

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

The Member appealed this decision to the Divisional Court. The appeal was heard on February 23, 2022. The appeal decision was released on June 7, 2022 (see: *Hirtle v. College of Nurses of Ontario*, 2022 ONSC 1479).

PANEL:	Mary MacMillan-Gilkinson	Chairperson
	Deborah Graystone, NP	Member
	Linda Marie Pacheco, RN	Member
	Heather Riddell, RN	Member
	Christopher Woodbury	Public Member

BETWEEN:

COLLEGE OF NURSES OF ONTARIO)	<u>EMILY LAWRENCE</u> for
)	College of Nurses of Ontario
- and -)	
)	
PAUL HIRTLE)	<u>NO REPRESENTATION</u> for
Registration No. 13553692)	Paul Hirtle
)	
)	
)	<u>CHRISTOPHER WIRTH</u>
)	Independent Legal Counsel
)	
)	Heard: September 30, 2019

DECISION AND REASONS ON PENALTY

In reasons released on July 3, 2019, the Panel made findings of professional misconduct against Paul Hirtle (the “Member”). In particular, the Panel found that the Member committed acts of professional misconduct as alleged in paragraphs 1(a), 1(b), 1(d), 1(e) [insofar as it deals with voice messages] of the Notice of Hearing. In respect of 2(a), the Panel found the Member’s conduct would reasonably be regarded as dishonourable and unprofessional. With regard to 2(b) and 2(d), the Panel found the Member’s conduct would reasonably be regarded as unprofessional. In connection with 2(e) [insofar as it deals with voice messages], the Panel found the Member’s conduct would reasonably be regarded as disgraceful, dishonourable and unprofessional. The Panel made no findings and dismissed the following allegations/portions of allegations contained in the Notice of Hearing: 1(c), 1(e) [insofar as it deals with text messages], 1(f), 1(g), 1(h), 2(c), 2(e) [insofar as it deals with text messages], 2(f), 2(g) and 2(h).

The Panel reconvened on September 30, 2019 at the College of Nurses of Ontario (the “College”) at Toronto, Ontario for the penalty hearing. The Panel’s decision and reasons on penalty are set out below. The Member was present and self-represented.

Penalty Submissions

College Counsel noted for the record that the Publication Ban made by the Panel earlier in the hearing remained in effect. In accordance with that Order, public disclosure of the names of the nursing students referred to orally or in any documents presented in this hearing or any information that could disclose the identity of the students, including the publication and broadcasting of these matters is prevented.

Penalty Submission - College Counsel

College Counsel submitted Exhibit #26 as the College Submission on Order dated September 30, 2019 which reads as follows:

THE COLLEGE OF NURSES OF ONTARIO (“CNO”) SUBMITS that, in view of the Panel of the Discipline Committee’s (the “Panel”) findings of professional misconduct the Panel should 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 5 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 the practising 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 the Director of Professional Conduct (the “Director”) 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 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, and
 - 3. 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 (where applicable):
 - 1. *Professional Standards*,
 - 2. *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 clients, 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 his behaviour;
- vii. If the Member does not comply with any 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 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 his employer(s) with a copy of:
 - 1. the Panel's Order,
 - 2. the Notice of Hearing, and
 - 3. 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; and
- 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.

College Counsel provided a review of the Member's conduct which the Panel had found had breached the standards of practice and was found to be disgraceful, dishonourable and/or unprofessional. These acts of professional misconduct related specifically to the Member's interaction with two nursing students who he supervised in his role as clinical instructor.

College Counsel submitted that the following aggravating and mitigating factors were present in this case:

Aggravating Factors:

- The Member was in a supervisory role over nursing students. An important aspect of this role is to model appropriate professional behaviour. The Member did not maintain professional behaviour and his conduct occurred over a period of time. It was not a "one off"; rather the Member demonstrated an ongoing pattern of behaviour targeting [Student A] and [Student B], at times in front of fellow students. College Counsel contended that sexual harassment sometimes occurs behind closed doors and at times in front of groups;

- The Member's conduct occurred in a clinical setting and included a joke and comments with a sexual connotation directed towards [Student A] and [Student B]. College Counsel submits that not only did the Member sexually harass the students, but it was done in a manner that was humiliating and embarrassing to [Student B] and [Student A] at the beginning of their professional careers;
- The Member's behaviour of sending a voice mail to [Student B] was highly inappropriate given his supervisory role as [Student B]'s clinical instructor.
- The Member took advantage of his position of power over both [Student B] and [Student A] in various ways.

Mitigating Factors:

- The Member has no prior discipline history with the College;
- The Member submitted good character evidence speaking to his clinical abilities in his role as a practising nurse.

College Counsel fairly noted that the Member's act of defending himself is not an aggravating factor. She explained that the fact that a penalty is being considered in this case following a contested hearing is relevant in one way only: some of the penalty decisions to be relied on, reflect the benefit to the member in those cases of having admitted his or her misconduct, which constitutes a mitigating factor to be taken into account in connection with penalty. College Counsel asked the Panel to consider the College's Submission on Order on the basis that it fairly reflects the serious conduct and reflects all goals of penalty by addressing the interests of the profession, public and the Member.

College Counsel submitted that the penalty proposed by the College would send a clear signal to members of the profession that this behaviour is serious and inappropriate. This proposed Order would signal that sexual harassment of nursing students is utterly intolerable within the profession. Accordingly the proposed penalty would provide specific and general deterrence.

Specific deterrence would also be achieved through an oral reprimand and 5 month suspension of the Member's certificate.

Goals of remediation would be met through two meetings with a Regulatory Expert and an 18 month employer notification of this decision. The Member's conduct occurred over a period of months and was not an isolated incident indicating his behaviours were intentional. These circumstances suggest the Member requires a significant signal from the College that his conduct is inappropriate. These aspects of the penalty will ensure the Member maintains good practice going forward.

College Counsel submitted that all components of the proposed penalty are directed at protecting the public and are a fair balance of deterrence and remediation.

College Counsel submitted four cases requiring similar regulatory responses related to sexual harassment of colleagues and demonstrating that the College's proposed penalty is within the range of penalties imposed by other panels of the Discipline Committee.

CNO v Robichaud (Discipline Committee 2016). This case involved a member's inappropriate conduct with colleagues in multiple incidents over the period of one day. The member's conduct included making inappropriate comments with a sexual connotation and unwanted touching of colleagues and a student nurse. Although the member was not the instructor, unwanted touching and comments towards a student was part of this member's conduct that was found to be disgraceful, dishonourable and unprofessional. The penalty in this case was a 4 month suspension, 12 month employer notification along with 2 meetings with a Nursing Expert. Similarities between Robichaud and the present case are that the member's conduct was directed at colleagues and not patients. The differences in the Robichaud case include that the conduct occurred in one day instead of over an extended period of time and there was no power dynamic between the member and his colleagues. The hearing in Robichaud proceeded with an Agreed Statement of Facts and a Joint Submission on Order.

CNO v Deonarain (Discipline Committee 2019). This case included the sexual harassment of a co-worker and included unwanted touching and comments with a sexual connotation. A difference from the present case is that the member in Deonarain expressed remorse. The hearing proceeded by way of an Agreed Statement of Facts and with a Joint Submission on Order. The member's expression of remorse was included in the Agreed Statement of Facts. The penalty in this case included a 3 month suspension, 12 month employer notification and 2 meetings with a Nursing Expert. The 3 month suspension of this member's certificate reflected the mitigating factors of the member's remorse and willingness to be remediated. The similarities to this case are that the misconduct occurred over several months and the member was in a position of authority over his RPN colleague.

CNO v Phillips (Discipline Committee 2016). This was a contested hearing. The member in this case was not present and did not call evidence. The panel made findings that the member harassed 4 colleagues, including 3 PSW's and 1 RPN. Similarities include that the member was in a position of power in his role of senior regulated nurse. This member's conduct also occurred over a period of time and included a number of colleagues. Similar conduct existed of unwanted sexual comments and touching between the member and colleagues. The penalty in this case was a 5 month suspension, 12 month employer notification and 2 meetings with a Nursing Expert. College Counsel submitted that in the case at hand, an 18 month employer notification was a good example of a reasonable and appropriate penalty for similar conduct.

CNO v Gesembe (Discipline Committee 2013/Penalty 2014). This case is similar in that it was a fully contested hearing. The member's conduct in this case included persistent, unwanted sexual comments and touching of colleagues. The panel in this case made findings of disgraceful, dishonourable and unprofessional conduct. The penalty in this case was a 5 month suspension, 18 month employer notification and 2 meetings with a Nursing Expert.

College Counsel submitted that the College's proposed penalty is in keeping with other decisions involving somewhat similar conduct and that should provide ample comfort that the College's Submission on Order is fair. College Counsel reminded the Panel that it is necessary to consider the

unique circumstances of each case including aggravating and mitigating factors when determining the appropriate penalty in a particular case.

Penalty Submissions – The Member

The Member made submissions regarding the appropriate penalty. The Member submitted a bundle of support letters from work colleagues which had previously been entered as Exhibit #25 and included a letter of support for the Member from a Director of Care who had been his supervisor since January 2017. The letter stated that the Member conducted himself professionally.

The Member also sought to introduce four additional letters of support. Two letters of support from colleagues were entered on consent as Exhibit #27 dated September 28, 2019 and Exhibit #28 dated September 27, 2019. The third letter was from a former RPN student dated September 28, 2019 and the fourth letter was a letter of support from the Member's wife.

College Counsel objected to the submission of portions of the letter from the former student and portions of the letter from the Member's wife. College Counsel submitted that it would be inappropriate to accept this information as it is not relevant to the penalty.

Following discussions between the parties, it was agreed that certain redactions to the letter from the RPN student would be made and the letter as redacted was entered as Exhibit #29 on consent. The Member also decided not to seek to enter the letter from his wife as an exhibit but, on consent, he read certain portions of that letter into the record.

The Panel accepted the redacted version of Exhibit #29. The student stated that the Member was supportive of her skills and helped her become a better nurse. She also stated that the Member never made her feel uncomfortable.

The Member read into the record certain portions of his wife's letter as agreed, which included testimony to his good character, his nursing skills and patient care. The letter also provided information regarding the physical and emotional stress these allegations have caused the Member and his family.

The Member denied committing the various acts of misconduct which he has been found by the Panel to have committed. He understood that admission of alleged misconduct provides opportunity for a lesser penalty but indicated that he could not admit to conduct that he denies committing. The Member asserted that if he had committed the misconduct in question he would demonstrate remorse. He further indicated that he understands the power imbalance between a clinical instructor and their student and takes this seriously. The Member also contended that no other allegations had ever been brought forward.

The Member submitted that the allegations against him in this case have been detrimental to him and his family. He did not agree with a 5 month suspension, considering the financial hardship that it would cause to himself and his family.

The Member expressed no concerns with the portion of the penalty dealing with remediation, education or an oral reprimand as proposed by the College and contended that these provisions would help him move forward as a better nurse. The Member also suggested that he could provide a letter of explanation, but not a letter of apology.

The Member submitted that the 18 month employer notification was a long period of time, however since Confederation College had already notified every employer in Thunder Bay of the allegations made against him in this case, he would not dispute this portion of the penalty. The Member also reviewed the decisions relied on by College Counsel and pointed out various similarities and differences.

CNO v Robichaud (Discipline Committee 2016). The Member contended that the 4 month suspension in this case was imposed in a case involving sexual touching of many colleagues. He stated there was no sexual touching in his case.

CNO v Deonarain (Discipline Committee 2019). The member in this case admitted to the allegations of sexual touching and received a 3 month suspension.

CNO v Phillips (Discipline Committee 2016). The 5 month suspension in this case included sexual touching. The member was not present or represented for this hearing.

CNO v Gesembe (Discipline Committee 2013/Penalty 2014). The Member noted that a 5 month suspension in this case which included sexual touching of female co-workers and staff was imposed and the misconduct involved was not comparable to his case.

The Member spoke to the significant impact that this hearing has had on him and his family. He stated that the proposed 5 month suspension would have negative financial implications on his family as he has two children in college and a home with bills to pay. The Member also stated that his absence from the Long Term Care Facility, where he currently works, would negatively impact the facility and its 150 residents. The Member also submitted that he would support being ordered to write a letter of explanation instead of a letter of apology which could explain his feelings and any misunderstanding. He also explained that living in a small community he will inevitably cross paths with students and submitted that there are limited opportunities for employment. The Member advised the Panel that he will never teach again and asked the Panel to include a “non-teaching” clause in his penalty.

Penalty Submission – College Counsel Reply

College Counsel submitted that the Panel can accept the evidence of good character contained in the letters of support but should give little weight to the statements that the Member did not engage in any conduct with the authors of these letters. College Counsel does not dispute the statements in the letters that the Member is a good nurse. Accordingly, the proposed penalty seeks rehabilitation of the Member.

College Counsel submitted that a letter of apology referred to by the Member is potentially appropriate where there is remorse and mitigating circumstances but it is not an appropriate penalty for this Panel to make in this case. It would not meet the goals of any penalty for this Panel to order

the Member to write a letter of explanation or apology when he denies the specifics of what has been found to be professional misconduct on his part.

College Counsel made reference to the Member's proposal that the order include a condition that he not engage in teaching in the future. She stated that it would be outside of the norm and difficult to monitor. It also would not address general deterrence and the message which the College asks the Panel to send to members of the profession.

College Counsel spoke to the length of the suspension and accepts the Member's point that some of the similar cases relied on involved sexual touching but contended that while an aggravating factor, its presence or absence in a particular case is not determinative of an appropriate penalty. College Counsel reminded the Panel that its task is to determine a penalty that is appropriate, given the particular facts in this case involving a clinical instructor and nursing students.

College Counsel submitted that the Panel has the discretion to consider the Member's financial contribution to his household with consideration of having children in college and the financial consequences of the suspension. College Counsel submitted that this is true of every suspension order but a suspension is a common penalty imposed as part of both general and specific deterrence. College Counsel also clarified that the purpose of a suspension is not to cause financial harm but to act as a specific and general deterrent, though it was accepted that financial hardship will frequently be a consequence of a suspension. It was also submitted that there is no evidence of hardship to the Member's employer resulting from a suspension.

Penalty Submissions – Member's Sur-Reply

The Member submitted that the reality of a 5 month suspension would include a 10 paycheck loss which will impose significant financial harm on his family. He contended that prior to this hearing he taught 100 students without incident. He submitted that his inability to teach would be punishment and act as a deterrent for others.

The Member stated that the cases reviewed to determine penalty all included sexual touching and that he did not cross that line and would never cross that line. He contended that he is a good nurse and that he will take the penalty imposed by the Panel and move forward to be the best nurse he can be.

Penalty Decision

The Panel makes the following order as to penalty:

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 5 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 the practising 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 the Director of Professional Conduct (the “Director”) 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 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, and
 - 3. 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 (where applicable):
 - 1. *Professional Standards*,
 - 2. *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 clients, 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 his behaviour;
 - vii. If the Member does not comply with any 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 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 his employer(s) with a copy of:
 1. the Panel's Order,
 2. the Notice of Hearing, and
 3. 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; and
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 found that the penalty proposed by the College is the most appropriate penalty in this case. The Panel considered all submissions by the Member and College Counsel. The cases provided in comparison of penalty were reasonable and contained similar relevant conduct although no cases are exactly the same.

The Panel agreed to accept the additional letters of support from the Member including the redacted version of an additional student letter. The Panel listened to and accepted the portions of his wife's letter read into the record by the Member emphasizing the physical and emotional stress that this hearing has had on the Member and his family.

The main point of contention between the Member and the College was the 5 month suspension. The Panel accepts that there will be financial consequences to the Member as a result of any suspension, and this is a common result of a suspension. The purpose of a suspension is, however, to protect the public and satisfy the twin goals of specific and general deterrence and, in this case, to signal to the profession the commitment of the College to address inappropriate sexual conduct in the nursing profession. It also demonstrates the commitment of the College to protect the public and maintain public confidence.

The 5 month suspension is necessary for both specific and general deterrence. Such a suspension sends a message to the membership that inappropriate sexual conduct is very serious and will not be tolerated by the College. It also emphasizes to the Member that this type of conduct calls for a significant penalty.

An oral reprimand supports the goal of specific deterrence. Two meetings with a Regulatory Expert along with review and education of the professional standards relevant to this case will provide rehabilitation and remediation necessary to ensure the Member's conduct remains within the parameters expected by the College and the public.

The 18 month employer notification will ensure the Member's practice will be monitored while ensuring public safety and confidence in the profession of nursing during this period of time.

The Panel considered all the evidence and consequences of this penalty and is satisfied that the penalty being imposed serves the public interest.

I, Mary MacMillan-Gilkinson, Public Member, sign this decision and reasons for the decision as Chairperson of this Discipline Panel and on behalf of the members of the Discipline Panel.