

**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: January 21-24, 2019

DECISION AND REASONS

This matter came on for hearing before a panel of the Discipline Committee (the “Panel”) on January 21-24, 2019 at the College of Nurses of Ontario (the “College”) at Toronto, Ontario

Paul Hirtle (the “Member”) was present and self-represented.

Publication Ban

College Counsel brought a motion pursuant to s.45(3) of the *Health Professions Procedural Code* of the *Nursing Act, 1991*, for an order preventing the public disclosure of the names of the nursing students referred to orally or in any documents presented in the Discipline hearing of the Member or any information that could disclose the identity of the nursing students, including a ban on the publication or broadcasting of these matters. The Member did not oppose the request.

The Panel considered the submissions of the parties and made an order preventing the public disclosure of the names of the nursing students referred to orally or in any documents presented in

the Discipline hearing of the Member or any information that could disclose the identity of the nursing students, including a ban on the publication or broadcasting of these matters.

Sealing Order

College Counsel also brought a motion pursuant to s.45(3) of the *Health Professions Procedural Code* of the *Nursing Act, 1991*, for an order preventing the public disclosure of Exhibits #22 and #23 presented in the Discipline hearing of the Member, including a ban on the publication or broadcasting of this information. The Member did not oppose the request.

The Panel considered the submissions of the parties and made an order preventing the public disclosure of Exhibits #22 and #23 presented in the Discipline hearing of the Member, including a ban on the publication or broadcasting of this information.

The Allegations

The allegations against the Member as stated in the Notice of Hearing dated September 20, 2018, 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 while you were employed as a clinical instructor for Confederation College, School of Health, Negahneewin and Community Services, conducting clinical placements at St. Joseph's Hospital in Thunder Bay, Ontario from February to April 2016, you contravened a standard of practice of the profession or failed to meet the standard of practice of the profession when you engaged in inappropriate conduct towards, and/or sexual harassment of, two nursing students, [Student A] and [Student B] when you:
 - a. Made sexual jokes and comments;
 - b. Stared at the students in an uncomfortable manner;
 - c. Flicked [Student A]'s ponytail;
 - d. Winked at [Student A] and rubbed her back;
 - e. Sent voice and text messages to [Student B] of a sexual nature, including a picture of a man pulling down his scrubs to show his penis (no face included) and a voice message that stated "I miss you. My wife is away," or words to that effect;
 - f. Touched [Student B]'s buttock while demonstrating how to move a [patient] from her bed;
 - g. Sent text messages to [Student A] of a sexual nature;
 - h. Told [Student A] that you wanted to "have sex with her butt," or words to that effect; and/or

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, while you were employed as a clinical instructor for Confederation College, School of Health, Negahneewin and Community Services, conducting clinical placements at St. Joseph's Hospital in Thunder Bay, Ontario from February to April 2016, 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 of the profession as disgraceful, dishonourable or unprofessional when you engaged in inappropriate conduct and/or sexual harassment of two nursing students, [Student A] and [Student B] when you:
 - a. Made sexual jokes and comments;
 - b. Stared at the students in an uncomfortable manner;
 - c. Flicked [Student A]'s ponytail;
 - d. Winked at [Student A] and rubbed her back;
 - e. Sent voice and text messages to [Student B] of a sexual nature, including a picture of a man pulling down his scrubs to show his penis (no face included) and a voice message that stated "I miss you. My wife is away," or words to that effect;
 - f. Touched [Student B]'s buttock while demonstrating how to move a [patient] from her bed;
 - g. Sent text messages to [Student A] of a sexual nature; and/or
 - h. Told [Student A] that you wanted to "have sex with her butt," or words to that effect.

Member's Plea

The Member denied all of the allegations set out in the Notice of Hearing of September 20, 2018. The hearing proceeded on the basis that the College bore the onus of proving the allegations in the Notice of Hearing against the Member.

Overview

The Member is a registered nurse who was employed as a clinical instructor for Confederation College, School of Health, Negahneewin and Community Services, conducting clinical placements at St. Joseph's Hospital in Thunder Bay, Ontario from February to April 2016. The Member allegedly behaved in an inappropriate way and/or sexually harassed two nursing students, [Student A] and [Student B], who were under the Member's supervision during their clinical placement.

The Panel heard evidence from 9 witnesses, including the Member, with 25 exhibits to consider. Two of the witnesses were the alleged targets of the Member's conduct in issue in this proceeding.

The Member was present and self-represented.

The Panel made findings of professional misconduct and determined that the Member contravened the standard of practice related to allegations 1(a), (b), (d) and a part of 1(e). The Panel also made findings of professional misconduct related to allegations 2(a), (b), (d) and a part of 2(e).

With respect to allegations 2(b) and (d), the Panel made findings that the Member's conduct was unprofessional.

With respect to allegation 2(a) the Panel made findings that the Member's conduct was unprofessional and dishonourable.

As to allegation 2(e), as it pertains to voice mail messages, the Panel made a finding that the Member's conduct was unprofessional, dishonourable and disgraceful.

The Panel finds with respect to allegations 1(c) and 2(c), that the Member did not breach the standard of practice, but demonstrated an error in judgment, and therefore the Member's actions did not constitute professional misconduct.

The Panel, based on the onus and standard of proof and the lack of clear, cogent and convincing evidence, dismissed allegations 1(f), (g), (h) and 2(f), (g), (h).

The Evidence

The Panel heard testimony from 9 witnesses. 25 Exhibits were presented as evidence. Some of these exhibits were copies of text messages allegedly sent between the Member and his students. College Counsel contended that the weight of witness testimony was most important to this hearing. It was acknowledged by College Counsel that text messages could not be verified or authenticated by the network provider due to the length of time between the date of the messages and when they were required for the hearing.

Witness #1 [Witness 1]

[Witness 1] was the [] of the School of Health, Negahneewin, and Community Services at Confederation College in Thunder Bay, Ontario during the time period of February 2016 to April 2016. Part of her role and responsibility [] included the hiring and supervision of clinical instructors. She was also accountable for staffing and student issues. [Witness 1] hired the Member as a clinical instructor for the period of February 2016 to April 2016.

[Witness 1] provided an overview describing the various clinical placements during an RPN program. In her testimony she described the role of a clinical instructor. She described several responsibilities of instructors including providing students with an overview of new skills and ensuring students have completed their research assignments. She also clarified the role of pre and post conferences. [Witness 1] stated that these conferences were to ensure the instructor is confident that students are able to practice safely and provide appropriate patient care. They were held at the beginning and end of each clinical shift. The role of the clinical instructor was described in Exhibit #6.

[Witness 1]'s testimony described the orientation process for clinical instructors of Confederation College. It included a review and understanding of all policies and procedures. Reference was made to Exhibit #7 which included the Personal Relationship Policy of Confederation College. This policy stated that employees "shall not become involved in a personal relationship with students".

In November of 2016, [Witness 1] received information from another clinical instructor about the Member's allegedly inappropriate conduct with two RPN students, [Student B] and [Student A]. She conducted an investigation which included separate interviews of the complainants and other students who were in the clinical group during when the alleged behaviour by the Member occurred. During these interviews [Witness 1] kept handwritten notes which she promptly converted to typed documents the same day of the interviews, all of which were provided as evidence in Exhibits #8, #9 and #11-#18.

[Witness 1] met with [Student A], [Student B], [Witness 4], [Witness 5] and [Student C] all of whom were students of the Member during the period February 2016 and April 2016. [Student C] was not a witness in this proceeding.

Exhibits #8, #9, #11-#18 inclusive were provided to the Panel containing [Witness 1]'s handwritten and type written notes from these interviews.

[Student A] provided [Witness 1] with text messages, allegedly from the Member to [Student A], as set out in Exhibit #10.

[Witness 1] assisted student [Student A] in completing the formal complaint process.

Once all the interviews were completed, [Witness 1] initiated a Safety Plan included in Exhibits #19 and #20, which included a "Do Not Trespass" order against the Member. This plan was shared with internal agencies and included student advice to walk in pairs and park closer to the building at night. Thunder Bay Regional Hospital was made aware of the Safety Plan.

The Member was subsequently put on a "do not hire" list at Confederation College as noted in Exhibit #21.

The Member was not advised by [Witness 1] or Confederation College of these actions.

The Panel found this witness to be credible. She was confident and consistent with her testimony and the Panel found no issue regarding the accuracy of her testimony concerning the process followed or documentation of student interviews.

Witness #2 [Student A]

[Student A] was a student of the Member during the clinical placement February 2016 to April 2016 at Confederation College, Thunder Bay, Ontario. The Member was her clinical instructor during this time.

She stated that she found the Member was "creepy" and "disgusting". She stated that the pre and post conferences at clinical included "sexual jokes" and discussions with sexual innuendos. She reported that the Member would touch her by rubbing her back while she was charting at a computer and it made her feel uncomfortable. She reported that after asking a question about a possible incision and drainage procedure to treat a patient with an edematous scrotum, the Member repeatedly called her "ball popper". She also recalled a sexual joke about a "hot dog" but did not recall the details.

[Student A] reported that the Member would repeatedly touch her ponytail while walking down the hallway. She described the behaviour of the Member as “flirtatious” and included “a lot of winking”. She also stated that he made her feel uncomfortable while demonstrating the “Gentle Persuasive Approach” during which the Member reached around her while holding her arm longer than normal in her opinion.

[Student A] also stated that the Member would look at her “up and down” which made her feel uncomfortable.

She testified that she had received text messages from the Member. Hard copies of the text messages in question were entered as Exhibit #10. In one text exchange [Student A] commented on a picture of a person holding a large fish. She reported the Member’s response was “that’s what she said”. [Student A] understood this as a sexual comment referring to his penis.

[Student A] provided her recollection of the lunch at the Foundry (a local pub) on the last day of the clinical placement for the students and instructors of a number of clinical groups. [Student A] testified that, while sitting at the table at the Foundry, she had a conversation with the Member of a sexual nature during which the Member referred to the fact that he had received nude photos from young females on Snapchat and asked to follow [Student A] on Snapchat, which she declined. The Member also insisted on hugging her for 6-7 seconds, which to her was longer than normal. She also stated that the Member told her he wanted to “fuck your ass” and it “freaked her out”.

Under cross-examination, [Student A] asserted that members of the clinical group at the Foundry, including instructors, would recall at least parts of this conversation.

[Student A] stated that she received text messages from the Member stating she was “a bad girl” and it made her feel uncomfortable. She testified that text messages received from the Member contained comments such as “you will have more luck staying out of trouble than me” which [Student A] felt was inappropriate. She subsequently blocked his number after telling her parents.

She recalled [Student B] showing her text messages believed to be from the Member including one with an image of a penis. Although no face was shown it was believed by [Student A] to be that of the Member. She also viewed messages that stated that the author, allegedly the Member, missed her ([Student B]) and that his wife was gone.

[Student A] also recalled the Member waiting for her at her next clinical placement after exiting the change room and asking her about [Student B].

She brought this information up to her next clinical instructor who encouraged her to report this information to [Witness 1].

The Panel found this witness generally credible as she was consistent in the details of her testimony.

Witness #3 [Student B]

[Student B] was a student of the Member during the clinical placement from February 2016 to April 2016 at Confederation College in Thunder Bay, Ontario. [Student B] described the Member's demeanour as "weird" and "odd". She recalled inappropriate comments with sexual connotations. She recalled a "hot dog" joke with a sexual reference but could not recall the details.

She also recalled the Member calling [Student A] "ball popper" multiple times. [Student B] also stated that she was fearful to ask questions because she was concerned about how it would be handled by the Member. She recalled that the Member would often "go off topic" and that she felt a "vibe" that did not seem right.

[Student B] recalled an incident when the Member was demonstrating the use of a "slider" sheet to transfer a patient, when he came up behind her, touching her on her hips above her buttocks, telling her to "use these muscles". This made her feel uncomfortable as he did not request permission to touch her. [Student B] confirmed that two people are needed to use a slider sheet, but she said that she did not recall anyone else being in the room except the Member, the patient and herself at the time of this incident. [Student B] described the Member demonstrating the "Gentle Persuasive Approach" and holding her arm longer than normal. This made her feel uncomfortable.

She also recalled inappropriate comments made by the Member during her clinical placement. She remembered other students looking at each other when the Member made inappropriate jokes or comments. [Student B] did not provide details of the jokes.

[Student B] described the lunch at the Foundry and that the Member stated that if he had a tequila shot he would not know what could happen. She estimated that the Member had five drinks but does not recall him having a tequila shot. She recalls the Member hugging her longer than normal at the Foundry, which made her feel uncomfortable as he was her instructor.

[Student B] stated that she exchanged text messages with the Member and received a number of voice mail messages from the Member for approximately 2 months after her clinical placement with the Member ended. She stated that the Member always initiated the conversation and she would reply intermittently. She stated that the Member's messages were overall sexual in nature and/or contained inappropriate comments.

Examples were "how r u...my wife is away" "come and visit me". [Student B] kept voice mail messages for a period of time from the Member. She testified she shared them with other students. She no longer has copies of these voice messages. [Student B] stated that the Member texted her requesting pictures of her and for her to "say something dirty". She also recalled him stating that if "my wife finds out", just say that she was calling for a reference. [Student B] recalled receiving a text apparently from the Member containing an image of a penis (no face shown). The male was pulling his "scrubs" down and she perceived it to be the image of the Member although no face was shown.

[Student B] admitted to sending sexual photos of herself by text to the Member, after his request for them, but that she believed the narratives within the texts were altered by the Member as submitted

in evidence by the Member (Exhibits #22-#23). She was fearful of repercussions if she refused his request in case he would be her clinical instructor in the future. She recalled other statements by the Member such as “Oh you’re so sexy” and “I like watching you in tight scrubs”.

The last call she received from the Member was enquiring if she knew why the College was contacting him. She stated she did not know.

The Panel found this witness to be generally credible and appeared sincere in her recollection of events. She also admitted to sending sexual photos of herself and appeared remorseful and embarrassed regarding her behaviour.

Witness #4 [Witness 4]

[Witness 4] was an RPN student during the clinical placement of February 2016 to April 2016 at Confederation College in Thunder Bay, Ontario. The Member was his instructor during this time. [Witness 4] confirmed that [Student B] and [Student A] were both students during this clinical placement. [Witness 4] described the Member as at first having a very “personable demeanour”. It later became apparent that there was a “creepy vibe” about the Member, according to [Witness 4], when he focused his attention on the female students of the group, particularly [Student B] and [Student A].

[Witness 4] also recalled that the Member would stare for prolonged periods of time, mostly at [Student B] and [Student A]. He also recalled the Member using certain people mostly [Student B] and [Student A] for demonstrations for clinical practice. [Witness 4] found this to be inappropriate.

[Witness 4] recalls during a demonstration of the “Gentle Persuasive Approach” that the Member held [Student B]’s hand for a long period of time. He found this different than what he usually had seen with this approach.

[Witness 4] described the Member’s demeanour with [Student B] and [Student A] as “flirtatious” and “smiling” and “joking” frequently with jokes of a sexual nature. He also recalled [Student A] had questioned the treatment of scrotal edema and recalled the subsequent nickname of “ball popper” which the Member used frequently in reference to [Student A]. He also recalled the Member flicking [Student A]’s hair.

He also recalled a sexual joke regarding a “hot dog”, but could not recall the details. [Witness 4] found this inappropriate and felt uncomfortable about it.

[Witness 4] was aware of the Member texting [Student A] and he recalled seeing the texts with words such as “bad girl”, “spanking” and “if only I was single”. [Witness 4] recalled feeling uncomfortable reading these messages and advised [Student A] to tell someone as they were inappropriate.

[Witness 4] had heard discussions regarding the penis image that [Student B] allegedly received from the Member, but did not see this image.

[Witness 4] did not attend the lunch at the Foundry.

The Panel found this witness to be generally credible as his testimony was consistent with that of others, including the “ball popper” comment and “hot dog” joke. He was honest in acknowledging not remembering some details.

Witness #5 [Witness 5]

[Witness 5] was an RPN student during the clinical placement of February 2016 to April 2016 at Confederation College in Thunder Bay, Ontario. She confirmed that the Member was her clinical instructor during this time period. [Witness 5] described the Member’s demeanour as more of a student than a teacher. She stated that pre and post conferences involved more joking around than helping students. She recalled that the Member’s jokes often referred to [Student B] and referenced her “joking about sexual activities and drinking with guys”. She did recall a joke about a “hot dog” and the Member stating that [Student B] liked hot dogs, inferring that they were sexual to her.

[Witness 5] also recalled the Member referring to [Student A] as “ball popper” after questioning the treatment for a scrotal edema. She recalled the Member using this term multiple times a day. [Witness 5] admitted to feeling uncomfortable with the amount of joking in pre and post conferences. She stated that [Student A] and [Student B] were both subjects of the Member’s attention.

[Witness 5] did not attend the lunch at the Foundry. [Witness 5] had heard about the penis image sent to [Student B] but did not see it.

The Panel found this witness to be generally credible as she was consistent and honest with her version of the events.

Witness #6 [Witness 6]

[Witness 6] is an employee of the College in the Role of Advanced Practice Consultant. Her role is the support of stakeholder engagement and the application of the *Professional Standards*, Revised 2002. She described the process that occurs when an enquiry is received by the College and how a Member would be directed to the relevant resources for support.

[Witness 6] stated that the *Professional Standard* is written ensuring the purpose is clear, it is easily understood, relevant and applicable to all roles and practice settings. The *Professional Standards*, Revised 2002 are applicable to all roles and practice settings. [Witness 6] affirmed that the purpose of a written standard is to provide a benchmark that is broad and contains principle based information to ensure public and other stakeholder awareness regarding nursing accountability.

Page 11 of the Practice Standard references “establishing and maintaining respectful, collaborative, therapeutic and professional relationships”, specifically in an educator role “to identify and support education related to professional and therapeutic relationships”.

Page 12 of this standard also addresses professional relationships with colleagues, including members and non-registered members. It also states how a nurse in an educator role demonstrates the standard by “supporting nurses in developing skills to address any unethical, unprofessional or unsafe behaviour of colleagues”.

The *Ethics* Standard was referenced in regard to the ethical values that underpin nursing practice. Reference was made to Page 10 “maintaining commitments to nursing colleagues” and the requirement of respect for colleagues as part of the standard. Page 12 referred to maintaining commitment to team members and colleagues which relates also to non-nurses.

The Panel found this witness to be credible in her role as Practice Consultant at the College. Her knowledge and testimony regarding the Practice Standard and *Ethics* Standard were clear and relevant to this hearing.

Witness #7 the Member

The Member graduated as a Registered Nurse (RN) from Lakehead University in 2013.

He was born and raised in Sudbury, Ontario. He testified to being married for 12 years to his second wife. They have 3 teenage boys.

The Member has worked as an RN in Long Term Care. He described the clinical environment for the clinical placement of February 2016 to April 2016 as including Alternative Level of Care and Palliative patients. The patient types included those with acquired brain injuries, dementia and those with chronic neurological disorders.

The Member presented seven letters of support from his current Director of Care, colleagues as well as former students. These were submitted as Exhibit #25.

The Member’s testimony included his role of a clinical instructor. The Member’s evidence was that he only looked at [Student A] to observe her in a clinical setting. He testified specifically about his role as a mentor and coach and the requirement to assist and monitor his students as they acquire clinical skills. His responsibilities also included assessing and grading the students. He acknowledged that his evaluation could have consequences to their education. The Member also admitted that this role was a position of power over students. His testimony included the acknowledgement that as an instructor, he set the tone of a professional environment, and that it was fair to set boundaries with students. In addition to his instructor role in February of 2016, the Member testified that he led 8-9 clinical groups at Confederation College from January to November 2016 at which time he was asked by Confederation College to not return to his position.

College Counsel referenced the Confederation Clinical Policy regarding relationships, which the Member admitted to knowing about.

The Member denied making any sexual or inappropriate jokes during the clinical placement February 2016 to April 2016. He denied recalling a conversation about [Student B] “partying and drinking”.

The Member also denied calling [Student A] “ball popper” or making jokes including a joke with a sexual reference to a “hot dog”.

The Member admitted that using these terms and or sexual jokes would be a breach of the Standard of Practice if he had committed these acts.

With reference to “winking”, the Member denied winking at students and agreed that this might be perceived as “flirting” and would also be perceived as breaching the Standard of Practice and considered unprofessional.

The Member’s testimony included agreeing with College Counsel that looking at someone “up and down” could be considered a sexualized act. The Member denied doing this and agreed that this would be considered a breach of the Standard of Practice.

The Member recalled one demonstration of a clinical procedure in a post conference. He did not recall any other demonstrations including a sliding sheet transfer. The Member did not recall using [Student A] for any clinical demonstrations.

In reference to “flicking ponytail” of [Student A], the Member does not recall touching her ponytail. He did state that he may have commented on the “dress code” which included students having their hair off of their shoulders.

The Member denied touching [Student A]’s back during her clinical placement with the Member.

The Member also denied touching the hips or buttocks of [Student B] during a sliding sheet transfer. He also testified that in order to use a sliding sheet, two students or nurses are required, one on each side of the patient. If another student was present they would have recalled the incident. If there was no one other than [Student B] and himself, he would have been on the other side of the bed for the demonstration and, therefore, not in a position to touch [Student B] as alleged.

The Member admitted to attending the lunch at the Foundry. He sat with the other instructors, one of one of whom was [Witness 8]. The Member admitted to having “one beer” and stated that his wife was previously married to an alcoholic so he does not drink heavily to avoid “being a trigger”. He did state that students offered to buy him a shot of tequila which he declined.

The Member also denied using the phrase, in reference to consuming alcohol, “I would not know what would happen”. The Member denied having any conversation with [Student A] of a sexual nature at the Foundry and adamantly denied that he had ever said to [Student A] that he wanted to “fuck your ass”.

The Member also denied hugging any students at the Foundry.

In reference to the texts provided in Exhibit #10, the Member denied that these messages were from him. He contended that some of the text messages were fabricated. He denied that there were any

text messages between himself and [Student A] after the clinical placement, but did admit to receiving texts from [Student B] including a partially dressed photo of [Student B].

The Member testified that he did not send the text message, including a picture of a man holding a fish, and contended that the image was taken off his Facebook page. It was an image of his ex-wife's cousin. He also stated that he would not fish for "steelhead" in April as stated in the message, as it is not in season and the water would still be frozen.

In reference to having Snapchat, the Member indicated that he is aware of what it is, but denied using it. He acknowledged that it could be used inappropriately to share photos and then discard them immediately.

The Member also stated that, had he known of these allegations sooner, he would have accessed his phone/text records earlier. Both the Member and College Counsel agreed that phone records are no longer available from the service provider after one year, with the result that it is not possible to verify their authenticity or the source of the messages.

The Member denied exchanging multiple emails, text messages or voice mails between himself and [Student B]. He also denied referencing that his wife was away as they do not travel separately. He also denied sending any images of his penis to [Student B].

The Member stated he was "shocked" to receive partially nude photos from [Student B] and was concerned about what would happen. Copies of these text messages from [Student B] were noted in Exhibits #22 and #23. The Member denied altering the dialogue in these text messages.

The Member testified that he was subsequently terminated from Thunder Bay Regional Health Sciences Center and St. Joseph's Care Group and that his contract with Confederation College was not renewed.

The Member presented evidence regarding Bill 132 with reference to Employer obligations regarding termination in Exhibit #24.

Exhibit #25 contained letters of support for the Member from his current Director of Care, colleagues as well as former students.

The Member was deemed to be a generally credible witness by the Panel in that he was internally consistent with his testimony.

Witness # 8 [Witness 8]

[Witness 8] was a colleague of the Member. She has been a registered nurse for 32 years. She attended the hearing via videoconference.

[Witness 8] held the role of clinical instructor for Confederation College during the time February 2016 to April 2016. She testified about the usual pre and post conference activities with instructors

and students. This time was intended to help students plan their day and to answer student questions.

[Witness 8] admitted her only relationship with the Member was in the clinical setting when instructors at times shared lunch breaks.

[Witness 8] recalled the lunch at the Foundry in April 2016 with instructors and students. She testified that she was sitting beside the Member and the students were at the other end of the table. She recalled the Member having a beer and consuming no other alcohol. She did not recall the Member speaking with the students. He would have had to talk around her or yell over her due to the seating arrangement. She did state she had left for the bathroom once but otherwise was at the table for approximately 1 hour when she and another instructor left the Foundry. She does not recall when and if the Member left at this time. She admitted that her hearing was “not the greatest” and admitted that noise interfered with her hearing. However, her evidence was that she would have heard inappropriate or sexual comments by the Member by virtue of her position sitting next to him. She testified that she heard no such comments.

[Witness 8] was not aware of any allegations against the Member until November 2016 when she learned of the Safety Plan from Confederation College initiated by [Witness 1]. [Witness 8] admitted to being “shocked” and “upset” regarding the allegations against the Member. [Witness 8] has had no previous knowledge or experience of similar behaviour with the Member.

When asked about students crossing boundaries, [Witness 8] recalled a clinical group sending “drunk” texts asking instructors to join “the party”. She stated that she advised the students that this would be crossing boundaries and to refrain from this practice.

The Panel found this witness to be generally credible. She was being honest about not being present at the Foundry for the entire time and that she was away from the table of students and instructors for a short period of time. She also acknowledged that she did not recall when the Member left the Foundry.

Witness #9 [Witness 9]

College Counsel sought leave of the Panel to call [Witness 9], [Student A]’s mother, as an additional witness following the close of the College’s case. She submitted that she had only become aware for the first time, as the Member testified, that his position was that he did not send the texts contained in Exhibit #10 to [Student A] and therefore, had been deprived of the opportunity to ask [Student A] questions to address this issue, so as to allow [Student A] to respond to the Member’s position. College Counsel relied on the rule in *Browne v. Dunn*, in support of her position

College Counsel, while indicating that she could have sought permission to recall [Student A] as a witness for this purpose, asserted that she preferred to seek permission to call [Witness 9], [Student A]’s mother, instead for the purpose of giving evidence about [Witness 9]’s discussion with [Student A] about texts [Student A] had received, in order to address the issue of whether the Member had sent them.

Without serious objection from the Member, the Panel allowed College Counsel to call [Witness 9] as a witness for this purpose. The Panel, the Member and College Counsel all agreed that videoconference was the preferred method. [Witness 9] was unable to provide testimony by videoconference therefore the Panel, the Member and College Counsel all agreed to accept her testimony by teleconference.

[Witness 9] confirmed that she is the mother of [Student A], who was an RPN student at the time of the allegations. She acknowledged knowing that her daughter was at the College to testify in a hearing. She admitted that her daughter, [Student A], read her inappropriate text messages that were allegedly sent from the Member.

[Witness 9] did not recall the exact content of the text messages as the events in question were 3 years ago. She testified to remembering that they were inappropriate. She also recalled [Student A]'s concern regarding the Member's behaviour during her clinical placement. [Witness 9] stated that she advised [Student A] that this was beyond what she could help her with and advised her to bring the information to her clinical supervisor. [Witness 9] did not recall when the conversation with her daughter regarding the texts occurred.

[Witness 9] did testify that she recalled that [Student A] did show the text messages to other students. She advised [Student A] to be clear on her facts.

This witness was truthful in that she admitted to not recalling the details of the text messages due to the time lapse, but acknowledged that they were inappropriate for an instructor/student relationship.

The Panel found this witness to be generally credible as she acknowledged that the time lapse left her unable to remember details of the text messages.

Final Submissions

College Counsel and the Member were in agreement that it had not been possible to obtain authenticating evidence concerning the text and voicemail messages in issue in this matter from the service provider because, as both parties agreed, the service provider only retained such information for one year and separate requests to the provider to confirm what text and voicemail messages relevant to this matter had been sent were first made by each party more than one year after the events in question. The Member contended that the delay on his part was the result of the fact that he had not learned of the allegations against him until well after the date on which [Student B] and [Student A] first brought their complaints to Confederation College.

College Counsel's submission was that in order for the Panel to conclude that the Member had not sent the text messages in question to [Student A], the Panel must accept that either (i) [Student A] was deliberately deceiving the Panel when she said that she had exchanged the text messages contained in Exhibit #10 with the Member or (ii) someone else texted these messages to [Student A] and she believed them to have been sent by the Member. She contended that neither of these possibilities has any ring of truth and that it was much more probable that [Student A] was telling

the truth and that the messages contained in Exhibit #10 are an accurate and complete record of the exchanges between [Student A] and the Member.

No copies of the text or voicemail messages the Member is alleged to have exchanged with [Student B] and, which form the basis for allegations 1(e) and 2(e) in the Notice of Hearing, were available at the hearing. [Student B]'s evidence was that she had deleted them before she approached Confederation College with her complaint. Once again, no authenticating information was available from the service provider because of the delay in requesting such information.

The Member provided copies of other texts purportedly between him and [Student B] (Exhibits #22 and #23) which contained sexualized, semi-clothed photographs of [Student B]. [Student B] accepted that she had sent these photographs to the Member but firmly asserted that the text message conversation, as contained in Exhibits #22 and #23, did not accurately reflect the actual conversation and that she recalled that conversation quite differently. Her clear implication was that Exhibits #22 and #23 could not be relied on as an accurate reflection of these text message conversation.

The College does not rely on anything in either Exhibits #22 or #23 in support of its case seeking to establish any of the allegations in the Notice of Hearing. Further, College Counsel indicated that she could not speak to the authenticity of Exhibits #22 and #23.

College Counsel accepted that some of the alleged acts that form the foundation of some of the allegations against the Member, as outlined in paragraphs 1 and 2 of the Notice of Hearing, occurred outside the time period referred to in those paragraphs, which is "while (the Member) was employed as a clinical instructor while conducting clinical placements at St. Joseph's Hospital from February 2016 to April 2016". College Counsel submitted, however, that the Panel can make findings against the Member in respect of such acts because the Member's conduct was the direct result of him being a clinical instructor during the time period of February 2016 to April 2016.

College Counsel also submitted that the credibility and reliability of witnesses needs to be assessed for honesty, consistency and their ability to observe issues they are providing evidence about.

College Counsel reminded the Panel that the evidence of witnesses was consistent regarding the informal behaviour of the Member and inappropriate jokes of a sexual nature occurring during the pre and post conferences.

It was also noted that [Student B], [Witness 5], [Witness 4] and [Student A] all recalled the Member using [Student A] and [Student B] repeatedly for demonstrations.

College Counsel indicated that the College is not asking the Panel to rely on similar fact evidence in respect of any of the allegations in the Notice of Hearing. Indeed, she cautioned the Panel against considering evidence in respect of one of the witnesses as probative with respect to any allegations of other witnesses. For example, she urged the Panel, in respect of the allegations relating to [Student A] to look directly to the evidence relevant to those allegations and not to apply, in that regard, any conclusions reached regarding the evidence of [Student B]. Instead, she urged the Panel to assess each allegation on its own with regard to the evidence that supports it.

College Counsel also presented two other cases with similar facts to those present in this case. In both cases the members were found to have breached the Standard of Practice and to have engaged in conduct that was disgraceful, dishonourable and unprofessional.

CNO vs Robichaud, 2016

This case considered sexual harassment in relation to an RN and colleagues. This member was found to have breached the standard and engaged in disgraceful, dishonourable, and unprofessional conduct.

CNO vs Phillips, 2016

This case involved sexual harassment in relation to an RPN and colleagues. This hearing proceeded by agreement with an admission of inappropriate conduct. The member was found to have engaged in disgraceful, dishonourable and unprofessional conduct.

In his final submissions, the Member adamantly denied all of the allegations in the Notice of Hearing of September 20, 2018. He also admitted that if he had committed any of the alleged behaviours his conduct would be considered disgraceful, dishonourable and unprofessional.

The Member's position was that he did not send any of the texts or voicemail messages to [Student A] or [Student B] that are the basis for allegations 1(e), 1(g), 2(e) and 2(g), and that the photocopies of the text messages purportedly between him and [Student A] in evidence as Exhibit #10 were not accurate or authentic in the sense that he did not send them. He pointed to the fact that, as he indicated in his evidence, he would not have been fishing for steelhead on April 17th, as portrayed in those texts, because the water would have still been frozen at the time. This assertion by the Member was not challenged or contested.

The Member alleged that Confederation College did not allow him the opportunity or time to authenticate the texts as he was not included in its investigation.

The Member also submitted that Confederation College did not attempt to authenticate the text messages involved in this investigation.

The Member contends that all the students could only recall one sexual joke and it was the same joke.

Following the hearing, the Panel requested further submissions in writing from the parties on the question of whether, if the Panel were to make any findings with respect to the Member's conduct which occurred after April 2016 and/or after the completion of the clinical placement, this could constitute professional misconduct as set out in paragraphs 1 and 2 of the Notice of Hearing given the specific reference contained in those paragraphs to "while (the Member was) employed as a clinical instructor for Confederation College from February to April 2016".

No further submissions were received from the Member.

College Counsel provided written submissions relying on the decision of the Supreme Court of Canada in *R. V. B. (G.)*, (1990) 2 SCR 30 (a criminal law case) as establishing that while the College must, in this case, prove the essential elements of the Member's conduct, the dates(s) on which any misconduct occurred need not be an essential element of such misconduct. In some cases, it may be, while in others it may not. The time the events occurred will be an essential element, College Counsel submitted, when the specific date(s) alleged are central to the Member's defence. Otherwise, the precise date(s) of the alleged acts are not essential elements of any misconduct alleged so long as the Member is provided with sufficient information to enable him to defend against the allegations.

College Counsel further contended that the essential elements of the allegations in the Notice of Hearing are (i) whether the Member engaged in the specific conduct set out in the allegations and (ii) whether he engaged in inappropriate conduct and/or sexual harassment towards [Student A] and [Student B] when he did so. Thus, College Counsel submitted that the Panel is able to make findings of misconduct against the Member in respect of acts that occurred outside the February 2016 to April 2016 time period.

The Panel accepts that the applicable legal principles concerning this issue are as outlined by College Counsel. The Member did not at any time submit that he was in any doubt about what the allegations against him were or what acts were being relied on by the College in respect of those allegations. Accordingly, the Panel finds that it may base potential findings of misconduct against the Member as alleged in the Notice of Hearing, on all acts for which sufficient evidence was presented in this matter, including those acts that occurred after April 2016.

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 for the reasons set out below, that the Member committed certain (but in some cases not all) acts of professional misconduct as alleged in allegations 1(a), 1(b), 1(d), 1(e), 2(a), 2(b), 2(d) and 2(e). With respect to allegations 2(b) and 2(d), the Panel finds the Member's conduct to be unprofessional. The Panel also finds that with respect to allegation 2(a), the Member's conduct was dishonourable along with unprofessional and showed a serious disregard for his professional obligations and that, with respect to allegation 2(e), the Member's conduct was disgraceful, dishonourable and unprofessional.

While the Panel finds that the factual basis for the acts of professional misconduct against the Member contained in allegations 1(c) and 2(c) has been established, the Panel has concluded that such acts do not constitute professional misconduct on the part of the Member as alleged, but rather constitute an error in judgment. Accordingly, the Panel dismisses allegations 1(c) and 2 (c).

Having considered the evidence and the onus and standard of proof, the Panel is unable to find that there is clear, cogent and convincing evidence establishing on the balance of probabilities that the Member committed acts of professional misconduct as alleged in paragraphs 1(f), 1(g), 1(h), 2(f),

2(g) and 2(h). Accordingly, for the reasons set out below, the Panel dismisses allegations 1(f), 1(g), 1(h), 2(f), 2(g) and 2(h).

Reasons for Decision

The Panel considered all the evidence, both in the form of witness testimony and exhibits. However the Panel gave no weight to Exhibits #8-#9, #11-#18 which constitute the notes made by [Witness 1] of Confederation College following her interviews with various students in connection with her investigation of complaints to Confederation College relating to the Member. While these notes were made exhibits without objection, none of the witnesses in this proceeding were taken to any of these exhibits or confronted during their testimony with these notes, let alone given an opportunity to address them. Accordingly, the Panel considered that it should be very cautious about giving any probative value to the contents of these exhibits and, in the end, has given the notes no weight. Neither party contended during the hearing that anything contained in these notes should be considered in connection with any of the allegations in the Notice of Hearing.

What follows are the reasons for the Panel's decisions concerning the eight separate allegations in each of paragraphs 1 and 2 of the Notice of Hearing. Because the factual circumstances underlying each of the eight allegations in each paragraph are identical, the Panel will address allegation (a) in both paragraphs 1 and 2 together and will also deal with each subsequent pair of allegations together. The Panel will also deal with allegations (e) and (g) in each of paragraphs 1 and 2 together since both of those allegations result from texts and, in the case of allegation (e), voicemails alleged to have been sent by the Member.

When assessing witness' credibility, the Panel used the criteria set out by the Divisional Court in the decision of *Re Pitts and Director of Family Benefits Branch of the Ministry of Community & Social Services* (1985), 51 O.R. (2d) 302, namely:

- (a) the witness' appearance and demeanour,
- (b) the witness' opportunity to observe,
- (c) the witness' capacity to remember,
- (d) the probability or reasonability of the evidence,
- (e) the internal consistency or inconsistency of the evidence,
- (f) the external consistency of the evidence, and
- (g) the witness' interest in the outcome of the case.

I Allegations 1(e), 1(g), 2(e) and 2(g)

The principle issue to be resolved involving all of these allegations is a factual one. Did the Member send the messages as alleged? His position is that he did not. The College maintains that he did.

There are three different sets of text and voicemail messages that were before the Panel in this proceeding:

- (i) The text messages relied on by the College for the purposes of allegations 1(g) and 2(g) and alleged to have been sent between the Member and [Student A], copies of which were filed as Exhibit #10;

- (ii) The text and voicemail messages relied on by the College for the purposes of allegations 1(e) and 2(e) alleged to have been sent between the Member and [Student B], of which no copies were entered as exhibits in this proceeding; and
- (iii) The text messages relied on by the Member and alleged to have been exchanged between the Member and [Student B], copies of which were filed as Exhibits #22 and #23. The College did not rely on this third set of text messages in respect of any of the allegations in the Notice of Hearing.

The Member disputed the authenticity of the first two sets of text and voicemail messages and asserted that he sent none of the messages in question and that he was not involved in the “conversations”. [Student B] directly disputed the authenticity of the third set of text messages and asserted that Exhibits #22 and #23 do not accurately reflect the “conversations” she had with the Member, although she did accept that she had sent the photos included in those “conversations” to the Member. College Counsel appeared not to accept the authenticity of this third set of text messages.

Dealing with the text messages referred to in (i) above, the Panel accepts that [Student A] received the text messages contained in Exhibit #10 and that she believed that they had been sent between herself and the Member. The fact that she consulted her mother, [Witness 9], about what to do following receipt of these texts, supports this finding and strongly leans away from any suggestion that [Student A] was part of any plan to fabricate these messages and to provide a false narrative in this proceeding.

The belief by [Student A] that the text messages in Exhibit #10 had been sent to her by the Member was, however, an assumption. [Student A] was not asked, and did not say, what, if any steps she took to confirm that the Member had sent these messages, nor was she asked how she may have concluded that this was the case. The Panel must, therefore conclude that she reached that conclusion solely on the basis that the messages on her phone indicated that they came from the Member.

[Student A]’s conclusion does not, therefore, lead inevitably to the conclusion that the Member did send these text messages to [Student A]. As College Counsel accepted, there is also the possibility that some third party sent them to [Student A] in such a way as to make them appear to have been sent by the Member.

No technological evidence from the service provider concerning the authenticity of any of these messages was available to the Panel for reasons already discussed.

If, as the College urges, the Panel is to discard the possibility that a third party might have sent these text messages and made them appear to have been sent by the Member, the Panel would need evidence concerning the ease or difficulty with which text messages can be sent by one person while appearing to have been sent by another. The College presented no such evidence in this proceeding. [Witness 9]’s evidence to the effect that [Student A] read her various texts and discussed what [Student A] should do in no way addresses the issue of whether the Member sent the texts, only the separate issue of whether [Student A] believed they were from the Member.

Similarly, the fact that [Student A] showed and discussed various texts with other students in no way addresses this issue.

The Panel is not in a position to make an independent assessment of how likely it is that someone else sent the texts in Exhibit #10 to [Student A] and presented them as having come from the Member. In the absence of any such evidence, the Panel lacks the necessary evidentiary record to make a finding on the balance of probabilities that the texts in Exhibit #10 were in fact sent by the Member. Accordingly the Panel finds that it has not been established that the Member sent the texts referred to in allegations 1(g) and 2(g) and those allegations are accordingly dismissed.

The same issue and analysis equally apply in respect of the text messages referred to in (ii) above that the Member is alleged to have sent to [Student B]. The same conclusion also applies with the result that the Panel concluded that the College's burden of proof to establish on the balance of probabilities that the Member sent these text messages to [Student B] has not been met. The result is that the portion of allegations 1(e) and 2(e) dealing with text messages must also be dismissed.

With respect to allegations 1(e) and 2(e), however there is a further issue. In these allegations, it is alleged that the Member also sent a number of voice messages to [Student B].

The authenticity of voice messages can be established by means of one additional factor not applicable in the case of text messages – voice recognition.

[Student B] was clear in her evidence that the voice messages in question were received by her from the Member but she was not asked how she came to that conclusion. While it would have been preferable if [Student B] had been asked to indicate how she concluded that the voice messages in question were from the Member, the Panel is prepared to accept that, on the balance of probabilities, [Student B] reached the conclusion she did based on her recognition of the Member's voice on the voice messages.

Accordingly, the Panel finds that, on the balance of probabilities, the Member did send the voice messages in issue in allegations 1(e) and 2(e). Further, the Panel finds, on the balance of probabilities, that one or more of those messages contained statements to the effect of "I miss you. My wife is away." [Student B]'s evidence was clear that that is what she heard on one of the voice messages. Further, the Member's position was not that he sent [Student B] voice messages, but that they were innocent and contained no such language. Rather, his position was that he did not send the voice messages in question. The Panel does not accept that position for the reasons given above.

In addition, the Panel finds that for the Member to say anything like "I miss you. My wife is away." to [Student B], a student for whom he had very recently had oversight responsibility as a clinical student was highly inappropriate and in breach of the standards. Such standards require nurses to act as a role model, be aware of how their behaviour affects others (*Professional Standards*, pp.10-12) and to be respectful towards colleagues and others, to uphold the standards of the profession and to conduct themselves in a manner that reflects well on the profession (*Ethics Standard*, pp. 10-11).

The Member's conduct in sending these voice messages fell well below that standard with the result that he failed to meet the Standards of Practice of the profession and committed professional misconduct as alleged in allegation 1(e).

In addition, the Panel finds that the Member's conduct in this respect was relevant to the practice of nursing (this issue was not disputed) and, having regard to all the circumstances, would reasonably be regarded by members of the profession as disgraceful, dishonourable and unprofessional. The Member's behaviour in sending a voice message of this sort, with what can only be considered to be a clear sexual innuendo, to [Student B], a very recent and possibly future clinical student of his, casts serious doubt on the Member's moral fitness and inherent ability to discharge the higher obligations the public expects professionals to meet.

Accordingly, the Panel finds that insofar as allegations 1(e) and 2(e) deal with voice messages, they are established. Those allegations are dismissed insofar as they deal with text messages.

II Allegations 1(a) and 2(a)

While allegations 1(a) and 2(a) allege that the Member made sexual jokes and comments in the plural, there was only evidence in this matter of one sexual joke and one comment with a sexual connotation by the Member. Accordingly, the Panel's consideration of these allegations is confined to that one alleged joke and one alleged sexual comment.

(i) Sexual Joke

The evidence of each of [Student A], [Student B], [Witness 4] and [Witness 5], all clinical students of the Member, was consistent on this point. They all testified that the Member made recurring references during their clinical placement to a hot dog joke. While [Student A], [Student B] and [Witness 4] were unable to recall any details about this joke, [Witness 5] testified that the gist of the joke was that [Student B] liked hot dogs because they had a sexual connotation for her.

(ii) Sexual Comments

The evidence of [Student A], [Student B], [Witness 4] and [Witness 5] was also consistent with respect to the single sexual comment, frequently repeated by the Member, that they could recall. Early in the clinical program, [Student A] had asked the Member about the appropriate treatment for scrotal edema (swollen scrotum) and enquired whether an incision and drainage could be used as treatment. All four student witnesses testified that, after that, the Member frequently and regularly referred to [Student A] as "ball popper". There can be no doubt that this term, if used, would contain a sexual innuendo.

Despite the Member's denial, the Panel is satisfied that, on the balance of probabilities, the Member did indeed tell the "hot dog joke" and did refer to [Student A] on multiple occasions as "ball popper". The "hot dog joke" was directed at [Student B] and the "ball popper" comment was directed at [Student A].

The evidence of the four students who testified was completely consistent on this point. The Panel was unable to find any reason as to why their evidence should not be accepted.

The Panel also finds that the Member's conduct in this respect, while supervising students for whom he had responsibility, was very inappropriate and in contravention of the Standards of Practice. Such standards require, among other things, that nurses demonstrate leadership, act as a role model and mentor, maintain respectful, collaborative relationships and maintain appropriate boundaries (Practice Standards, pp.10-11). The joke and comment in issue here fell short of those requirements with the result that the Member failed to meet the standard of practice of the profession when he inappropriately made a "hot dog joke" with a sexual connotation with reference to [Student B] and regularly referred to [Student A] as "ball popper", all as alleged in allegation 1(a).

Further, the Panel finds that the Member engaged in inappropriate conduct and/or sexual harassment of [Student A] and [Student B] when he made the "hot dog joke" and "ball popper" comments in relation to [Student B] and [Student A] respectively. Such conduct was relevant to the practice of nursing and would reasonably be regarded by members of the profession as dishonourable and unprofessional, though not disgraceful.

By making these comments in the clinical setting, the Member inhibited student participation in question and answer sessions and made [Student A] and [Student B], as well as, according to their own evidence, [Witness 4] and [Witness 5], feel uncomfortable, and with good reason. This behaviour of an instructor did not lead to a healthy, positive learning environment. The Member seriously disregarded his professional obligations when he chose to make these comments and knew, or ought to have known, that his conduct was unacceptable and fell well below the standards of the profession.

Accordingly, the Panel finds that the Member's actions were, in this respect, dishonourable and unprofessional. The Panel is not, however, persuaded that the Member's conduct in this respect rose to the level of disgraceful as the Panel is not convinced that these comments, misguided and inappropriate as they most certainly were, cast doubt on the Member's ability to discharge the higher obligations the public expect of professionals.

For the avoidance of any doubt or uncertainty on this point, the Panel simply states in conclusion on this point that the only sexual joke which the evidence establishes the Member told is the "hot dog joke" and the only sexual comment told by the Member, established by the evidence, is the "ball popper" comment.

Accordingly, allegations 1(a) and 2(a) are established.

III Allegations 1(b) and 2(b)

[Student A] and [Witness 4] both testified that the Member would stare at [Student A] repeatedly and, according to [Student A] would "look her up and down" in a way that she considered flirtatious. This made [Student A] feel uncomfortable and was regarded by [Witness 4] as inappropriate.

The Member denied this allegation, asserting that he only looked at [Student A] to observe her in a clinical setting.

In connection with this allegation, the Panel regards the combined evidence of [Student A] and [Witness 4] to be sufficient to establish, on the balance of probabilities, that the Member stared at and looked [Student A] up and down in an inappropriate manner. [Student A] and [Witness 4] were in the best position to assess how the Member was staring at [Student A] Further, [Witness 4] who was not the target of this action, entirely corroborated the evidence of [Student A] on this point. The Panel was unable to find any reason as to why [Student A]’s and [Witness 4]’s evidence on this point should not be accepted.

The Panel considers such behaviour to be relevant to the practice of nursing and would reasonably be regarded by members of the profession as unprofessional and constituting a breach of the Standards of Practice, specifically pp.10-12 referencing that ethical nurses are concerned about the well-being of nursing colleagues and are respectful to each other; and role-modelling professional values, beliefs and attributes. The Panel is not satisfied that these acts, on their own, show an element of moral failing on the part of the Member or fall sufficiently far below the standards expected of a professional so as to be dishonourable. Further, the Panel is not satisfied that these actions, by themselves, constitute disgraceful conduct as they do not show an element of moral failing on the part of the Member as opposed to a failure by him to understand the expected behaviour in a professional setting.

Accordingly, allegations 1(b) and 2(b) are established as unprofessional.

IV Allegations 1(c) and 2(c)

The evidence of [Student A] and [Witness 4] to the effect that the Member flicked [Student A]’s ponytail on more than one occasion is sufficient to establish, on the balance of probabilities, that the Member did, in fact, flick her ponytail multiple times during the clinical placement. The precise context in which this occurred was, however, not made clear by either [Student A] or [Witness 4].

While such behaviour on the Member’s part could, in certain circumstances, easily be annoying, the Panel is not satisfied that, on a stand-alone basis, it either contravenes a standard of practice or constitutes disgraceful, dishonourable or unprofessional behaviour so as to amount to professional misconduct.

Rather, the Panel considers such behaviour to constitute an error of judgment on the Member’s part. The Panel hastens to add, however, that behaviour of this sort is not to be encouraged.

Accordingly, allegations 1(c) and 2(c) are dismissed.

V Allegations 1(d) and 2(d)

Despite the Member’s denial, qualified by lack of total recall, the evidence of N.K is sufficient to establish that, on the balance of probabilities, the Member did wink at [Student A] and did rub her back while she was charting. The fact that the Member’s actions may not have been observed by other witnesses is, in this instance, not surprising since these actions on the part of the Member are capable of occurring without drawing widespread attention.

The unwanted attention and physical contact involved in these actions made [Student A] feel uncomfortable, and reasonably so. Therefore, with respect to allegation 1(d) the Panel finds that these actions by the Member constituted a breach of the Practice Standard (pp 10-12) specifically referencing “a nurse demonstrates leadership through respect, trust, integrity”; “maintaining boundaries between professional therapeutic relationships and non-professional personal relationships” and “each nurse establishes and maintains respectful, collaborative, therapeutic and professional relationships”.

With respect to allegation 2(d), the Panel also found that as a result, the conduct of the Member is relevant to the practice of nursing, and would reasonably be regarded by members of the profession as unprofessional. These recurring actions on the Member’s part represented a serious and persistent disregard for his professional obligations as unwanted touching (in respect of the back rubbing) and winking (with a flirtatious overtone involved) are inappropriate and unprofessional. The Panel is not satisfied, however, that this conduct is sufficiently serious to constitute dishonourable or disgraceful conduct by the Member. The Panel is not satisfied that these acts, on their own, show an element of moral failing on the part of the Member or fall sufficiently far below the standards expected of a professional so as to be dishonourable. Further, the Panel is not satisfied that these actions by themselves, constitute disgraceful conduct as they do not show an element of moral failing on the part of the Member as opposed to a failure by him to understand the expected behaviour in a professional setting.

Accordingly, allegations 1(d) and 2(d) are established as unprofessional.

VI Allegations 1(f) and 2(f)

[Student B] testified that, while demonstrating to her how to move a [patient] from the [patient’s] bed using a slider sheet, the Member, without asking permission, touched her buttock or hip and told her to “use these muscles”. [Student B]’s evidence was that she did not recall anyone being in the [patient’s] room at the relevant time, other than [Student B], the Member and the [patient]. The [patient] did not testify in this proceeding.

The Member’s evidence and submission was that if he were demonstrating how to use a slider sheet and only he and D.H, were present with the [patient], he would have necessarily been on the other side of the [patient’s] bed from [Student B] because using a slider sheet requires two people, one on either side of the [patient’s] bed. The Member’s position, therefore was, in that situation, he would not have been in a position to touch [Student B] on the buttock, hip or otherwise. The College did not take issue with the Member’s submission concerning the requirements for the use of a slider sheet.

In her evidence, [Student B] agreed that two people are needed to use a slider sheet but nonetheless testified that she recalled the Member being behind her and touching her hip.

Given the Member’s persuasive explanation for why this alleged touching could not have occurred while he was demonstrating the use of a slider sheet to [Student B] without the presence of someone else other than the [patient] in the room, along with the lack of any evidence supporting the conclusion that there was any one else in the room, the Panel is not satisfied that the College has

satisfied its burden of proof in respect of these allegations. Therefore, it has not been established, on the balance of probabilities by clear, cogent and convincing evidence that the Member did in fact touch [Student B] while demonstrating the use of a slider sheet. The Member's position is at least equally persuasive in favour of the conclusion that no such touching could feasibly have occurred in the circumstances described by [Student B]. [Student B] for her part, neither (i) provided a reasonable explanation as to how the Member was demonstrating the use of a slider sheet standing on the same side of the bed as [Student B] (so as to be in a position to touch her) if no one else was present to participate in the demonstration, nor (ii) established that there was another person present in the room who could have been on the other side of the bed for the demonstration.

Accordingly, allegations 1(f) and 2(f) are dismissed.

VII Allegations 1(h) and 2(h)

[Student A]'s evidence was that while the group of clinical students and instructors was sitting at the table at the end-of-clinical-practice lunch at the Foundry, she had a conversation with the Member that was sexual in nature, beginning with the Member's comment that young females had sent him nude photographs on Snapchat and getting "worse" from there. During the course of this conversation, which [Student A] testified occurred while the group of clinical students and instructors was in the vicinity, [Student A] asserted that the Member told her he wanted to "fuck her ass". In cross-examination, [Student A] was asked if those in the clinical group would recall portions of this conversation. She replied that they would.

[Witness 8], a colleague of the Member and a fellow instructor in the same clinical program, attended the lunch at the Foundry. Her evidence was that she was sitting beside the Member at the table. She further testified that the Member had no conversation of the sort described by [Student A] while [Witness 8] was at the table. [Witness 8] admitted that she had left the table to use the washroom at one point and that she was not certain whether she left the Foundry before or after the Member but she was firm in her evidence that there had been no such conversation between the Member and [Student A] while she was at the table.

[Witness 8] readily conceded that her hearing was "not the best" but she nonetheless rejected the possibility that the Member had any conversation with any student while she was sitting at the table that she had not heard. Her evidence was that the Member and any student would have had to yell over her.

The Member, for his part, categorically denied this allegation.

[Student B], who also attended the Foundry lunch, did not, in her evidence, indicate either that she had heard any conversation of the kind in issue between the Member and [Student A], or that [Student A] had told her anything about any such conversation in the months following, despite the fact that N.K and [Student B] both testified that they had shared various details of their interactions with the Member over the summer of 2016.

[Witness 4] and [Witness 5] did not attend the Foundry lunch so neither had any opportunity to hear any conversation that might have taken place there between [Student A] and the Member. Neither [Witness 4] nor [Witness 5] testified to having heard anything from anyone about this comment that the Member is alleged to have made to [Student A] at any time after the lunch at the Foundry.

In the result, [Student A] was the only witness to have reported hearing the Member make this comment. Further, she accepted in her evidence that, given the circumstances and environment at the Foundry, other members of the clinical program in attendance would recall the conversation she gave evidence about. However, in fact, no other member of that party testified to having heard anything like the conversation [Student A] described and [Witness 8], while not able to provide definitive evidence about the entire time period in question, firmly denied having heard any such conversation. College Counsel, while pointing out the qualifications in [Witness 8]'s testimony based on her absence(s) from the table and her less than perfect hearing, nonetheless accepted that [Witness 8] was an honest witness.

Based on all the evidence, the Panel has determined that the College has not met its burden of proof and has not established, by clear cogent and convincing evidence, that it is more likely than not that the Member had the alleged conversation with [Student A]. The Panel finds that, given the environment at the Foundry, other members of the clinical program party likely could and probably would have heard any such conversation had it occurred. Yet, no witness other than [Student A] testified to that effect and [Witness 8] testified to the opposite effect.

Accordingly, allegations 1(h) and 2(h) are dismissed.

Resumption of Hearing for Penalty

Given the Panel's determinations in this Decision, the Hearings Administrator will contact the parties to schedule a date on which the hearing will resume to address the issue of penalty.

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.