



Discipline Appeal Committee

[REDACTED]

Appellant

v

Susan Fox

Respondent

Counsel for the Appellant: Mr. Frank Miller (Frank Miller Law)

Counsel for the Respondent: Ms. Claire Bebbington (McTague Law Firm LLP)

Discipline Appeal Committee (DAC)

Professor Reem Bahdi (Chair)

Ms. Ghadeer Al Ghosein

Ms. Grace Liu

DECISION

I. Background and Context

A. The Adjudicator's Sanction: Indefinite Denial of Registration in the Nursing Program

[REDACTED] committed a serious offence. On April 26, 2016, he falsified the medical records of two patients while he was completing a placement at Windsor Regional Hospital. In response, Dr. Sue Fox, the Associate Dean of Nursing, issued a sanction of denial of registration in the Nursing program to [REDACTED] for an indefinite period of time.

Associate Dean Fox explained that she ordered this sanction because she believed that ordering suspension would restrict [REDACTED] from applying to other programs at the University of Windsor. While Nursing does not want him back, neither do they want to prevent him for attending another program. We understand that [REDACTED] has effectively been removed from the Nursing Program and that without a termination date set on the denial of registration order, he has no or little prospect of returning to the Nursing program. In effect, he has been expelled from Nursing.

Associate Dean Fox acted to protect the Nursing Faculty's reputation and the reputation of the University of Windsor within the medical community. She also sought to emphasize to the student body the importance of living up to professional and ethical standards. Ultimately, she acted out of a conviction that [REDACTED] conduct suggests a lack of the good character necessary to live up to the ethical standards of the nursing profession. As a member of the nursing profession and Associate Dean of a professional faculty, Dr. Fox has an obligation to give effect to the relevant rules of professional conduct.

[REDACTED] admits to falsifying medical records on April 26, 2016. His appeal before this committee involves the question of whether the sanction was proportionate to the offence committed. Proportionality, on the facts of this case, is intimately tied up with the question of whether there are aggravating or mitigating circumstances.

The Committee is unanimous in its decision that the sanction imposed was disproportionate having regard for all the circumstances. Our reasons for varying the sanction are set out below, followed by our sanction order.

B. The False Medical Records of April 26, 2016:

██████████ was assigned to patients at Windsor Regional Hospital as a student nurse. As part of his duties, he was required to assess and record medical details for two patients on their respective patient charts. The information recorded on the patient chart is the principle means of communication between nursing staff about the ongoing condition of a patient. It is used to help determine the nature of the care required by a patient, including the type and quantity of medication given.

On the morning of April 26, 2016, ██████████ falsified the medical records for two patients. For example, ██████████ estimated the patients' heart rate based on previous entries and recorded these estimates instead of actually taking the patients' heart rates and recording the true measures.

This incident came to the attention of ██████████ sessional clinical instructor, ██████████ largely by chance. ██████████ is a registered nurse and the course instructor responsible for supervising ██████████ work as well as the work of other students. She was on site at the hospital on April 26. While ██████████ checked in with students on a regular basis, she did not constantly watch ██████████ or any other student. Instead, ██████████ like the other students, was trusted to perform his assigned tasks with the requisite care, competence and skill.

Early in the afternoon of April 26, ██████████ witnessed ██████████ another nursing student rushing to tend to ██████████ patients. ██████████ questioned ██████████ who explained that ██████████ had revealed to her and other students over lunch that while he had spoken to his patients and considered their physical wellbeing in this way, he had in fact not performed the full assessments required. Instead, he had read their previous chart entries and recorded estimates of the required medical information. ██████████ was on her way to make up for ██████████ actions by doing the assessments herself.

██████████ confirmed ██████████ report by speaking with the other students and the patients in question. She then confronted ██████████ who initially denied that he had made up the chart entries. When pressed, he admitted that he had falsified the information. No one was hurt but ██████████ conduct shocked ██████████. She advised ██████████ that he was required to pack up his belongings and leave the hospital immediately.

Associate Dean Fox was informed. She conducted her own investigation which lead to ██████████ indefinite denial of registration in the Nursing program. The question before us is whether such an order is justified in light of the requirements of Bylaw 31.

II. What Is The Relationship Between Bylaw 31 and The CNO Standards And How Does This Relationship Factor Into Assessing ██████████ Conduct?

We were directed to the CNO, Practice Standard, Ethics [hereinafter "The Standards"] as the proper measure against which to judge student conduct. Associate Dean Fox explained in the document entitled "Decision of Associate Dean" (AI Form 2, Tab 24, Disclosure Materials, Associate Dean Fox) that her sanction decision was based on the understanding that "all students are well aware of, and are required to abide by" these standards.

Associate Dean Fox considered the fact that ██████████ was at the end of his third year of a four-year program and thus should be aware of The Standards, an aggravating factor in her decision. Associate Dean Fox determined that ██████████ breached The Standards pertaining to: i) documentation; and, ii) ethics (AI Form 2, Tab 24, Disclosure Materials, Associate Dean Fox).

There is no question that he breached The Standards pertaining to documentation on April 26. Associate Dean Fox explained that she went beyond the sanctions identified in Bylaw 31 because of the seriousness of [REDACTED] conduct on April 26 and the circumstances surrounding it.

Acting for [REDACTED] Mr. Frank Miller, suggested that professional standards are best left to professional bodies. In other words, [REDACTED] should be considered a student, not a professional and the institutional response to his bad behavior should emphasize "teachable moments." Accordingly, we were urged to accept that the discipline process as it has unfolded so far constitutes sufficient sanction. If other sanctions are to be imposed, Mr. Miller argued that they should not exceed suspension for 4 months.

Mr. Miller provided us with examples of sanctions imposed by the CNO on members who had falsified medical documentation. In no case did the College revoke the member's license to practice. In every case that was brought to our attention, the CNO suspended the nurse in question for a limited period. In *CNO and Barry*, for example, the sanction imposed for repeated failures to keep accurate records included a one-month suspension. While all of the cases presented can, of course, be distinguished on the facts, the main message is that none of those presented to us have lead to expulsion from the profession even where the impugned conduct is more serious than of [REDACTED].

Acting on behalf of the University of Windsor, Ms. Claire Bebbington argued that [REDACTED] should be given a higher sanction than the CNO would impose on registered nurses because the nurses had already proven themselves capable of living up to their professional standards and have built up their reputations within the medical community. Any lapses by nurses should thus be considered isolated breaches. Ms. Bebbington pointed out that [REDACTED] has already begun to breach the rules early in his career. The suggestion is that the passage of time will only make him more inclined to violate his professional obligations. We were thus urged to accept a more severe sanction in response to [REDACTED] conduct than a tribunal would impose on a fully fledged member of the College of Nurses for substantially similar – or even worse – conduct.

Ms. Bebbington also presented us with cases in which the Judicial Panel and the Discipline Appeals Committee expelled students. Most of the cases involve repeated deceptions by the student. The Judicial Panel and Discipline Appeals Committee have ordered or upheld decisions to expel students for offences such as forgery and fraud from the University. Ms. Bebbington stressed that falsification of medical records constitutes, at minimum, a similarly serious offence to those offences which have previously lead to expulsion from the University.

But, all of the cases in question relate to the previous discipline process as defined by the previous version of Bylaw 31. The Bylaw and the related discipline process have since undergone significant review. The current regime emphasizes that education and re-engagement form part of the desired response to proven ethical breaches.

The mission of the academic integrity system, of which this bylaw forms a part, is to uphold a culture of academic integrity – the foundation of academic life within our community – through education, enforcement and re-engagement. (Bylaw 31, Preamble)

Accordingly, we cannot accept either the position that Nursing students should be held to a higher standard than nursing professionals or the position that a Nursing student should be treated as any other student. The proper standard by which [REDACTED] conduct is to be judged lies somewhere in between full-fledged professional and student. As a corollary, we are bound by Bylaw 31, including its underlying principles of education, enforcement and re-engagement in rendering a decision. But, we cannot ignore the profession specific rules in our interpretation and application of Bylaw 31.

If this Committee were to hold that Nursing students are to be held to a higher standard than nursing professionals, we would be setting the bar for all students, not simply [REDACTED]. We only need to have regard for other sections of The Standards and the overall circumstances of the case before us to caution us against setting such a bar. We note, for example, that The Standards highlight the obligation of nurses, as a self-regulating profession, to report troubling peer behaviour. At page 11, The Standards discuss the obligation of "reporting to the appropriate

authority any nursing colleague whose actions or behaviours towards clients are unsafe or unprofessional..." The scenario presented on the same page involves an ethical conflict between a nurse who, for various reasons, has failed to assess a patient properly and a nurse who does not want to add to a colleague's stress by reporting her. Nonetheless, under "Behavioural directives," The Standards suggest that reporting is necessary and required by the obligation owed to the profession.

Accordingly, students who fail to report the conduct of one of their peers would also have to face discipline with sanctions that should, at least in theory, surpass those that would be imposed on nurses in similar circumstances. We do not want to establish such a regime.

Our review of The Standards gives rise to two interdependent points that influenced our approach to the appropriate sanction in this case. First, students can be at different stages in the evolution of their professional development but are required to ultimately prove the strength of their professional judgments. Second, instruction about the nature and scope of professional duties constitute an ongoing part of nursing education.

At the same time, the added responsibility given to Nursing students as distinct from other students on campus, requires a different set of expectations. Ultimately, it makes no difference to a patient if a lapse in care falls to a student or a registered nurse. A failure to provide care is a failure to provide care. Moreover, the range of interests identified by Associate Dean Fox do not necessarily arise when a student outside of Nursing fails to live up to expectations.

Ultimately, absent other compelling, aggravating circumstances, students, including Nursing students, will ordinarily be given the opportunity to redeem themselves.

III. Were We Presented With Other Sufficient Aggravating Circumstances In This Case To Warrant The Adjudicator's Sanction?

Associate Dean Fox determined that [REDACTED] had violated The Standards requirement to document on more than one occasion. A concern about repeated falsification of medical records factored into the Associate Dean's sanction decision.

A. Has It Been Established That [REDACTED] Has Repeatedly Falsified Records?

The Associate Dean's decision to indefinitely deny registration in the Nursing Program to [REDACTED] was made in light of her conviction that his conduct on April 26 was indicative of a pattern of behavior. In other words, she had determined that he had falsified medical records on several occasions. This conclusion weighed heavily in the sanction imposed.

There is no direct evidence that [REDACTED] had repeatedly falsified medical records. Associate Dean Fox came to this conclusion based on e-mails received and conversations she had with students in [REDACTED] class. Dr. Fox received and put into evidence e-mails from [REDACTED], [REDACTED], [REDACTED] and [REDACTED]. Only [REDACTED] testified directly before the Committee.

The relevant e-mail from [REDACTED] is dated May 4, 2016. It explains that he was present at the lunch on April 26, 2016 and that he heard [REDACTED] say that he had falsified records that morning. His e-mail also indicates that [REDACTED] has a habit of recording false patient information. [REDACTED] writes,

There have been approximately 6-8 times between January 2016 and April 26 2016, that [REDACTED] has stated to me that he didn't take vital signs or perform head to toe assessments on his clients as well as saying "all you have to do is get a good visual of the client to understand if they are okay". Upon making these statements he would laugh as if he was getting away with not having to perform any of his assessments.

██████████ however, did not testify before the Committee. There is no indication that he reported any of the previous incidents to anyone in a position of authority prior to May 4, 2016. None of these alleged incidents were investigated by the Associate Dean after the April 26 incident was uncovered.

██████████ e-mail is dated May 6, 2016. ██████████ indicates in this email that ██████████ had told her that he has falsified medical records in the past: "... as long as the vitals and head to toe that was previously charted looked normal, he would just vary the numbers." ██████████ explains that she thought that he was joking when they had this conversation. ██████████ did not testify before the Committee.

██████████ e-mail is dated May 6, 2016. ██████████ was at the lunch in which ██████████ indicated that he did not do vitals that day. Like her peers, ██████████ indicates in her e-mail that ██████████ also made a general statement about not doing assessments or taking vitals on previous days. ██████████ did not testify before the Committee.

██████████ is the only student who provided an e-mail to Associate Dean Fox and who testified before us. ██████████ e-mail is dated May 6, 2016, and also recounts the lunch encounter with ██████████. In the e-mail, she explains that ██████████ admitted to her and two other student colleagues over lunch that he had falsified the medical records of two patients that morning. Her e-mail also indicates that she pressed ██████████ about the importance of proper assessment and that he replied that "he never does them unless a teacher is present."

However, in her testimony, ██████████ pulled back significantly on her conclusion that ██████████ conduct of April 26 represented a pattern of behavior. When pressed about whether ██████████ lunch-time comments meant that he did not do assessments or take vitals as required on April 26 or whether he meant that he did not do them on *any* day, ██████████ indicated that she was not altogether certain. Her inability to be certain in her oral testimony is crucial. It undercuts the more definitive statements made in her e-mail. While ██████████ remained firm that ██████████ said that he would do the assessments only if a professor was around, this falls short of establishing a pattern of falsifying records. The claim that he failed to perform assessments is not the same as an admission to repeatedly recording false information.

Dr. Fox relied on the student e-mails to conclude that ██████████ repeatedly falsified information. She explained that she also spoke to the students. However, no notes of Dr. Fox's meetings with the students were provided to the Committee and Dr. Fox did not testify about any details of her meetings with the students.

Dr. Fox explained that she believed the statements made by the students in their e-mails were true because they had no reason to lie. However, without the benefit of hearing the students' testimony, we cannot determine if they, like ██████████ would also qualify the statements made in their e-mails in some way.

Given that ██████████ qualified the information she provided in her e-mail in her testimony and given that the other students did not testify, we cannot take the e-mails on their face value or conclude that they provide an accurate picture of ██████████ conduct. Overall, we find that the burden of demonstrating that ██████████ had more likely than not repeatedly falsified records beyond the April 26 incident has not been made out on the evidence presented to us.

We hasten to add that had it been established that ██████████ had a record of falsifying information, we would have been more inclined to uphold the sanction imposed by Associate Dean Fox.

B. Has It Been Established That ██████████ Has A General Disregard For Patient Health, Well-Being and Safety?

Dr. Fox testified that ██████████ is beyond professional redemption in that he has demonstrated his inability or unwillingness to live up to The Standards requirement of ethical conduct. This was another aggravating factor in her decision. Dr. Fox reached the conclusion that ██████████ represents a risk to the profession based on a number of factors. We have addressed the concern about repeated falsification of records above. In addition, in completing AI Form 2, Dr. Fox emphasizes ██████████ attitude as evidence of his inability to live up to professional standards.

In particular, the form stresses [REDACTED] "attitude when communicating this practice [of recording inaccurate medical information] to his peers" (Tab 24 in Disclosure Materials, Associate Dean Fox).

Again, the e-mails submitted after the April 26 incident by [REDACTED] peers prove central. For example, in one e-mail dated April 27, [REDACTED] describes [REDACTED] as immature. In another e-mail dated May 4, [REDACTED] describes how [REDACTED] laughed when confiding in him and others that he had not completed his assessment on April 26. [REDACTED] concluded that [REDACTED] was laughing because he was delighted at "getting away with not having to perform any of his assessments" (E-mail from [REDACTED] to Susan Fox, May 4, 2016, Tab 14 in Disclosure Materials, Associate Dean Fox)

These peer reports helped form Dr. Fox's conclusion that [REDACTED] was too cavalier in his approach to patient care and that he believed that the matter of falsifying information on April 26 was "not a big deal."

In her testimony, [REDACTED] described [REDACTED] as someone who likes to joke around. We are left with the overall impression that it is sometimes difficult to determine if [REDACTED] is serious or not.

[REDACTED] has indicated that she will not continue to supervise [REDACTED] under her license and is uncertain whether she will continue to teach in the Nursing program after this incident. Her reluctance is understandable. [REDACTED] has broken [REDACTED] trust and it is not clear if he can take measures to repair that trust.

At the same time, [REDACTED] made clear that [REDACTED] possesses the willingness and skill to protect patient safety and well-being. [REDACTED] indicated the same. Their testimonies, notwithstanding their concerns around the events of April 26, paint a picture of a caring and competent individual. Both witnesses indicated that [REDACTED] builds good rapport with his patients; he takes the time to speak with them, listens to their concerns, and they appear to like him. [REDACTED] noted that she had occasion to watch him perform assessments and observed that he does them "very, very well."

The evidence before us presents a complex picture. We cannot conclude based on the evidence before us that it is more likely than not that [REDACTED], as a matter of attitude or character, is unable or unwilling to care about patient health and safety. In reaching this conclusion, we are of course not making a determination under the CNO Standards but are responding to arguments and evidence presented to us about the nature and significance of [REDACTED] attitude.

C. Is Substance Abuse An Issue?

Dr. Fox also listed this issue as an aggravating factor that informed her sanction decision (AI Form 2, Tab 24 in Disclosure Materials, Associate Dean Fox). In reaching this conclusion, Dr. Fox relied on reports from [REDACTED] peers. However, this matter was not raised or argued before us. As it has not been established, we cannot consider it an aggravating factor.

D. Was There Evidence that [REDACTED] Had Lied to Dr. Fox?

Dr. Fox believes that [REDACTED] lied to her about missing clinical days and she listed this issue as an aggravating factor in her decision to deny [REDACTED] registration into the Nursing program indefinitely. Her notes indicate that during their meeting of May 26, he had admitted to not being truthful about missing clinical days. Dr. Fox's repeated the same concerns in her testimony.

We accept that Dr. Fox's concerns about [REDACTED] honesty were heightened by his failure to acknowledge that he had previously missed clinical days and that this lie raises serious concerns about [REDACTED] respect for his instructors. We note that [REDACTED] also expressed the same concern about lack of respect in her midterm assessment of [REDACTED].

We therefore have come to the conclusion that [REDACTED] more likely than not, was not fully forthcoming throughout his dealing with Dr. Fox even though he eventually owned up to his failures.

IV. Are There Mitigating Factors That Should be Taken Into Consideration in the Assessment of Sanction Imposed?

[REDACTED] explained that about two weeks prior to April 26, his father chose to abandon his family by moving out of the country. [REDACTED]

[REDACTED] He was in fact late in attending his shift on April 26 because he had been on the phone with his father until the early hours of the morning trying to reason with him.

Dr. Fox did not consider these circumstances mitigating factors. She noted that [REDACTED] professional obligations require him to disclose any problems that might affect patient care to his supervisor so that alternative arrangements could be made.

[REDACTED] acknowledges that in hindsight he should have brought this matter to his supervisor's attention. He claims that his family situation clouded his judgment. Although his testimony was confusing at times, he indicated that he knew on April 26 that what he had doing was wrong; if he had listened to the voice inside of him at the time, he would have acted differently. At the same time, he did not fully appreciate the seriousness of the conduct in question. This was in part driven home to him through the Bylaw 31 process.

In crafting a sanction, Bylaw 31 requires us to take [REDACTED] family circumstances seriously without negating his obligations under the CNO standards.

V. The Interests at Stake and the Sanctions Imposed

Having heard and carefully weighed the evidence presented to us, we have come to the conclusion that a sanction short of indefinite denial of registration in the Nursing program would further the interests at stake. We have weighed the following factors against the seriousness of the conduct at issue:

- the lack of evidence establishing a repeated pattern of behavior
- the fact that even if a pattern were established, the cases presented to us suggest that the CNO itself would impose a lesser sanction than has been imposed against [REDACTED] and would not expel a member
- the fact that [REDACTED] has exhibited a caring attitude towards his patients
- the existence of family circumstances
- the fact that this is a first offence
- the fact that [REDACTED] is otherwise a good student

The Committee must now fashion a remedy in light of Bylaw 31 that gives weight to the interests identified and taken into consideration by Dr. Fox, namely:

- the risk placed on patient safety even though no one was actually hurt
- the university's reputation
- the need to send the right message to students in part to discourage similar behaviour
- the risk placed on [REDACTED] license
- the need to correct and deter similar conduct by [REDACTED] in the future
- the fact [REDACTED] has harmed his relationship with his instructors and peers
- the need to provide education and re-integration opportunities for [REDACTED]

Having regard to the above, the Committee orders the following sanctions:

- That [REDACTED] be denied registration into the Nursing Program for two academic years, not including the year currently in progress, or until September 2018

- That [REDACTED] repeat his 3rd year of Nursing upon return to the program in September 2018
- That [REDACTED] write letters of apology to Windsor Regional Hospital, [REDACTED], Associate Dean Fox and [REDACTED] within two months of the date of this decision

Finally, the Committee urges [REDACTED] to take measures to re-build the trust of his supervisors and peers and to demonstrate the commitment to nursing that he has indicated he holds. One such measure might include seeking out ethics courses and reflecting on the meaning, importance and significance of integrity.

The Committee also invites the Faculty to identify measures that would permit [REDACTED] meaningful re-integration into the Nursing Program upon his return.



Professor Reem Bahdi
Chair, Discipline Appeal Committee

DATED THIS 23rd day of August 2016