

**DISCIPLINE COMMITTEE
OF THE COLLEGE OF NURSES OF ONTARIO**

PANEL:	Dawn Cutler, RN	Chairperson
	Eloisa Busto, RPN	Member
	Marnie MacDougall	Public Member
	Fidelia Osime	Public Member
	Michael Schroder, NP	Member

BETWEEN:

COLLEGE OF NURSES OF ONTARIO)	<u>JEAN-CLAUDE KILLEY</u> for
)	College of Nurses of Ontario
- and -)	
)	
MICHAEL TOLIBAS)	<u>DANIEL LIBMAN</u> for
Registration No. 0503243)	Michael Tolibas
)	
)	<u>CHRISTOPHER WIRTH</u>
)	Independent Legal Counsel
)	
)	Heard: May 31, 2022

DECISION AND REASONS

This matter came on for hearing before a panel of the Discipline Committee (the “Panel”) of the College of Nurses of Ontario (the “College”) on May 31, 2022, via videoconference.

The Allegations

The allegations against Michael Tolibas (the “Member”) as stated in the Notice of Hearing dated February 18, 2022 are as follows:

IT IS ALLEGED THAT:

1. You have committed an act of professional misconduct as provided by subsection 51(1)(c) of the *Health Professions Procedural Code* of the *Nursing Act, 1991*, S.O. 1991, c. 32, as amended, and defined in subsection 1(1) of *Ontario Regulation 799/93*, in that on or about May 15, 2017, while employed as a Registered Nurse and/or Research Coordinator at St. Michael’s Hospital in Toronto, Ontario (the “Hospital”), you contravened a standard of practice of the profession or failed to

meet the standards of practice of the profession, by exposing your penis and/or masturbating in front of Colleague [1].

2. You have committed an act of professional misconduct as provided by subsection 51(1)(c) of the *Health Professions Procedural Code* of the *Nursing Act, 1991*, S.O. 1991, c. 32, as amended, and defined in subsection 1(37) of *Ontario Regulation 799/93*, in that on or about May 15, 2017, while employed as a Registered Nurse and/or Research Coordinator at the Hospital, you engaged in conduct or performed an act, relevant to the practice of nursing, that, having regard to all the circumstances, would reasonably be regarded by members as disgraceful, dishonourable or unprofessional, by exposing your penis and/or masturbating in front of Colleague [1].

Member's Plea

The Member admitted the allegations set out in paragraphs 1 and 2 in the Notice of Hearing. The Panel received a written plea inquiry which was signed by the Member. The Panel also conducted an oral plea inquiry and was satisfied that the Member's admission was voluntary, informed and unequivocal.

Agreed Statement of Facts

College Counsel and the Member's Counsel advised the Panel that agreement had been reached on the facts and introduced an Agreed Statement of Facts, which as amended reads, unedited, as follows:

THE MEMBER

1. Michael Tolibas (the "Member") registered with the College of Nurses of Ontario ("CNO") as a Registered Nurse ("RN") on January 6, 2005.
2. The Member's certificate of registration is currently suspended on an interim basis pursuant to an order of the Inquiries, Complaints, and Reports Committee ("ICRC") that took effect on September 22, 2021.
3. The Member was employed as a full-time RN at St. Michael's Hospital (the "Hospital"), from February 13, 2006, to July 12, 2018, at which time his employment was terminated.

PRIOR HISTORY

4. The Member has no prior disciplinary findings with CNO.

THE FACILITY

5. The Hospital is located in Toronto, Ontario.

6. The Member was working as a Research Coordinator in the Hospital's Multiple Sclerosis Research Clinic ("MS Clinic") at the time of the incident described below.
7. As a Research Coordinator at the MS Clinic, the Member performed infusion and blood work. He also administered medication orally to patients and completed infusions by injections.

INCIDENT RELEVANT TO ALLEGATIONS OF PROFESSIONAL MISCONDUCT

8. The Member's colleague, [Colleague 1], worked as a Research Coordinator in the MS Clinic from 2002 to 2019.
9. The Member and [Colleague 1] worked together for approximately 10 years. Prior to the incident in question, there were no issues of concern impacting the professional relationship between [Colleague 1] and the Member. On the contrary, they had a positive collegial rapport.
10. On or around May 15, 2017, [Colleague 1] and the Member took a lunch break to eat together with a visiting former colleague, [Colleague 2] ("[]"). After [Colleague 2] left, [Colleague 1] did some work at the table in the office she shared with the Member.
11. [Colleague 1] was standing and engaged in transferring serums at the table when she felt the Member pass her from behind. The Member bumped into [Colleague 1]'s rear end. When [Colleague 1] turned around, she was face to face with the Member. If [Colleague 1] were to testify, she would state that there was sufficient space to pass by without bumping into her. She would further state that the fact that the Member was facing her meant that the Member had bumped into her with his groin.
12. After this momentary interruption, [Colleague 1] continued working. The Member then said to her in Filipino: "I just can't hold it anymore," or words to that effect. [Colleague 1] responded by asking "What?" and turned around to find the Member masturbating. He was rubbing himself in his chair, with his pants open and his penis exposed.
13. [Colleague 1] immediately left the room and exited the main building of the Hospital. She went across the street to the Research Institute and sat there for over two hours in a state of shock.
14. On or around June 25, 2018, [Colleague 1] contacted Human Resources ("HR") at the Hospital to report the incident.
15. In the spring of 2018, prior to submitting a complaint to HR, [Colleague 1] submitted a request to for a room change. She expressed discomfort with sharing a room with the Member. At the material time, a new floor plan was in development for the Hospital's new patient tower, which prompted [Colleague 1] to make the request.

16. Following receipt of [Colleague 1]'s complaint, the Hospital conducted an internal investigation.
17. At the time of the Hospital's investigation, the Member and [Colleague 1] continued to work together. However, they were no longer interacting outside of the workplace and [Colleague 1] was actively avoiding speaking with the Member unless required to do so as part of a work task.
18. The Member was asked about the incident during the Hospital's investigation. The Member indicated that [Colleague 1] did not talk to him the following day and that he had apologized to [Colleague 1] for what he described as a misinterpretation.
19. The Hospital concluded that [Colleague 1]'s allegation had been substantiated and that the Member had breached its *Code of Conduct* policy and the *Discrimination, Harassment and Violence in the Workplace* policy.
20. CNO received the Hospital's mandatory employer report on July 31, 2018.

CNO STANDARDS

21. CNO's *Professional Standards* provides that each nurse is accountable to the public and responsible for ensuring her or his practice and conduct meets legislative requirements and the standards of practice of the profession.
22. CNO's *Professional Standards* further provide, in relation to the Relationships standard, that nurses meet the standard by establishing and maintaining respectful, collaborative and professional relationships with colleagues, health care team members and employers. The Professional Relationships standard notes that professional relationships are based on trust and respect, and result in improved client care. A nurse demonstrates having met this standard by actions such as:
 - a. role-modelling positive collegial relationships; and
 - b. using a wide range of communication and interpersonal skills to effectively establish and maintain collegial relationships.
23. In addition, CNO's *Professional Standards* further provides that a nurse demonstrates leadership by providing, facilitating and promoting the best possible care/service to the public. A nurse demonstrates this standard by actions such as role-modelling professional values, beliefs and attributes.
24. The Member admits and acknowledges that he acted inappropriately toward [Colleague 1] at the Hospital. The Member acknowledges that this conduct occurred in the workplace

and involved his co-worker and that it fell below the standards of practice of the profession.

ADMISSIONS OF PROFESSIONAL MISCONDUCT

25. The Member admits that he committed the acts of professional misconduct as alleged in paragraph 1 of the Notice of Hearing, as described in paragraphs 8 – 24 above.
26. The Member admits that he committed the acts of professional misconduct as alleged in paragraph 2 of the Notice of Hearing, and in particular, that his conduct would reasonably be regarded by members as disgraceful, dishonourable and unprofessional, as described in paragraphs 8 – 24 above.

Decision

The College bears the onus of proving the allegations in accordance with the standard of proof, that being the balance of probabilities based upon clear, cogent and convincing evidence.

Having considered the evidence and the onus and standard of proof, the Panel finds that the Member committed acts of professional misconduct as alleged in paragraphs 1 and 2 of the Notice of Hearing. As to allegation #2, the Panel finds that the Member engaged in conduct that would reasonably be regarded by members of the profession to be disgraceful, dishonourable and unprofessional.

Reasons for Decision

The Panel considered the Agreed Statement of Facts and the Member's plea and finds that this evidence supports findings of professional misconduct as alleged in the Notice of Hearing.

Allegation #1 in the Notice of Hearing is supported by paragraphs 8-25 in the Agreed Statement of Facts. While working at St. Michael's Hospital (the "Hospital"), the Member exposed his penis and masturbated in the presence of [Colleague 1]. The Member breached the *Professional Standards* when he failed to maintain a respectful and professional relationship with [Colleague 1]. Masturbating in the presence of [Colleague 1] eroded the trust, respect, and collegial rapport that had developed between the Member and [Colleague 1] during their previous 10 year professional working relationship. The Member's actions provided for a continuing level of discomfort felt by [Colleague 1] as she submitted a request for a room change approximately one year later in hopes of distancing herself from the Member.

With respect to allegation #2, the Member's conduct was clearly relevant to the practice of nursing. The Panel finds that the Member's conduct in masturbating in the presence of [Colleague 1] was unprofessional as it demonstrated a serious disregard for his professional obligations.

The Panel also finds that the Member's conduct was dishonourable as it contained an element of moral failing. The Member knew or ought to have known his actions were inappropriate and fell well below the standards of a professional.

Finally, the Panel finds that the Member's conduct was disgraceful as it shames the Member and by extension the profession. The conduct of masturbating in the presence of a colleague with whom the Member had worked for the previous 10 years casts serious doubt on the Member's moral fitness and inherent ability to discharge the higher obligations the public expects professionals to meet.

Penalty

College Counsel and the Member's Counsel advised the Panel that a Joint Submission on Order had been agreed upon. The Joint Submission on Order requests that this Panel make an order as follows:

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 suspend the Member's certificate of registration for 3 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. Directing the Executive Director to impose the following terms, conditions and limitations on the Member's certificate of registration:
 - a) The Member will attend a minimum of 2 meetings with a Regulatory Expert (the "Expert") at his own expense and within 6 months from the date that this Order becomes final. If the Expert determines that a greater number of sessions are required, the Expert will advise CNO regarding the total number of sessions that are required and the length of time required to complete the additional sessions, but in any event, all sessions shall be completed within 12 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 CNO in advance of the meetings;
 - ii. At least 5 days before the first meeting, or within another timeframe approved by the Expert, 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 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 and decision tools (where applicable):
 - 1. *Code of Conduct*, and
 - 2. *Professional Standards*;
 - iv. At least 5 days before the first meeting, or within another timeframe approved by the Expert, the Member provides the Expert with a copy of the completed Reflective Questionnaires;
 - 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 their report to CNO, 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 his 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 his certificate of registration;
- b) For a period of 18 months from the date the Member returns to the practice of nursing, the Member will notify his employers of the decision. To comply, the Member is required to:
- i. Ensure that CNO 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 his employer(s) with a copy of:
 1. the Panel's Order,
 2. the Notice of Hearing,
 3. the Agreed Statement of Facts,
 4. this 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 CNO, in which it will confirm:
 1. that they received a copy of the required documents, and
 2. that they agree to notify CNO 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 CNO, the Expert [or the employer(s)] will be delivered by verifiable method, the proof of which the Member will retain.

Penalty Submissions

Submissions were made by College Counsel.

The aggravating factors in this case were:

- The misconduct was both serious, intentional and intimate; and
- The misconduct had both an immediate and lasting impact on the Member's co-worker.

The mitigating factors in this case were:

- This was an isolated incident that did not reoccur;
- The Member had no prior discipline history with the College;
- The Member cooperated with the College and admitted to the facts surrounding the misconduct;
- The Member accepted responsibility for his misconduct by entering into and Agreed Statement of Facts and a Joint Submission on Order; and
- The Member is amenable to remediation and rehabilitation.

College Counsel submitted that the Joint Submission on Order meets all the goals of penalty including rehabilitation, protection of the public, and general and specific deterrence.

The proposed penalty provides for general deterrence through the 3 month suspension of the Member's certificate of registration which sends a strong message to members that there are serious consequences for engaging in similar misconduct.

The proposed penalty provides for specific deterrence through the oral reprimand and the 3 month suspension of the Member's certificate of registration which will deter the Member from repeating the same behaviour going forward.

The proposed penalty provides for remediation and rehabilitation through a minimum of 2 meetings with a Regulatory Expert, which will provide the Member with greater insight into his misconduct.

Overall, the public is protected through the 18 months of employer notification which provides for increased vigilance from the employer on the Member's return to practice.

The Joint Submission on Order is in the profession's interest as it sends a message to members that there are serious consequences for such misconduct, and it demonstrates to the public the College's ability to self-regulate.

College Counsel submitted the following cases to the Panel to demonstrate that the proposed penalty fell within the range of similar cases from this Discipline Committee:

CNO v. Crummey (Discipline Committee, 2020): This case proceeded by way of an Agreed Statement of Facts and a Joint Submission on Order. The member harassed two co-workers by way of making sexual jokes and remarks towards them. The Member also discussed his personal sexual experiences with co-workers. These incidents caused distress and discomfort amongst his co-workers. The penalty included an oral reprimand, a 5 month suspension of the member's certificate of registration, 2 meetings with a Regulatory Expert and 12 months of employer notification.

CNO v. Keddie (Discipline Committee, 2020): This case proceeded by way of an Agreed Statement of Facts and a Joint Submission on Order. The member inappropriately touched a co-worker on the buttocks as he was passing the co-worker in the hallway at work. The penalty included an oral reprimand, a 1 month suspension of the member's certificate of registration, 2 meetings with a Regulatory Expert and 12 months of employer notification.

CNO v. Deonarain (Discipline Committee, 2019): This case proceeded by way of an Agreed Statement of Facts and a Joint Submission on Order. The member sexually harassed a co-worker by making repeated inappropriate comments about the co-workers breasts. Additionally, the member touched the co-worker's breast and buttocks without her consent. The penalty included an oral reprimand, a 3 month suspension of the member's certificate of registration, two meetings with a Regulatory Expert and 12 months of employer notification.

CNO v. Robichaud (Discipline Committee, 2016): This case proceeded by way of an Agreed Statement of Facts and a Joint Submission on Order. The member made harassing comments and physical gestures to three co-workers, one of which was a nursing student. The penalty included an oral reprimand, a 4 month suspension of the member's certificate of registration, two meetings with a Regulatory Expert and 12 months of employer notification.

Submissions were made by the Member's Counsel.

The Joint Submission on Order serves the College's goals of protecting the public and maintaining the integrity of the profession.

The mitigating factors in this case were:

- The Member has admitted the allegations of professional misconduct;
- The Member cooperated fully with the College and has taken responsibility for his actions by entering into an Agreed Statement of Facts and a Joint Submission on Order;
- The Member has spared the College time and costs that would have been associated with a contested hearing;
- The Member has no prior discipline history;
- The Member has been registered with the College for 17 years and has had an unblemished practice during this time up until this issue arose;
- The conduct did not relate to any patient care;
- The conduct was out of character for the Member;
- The misconduct involved an isolated incident that was not repeated;
- The Member is remorseful;
- The Member understands that his conduct fell below the standards of the College; and
- The Member was also subject to an interim suspension since September 2021.

The appropriate objectives of penalty were met in this case. It protects the public, provides for denunciation, general and specific deterrence and it affords the Member an opportunity for rehabilitation.

The Member's Counsel highlighted that the decision of the Supreme Court of Canada of *R. v. Anthony Cook* is the leading authority on Joint Submissions on Order. The Panel must accept the Joint Submission on Order unless it would bring the administration of justice into disrepute.

Penalty Decision

The Panel accepts the Joint Submission on Order and accordingly orders:

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 3 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 a minimum of 2 meetings with a Regulatory Expert (the “Expert”) at his own expense and within 6 months from the date that this Order becomes final. If the Expert determines that a greater number of sessions are required, the Expert will advise CNO regarding the total number of sessions that are required and the length of time required to complete the additional sessions, but in any event, all sessions shall be completed within 12 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 CNO in advance of the meetings;
 - ii. At least 5 days before the first meeting, or within another timeframe approved by the Expert, 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 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 and decision tools (where applicable):
 - 1. *Code of Conduct*, and
 - 2. *Professional Standards*;
 - iv. At least 5 days before the first meeting, or within another timeframe approved by the Expert, the Member provides the Expert with a copy of the completed Reflective Questionnaires;
 - 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 their report to CNO, 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 his 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 his certificate of registration;
- b) For a period of 18 months from the date the Member returns to the practice of nursing, the Member will notify his employers of the decision. To comply, the Member is required to:
- i. Ensure that CNO 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 his employer(s) with a copy of:
 1. the Panel's Order,
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 - 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 CNO, in which it will confirm:
 1. that they received a copy of the required documents, and
 2. that they agree to notify CNO 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 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 understands that the penalty ordered should protect the public and enhance public confidence in the ability of the College to regulate nurses. This is achieved through a penalty that addresses specific deterrence, general deterrence and, where appropriate, rehabilitation and

remediation. The Panel also considered the penalty in light of the principle that joint submissions should not be interfered with lightly.

The Panel concluded that the proposed penalty is reasonable and in the public interest. The Member has co-operated with the College and, by agreeing to the facts and a proposed penalty, has accepted responsibility.

The Panel finds that the penalty satisfies the principles of specific and general deterrence, rehabilitation and remediation and public protection. Specific deterrence is met through the oral reprimand and the 3 month suspension of the Member's certificate of registration. General deterrence is met through the 3 month suspension of the Member's certificate of registration as it sends a strong message to members that there are serious consequences for engaging in similar misconduct. Rehabilitation and remediation is achieved through a minimum of 2 meetings with a Regulatory Expert which will provide the Member with greater insight into his misconduct. The public is protected through the 18 months of employer notification as the Member's employer will provide heightened vigilance on the Member's return to practice. The penalty demonstrates the College's ability to self-regulate and its commitment to ensure that public trust is maintained in the nursing profession.

The penalty is also in line with what has been ordered in previous cases in similar circumstances.

I, Michael Schroder, NP, sign this decision and reasons for the decision on behalf of the Chairperson of this Discipline Panel and on behalf of the members of the Discipline Panel.