in nursing regulation and has been approved by the Director of Professional Conduct (the "Director") in advance of the meetings;
    - ii. At least 7 days before the first meeting, the Member provides the Expert with a copy of:
      1. the Panel's Order,
      2. the Notice of Hearing,
      3. the Agreed Statement of Facts,
      4. this Partial Joint Submission on Order, and
      5. if available, a copy of the Panel's Decision and Reasons;
    - iii. Before the first meeting, the Member reviews the following CNO publications and completes the associated Reflective Questionnaires, online learning modules, decision tools and online participation forms (where applicable):
      1. *Professional Standards*,
      2. *Ethics*, and
      3. *Code of Conduct*;

- iv. At least 7 days before the first meeting, the Member provides the Expert with a copy of the completed Reflective Questionnaires, and online participation forms;
  - v. The subject of the sessions with the Expert will include:
    - 1. the acts or omissions for which the Member was found to have committed professional misconduct,
    - 2. the potential consequences of the misconduct to the Member's patients, colleagues, profession and self,
    - 3. strategies for preventing the misconduct from recurring,
    - 4. the publications, questionnaires and modules set out above, and
    - 5. the development of a learning plan in collaboration with the Expert;
  - vi. Within 30 days after the Member has completed the last session, the Member will confirm that the Expert forwards his/her report to the Director, in which the Expert will confirm:
    - 1. the dates the Member attended the sessions,
    - 2. that the Expert received the required documents from the Member,
    - 3. that the Expert reviewed the required documents and subjects with the Member, and
    - 4. the Expert's assessment of the Member's insight into her behaviour;
  - vii. If the Member does not comply with any one or more of the requirements above, the Expert may cancel any session scheduled, even if that results in the Member breaching a term, condition or limitation on her certificate of registration;
- b) For a period of 12 months from the date this Order becomes final during which the Member is engaged continuously in the practice of nursing (i.e. not including the period during which the Member's certificate of registration is suspended), the Member will notify her employers of the decision. To comply, the Member is required to:
- i. Ensure that the Director is notified of the name, address, and telephone number of all employer(s) within 14 days of commencing or resuming employment in any nursing position;
  - ii. Provide her employer(s) with a copy of:
    - 1. the Panel's Order,
    - 2. the Notice of Hearing,
    - 3. the Agreed Statement of Facts,

4. this Partial Joint Submission on Order, and
  5. a copy of the Panel's Decision and Reasons, once available;
- iii. Ensure that within 14 days of the commencement or resumption of the Member's employment in any nursing position, the employer(s) forward(s) a report to the Director, in which it will confirm:
1. that they received a copy of the required documents, and
  2. that they agree to notify the Director immediately upon receipt of any information that the Member has breached the standards of practice of the profession.
4. All documents delivered by the Member to the CNO, the Expert or the employer(s) will be delivered by verifiable method, the proof of which the Member will retain.

### **Reasons for Penalty Decision**

The Panel accepted the Partial Joint Submission on Order. The 2 meetings with a Regulatory Expert and 12 months of employer notification will provide specific as well as general deterrence and ensure that the Member has opportunity to remediate and rehabilitate. Conditions contained within the Partial Joint Submission on Order were appropriate and in line with what has been ordered in previous cases.

In determining the length of the suspension, the Panel considered a number of factors.

The Panel accepted as a mitigating factor that the Member took accountability by admitting to professional misconduct thereby saving time and resources related to a lengthy investigation. Aggravating factors included the active deceit and dishonesty by the Member over a four-year period to commit benefit fraud and also involve her husband in the fraud. The Member also demonstrated disregard for accountability until approached by facility investigators. This is a serious level of misconduct that requires a strong message of specific as well as general deterrence. Also considered as an aggravating factor was that the Member did not pay back to the facility the amount defrauded. The College's *Professional Standards* require nurses to respect truthfulness and act with integrity and honesty. Returning something that was stolen, in this case the dollar amount of the benefits, is a fundamental concept of being honest and acting with integrity. The Member failed to do this once she was caught and has continued to ignore this despite the passing of four years since the misconduct.

In determining the length of the suspension and any conditions that might be attached, the Panel reviewed the cases submitted by College Counsel and the Member's Counsel. In addition to the circumstances of each case, the Panel paid particular attention to any evidence of restitution and/or whether criminal charges were laid. The Panel considered that these may have been key variables impacting the suspensions imposed.



Similarities existed with *CNO v. Kartisch*, *CNO v. Craig*, *CNO v. Fellows-Smith* and *CNO v. Velasquez*. All these cases involved non-client related misconduct, penalties proceeded by way of Joint Submission on Order and suspensions varied between two and three-months. As well, all these cases involved some amount of restitution being made and/or a fine imposed.

The suspensions in *CNO v. Cuppage* and *CNO v. Mohamed* ranged from three to four months. Both involved fraudulent sick benefits and the amounts defrauded ranged from \$1,300.00 to over \$16,000.00. No restitution was paid in either case.

Cases with criminal charges varied in their length of suspension. In *CNO v. Codinha*, the member was charged with impaired driving and failed to report the charges to the College. A Joint Submission on Order agreement proceeded with a suspension of six months. The panel in the case referenced a previous undertaking in its reasons for the lengthy six-month penalty. *CNO v. Varona*, *CNO v. Ritchie* and *CNO v. Khalill* all involved criminal charges for fraud. All proceeded by way of a Joint Submission as to Penalty and included a 45-60 day suspension. All three cases involved repayment of the amounts defrauded.

The Panel accepted that there were no identical cases to the one being heard before this Panel and no consistent terms related to the length of suspension, the impact of restitution or the existence of criminal charges.

The Panel took guidance from the range of suspensions in *CNO v. Kartisch*, *CNO v. Craig*, *CNO v. Fellows-Smith* and *CNO v. Velasquez*. All involved suspensions between two and three-months suspension and also involved some amount of restitution and/or fine. A distinguishing feature in the case before this Panel is the serious and aggravating factors and in particular the lack of restitution, similar to *CNO v. Cuppage* (three months suspension) and *CNO v. Mohamed* (four months suspension) where no restitution was paid. The Member has kept the money she defrauded for the last four years. As well, the Member was an active participant in the fraud and only stopped once the facility investigation caught up with her. There was no indication that the Member had any intention of stopping the fraud until she was caught. These are serious actions of professional misconduct. Because of the seriousness, the Panel determined a strong message related to suspension was needed as dishonest practices would not be tolerated.

The Panel also considered the matter of general deterrence. College Counsel submitted that benefit fraud was widespread, listing multiple cases from St. Michael's Hospital and University Health Network that are under review by the Discipline Committee. College Counsel submitted that the Panel should consider these cases and send a strong message to the profession of general deterrence with a suspension of three and up to four months. College Counsel did not present evidence on the cases before the Discipline Committee. The Panel deliberated on the advice from ILC regarding this and found that there was insufficient evidence for the Panel to consider. Therefore, the Panel did not consider in its decision these other cases that may be before the Discipline Committee. However, the Panel felt strongly that the misconduct of the Member was

serious enough, without considering the additional cases and their possible influence on general deterrence, to warrant a significant suspension.

Considering these matters, the Panel determined the longer penalty of four months was warranted and reasonable.

The Panel also considered the matter of restitution and its potential impact on a suspension. The Panel reviewed the submissions from College Counsel and the Member's Counsel regarding the Panel's jurisdiction to order restitution. The Panel recognized it could not order restitution per subsection 51(2) of the *Code*, but considering subsection 51(3) of the *Code*, the Panel could consider restitution as a condition to be satisfied for the removal of a suspension. The Panel considered the non-payment of the defrauded amounts as a serious aggravating factor in this case agreeing with College Counsel in its written submission on the matter that "restitution should be at the initiative of the member facing discipline and, if paid, considered a mitigating factor". As well, the Panel did not want to send a message that withholding stolen money was condoned and could then be leveraged later to reduce a suspension. After deliberations, the Panel decided not to include restitution as a factor impacting its penalty decision. The Panel felt that the Member ought to have paid back the funds and conducted herself with the honesty and integrity that the College expects. The Member's Counsel submitted that the Member was willing to pay restitution. That opportunity remains available to the Member.

With regards to suspending or deferring the suspension, the Panel takes the matter of protecting the public during a pandemic seriously. Equally important is the message of specific and general deterrence a suspension sends for the Member and members of the profession. The Member's employer, Sunnybrook Health Sciences Centre is known as a large facility and did not submit a request to suspend the suspension. As a large facility, the Panel expects it has the resources to mitigate the impact of the Member's suspension, even in the midst of a pandemic. Considering this, the Panel was satisfied that the Member should be suspended once the Order becomes final and without delay.

I, Carly Gilchrist, RPN, sign this decision and reasons for the decision as Chairperson of this Discipline Panel and on behalf of the members of the Discipline Panel.