SUPREME COURT OF NOVA SCOTIA
Citation: *Finkle v. NSHA*, 2023 NSSC 426

Date: 20231228
Docket: 524430
Registry: Halifax

Between:

Dr. Simon Neil Finkle

Applicant

v.

Nova Scotia Health Authority

Respondent

AND

Docket: 524433
Registry: Halifax

Between:

Dr. Kenneth West

Applicant

v.

Nova Scotia Health Authority

Respondent

DECISION

Judge:	The Honourable Justice John A. Keith
Heard:	December 18, 2023, in Halifax, Nova Scotia
Oral Decision:	December 28, 2023
Written Decision:	January 22, 2024
Counsel:	Catherine A. Fawcett, K.C. for the Applicants Roderick H. Rogers, K.C. for the Respondent

By the Court:

Introduction and Brief Conclusion

[1] Dr. Kenneth West and Dr. Neil Finkle are licensed medical practitioners who work in the Nephrology Division of the Queen Elizabeth II Hospital, Halifax, Nova Scotia. Between 2009 and November 2021, Dr. West was Head of the Nephrology Division at the Queen Elizabeth II Hospital in Halifax, NS (the "**QEII**"). In November, 2021, Dr. Finkle was appointed Interim Division Head for Nephrology at the QEII, replacing Dr. West.

[2] Both Dr. West and Dr. Finkle became the subject of formal written complaints made under the Nova Scotia Health Authority's "Respectful Workplace Policy" and more formally described in these proceedings as Policy AD-HR-020. A copy of the Respectful Workplace Policy is attached to these reasons.

[3] The Nova Scotia Health Authority ("**NSHA**") appointed Andrea Lowes of Certitude Workplace Investigations (the "**Investigator**") to conduct an investigation into (or assessment of) the complaints against Dr. West and Dr. Finkle.

[4] The Investigator completed her investigation into the complaints and issued separate reports concluding certain of Dr. West and Dr. Finkle's actions amounted to “harassment”, as that term is defined in the Respectful Workplace Policy.

[5] By letters dated May 1, 2023, Dr. Aaron Smith in his capacity as Medical Executive Director of NSHA's Northern Zone, and Alejandro Ocampo in his capacity as Medical Affairs Lead for the Western Zone of the NSHA, wrote separately to each of Dr. West and Dr. Finkle. In these letters, Dr. Smith and Mr. Ocampo confirm that, among other things:

> 1. The following actions were required of Dr. West and Dr. Finkle (the language is mandatory):
>
> > (1) You will complete a review of the Nova Scotia Health Respectful Workplace Policy and complete the Learning Management System training module "Introduction to Respectful Workplace Policy". The module can be accessed through the LMS portal: ttps://elearning.nshealth.ca. This Policy

> review and the module must be completed within the three months of the date of this letter.
>
> (2) You will complete the certificate course in Psychologically Safe Leadership course offered jointly through Nova Scotia Health and the University of New Brunswick. The course is described in the attached document and can be accessed through NS Health People Services. This course will be completed within six months of the date of this letter.
>
> (3) You will complete the "Effective Team Interactions" workshop offered through the Canadian Medical Protective Association (CMPA). The course can be found here: https://www.cmpa-acpm.ca/en/educationevents/workshops/effective-team-interactions. This workshop must be completed within 12 months of the date of this letter. (Underlining in original)
>
> 2. Dr. West and Dr. Finkle must "self-report in writing to the Central Zone Medical Executive Director" upon completion of these actions; and
>
> 3. [F]ailure to complete these actions within the timeframes specified above may result in the consideration of a more comprehensive approach, which could include a medical bylaws process.
>
> (the "**Decisions**")

[6] By Notice for Judicial Review bearing Hfx No. 524430 issued June 6, 2023 and amended August 31, 2023, Dr. Kenneth West requested judicial review of the Decisions.

[7] By Notice for Judicial Review bearing Hfx No. 524433, also issued June 6, 2023 and amended August 31, 2023, Dr. Neil Finkle also requested judicial review of the Decisions.

[8] Given certain shared facts and issues, the parties agreed that the two proceedings would be heard together. The hearing is scheduled to proceed in May 2024.

[9] On December 18, 2023, I heard a preliminary motion by NSHA seeking to strike the Notices of Judicial Review on the basis that the Nova Scotia Supreme Court lacks the necessary jurisdiction to review the Decisions.

[10] On December 28, 2023, I provided the parties with a "bottom line" decision dismissing the NSHA's preliminary motion and concluding that this Court has the jurisdiction to judicially review the challenged decisions. Given that the application for judicial review is to be heard in the near future, I agreed to provide my written reasons in relatively short order. These are my reasons.

BASIC FACTUAL BACKGROUND

[11] The evidence before the Court on this preliminary, jurisdictional motion consisted of the Record prepared by the NSHA for the purposes of the judicial review; the affidavit of Dr. West sworn November 6, 2023; and the affidavit of Dr. Finkle sworn November 6, 2023.

DR. WEST

[12] Doctor Kenneth West has practised medicine for 29 years and, at all material times, was the senior Nephrologist at the QEII in Halifax.

[13] By letter dated June 20, 2022, the NSHA granted to Dr. West a "Medical Staff Appointment" under the NSHA Medical Staff By-laws, Part B, section 2.2. The primary zone for these privileges was identified as zone central. The appointment was effective as of March 4, 2022 and expires as of March 3, 2025. The appointment was made with the approval of NSHA's Board of Directors and on the recommendations of the Zone Credentials Committee and the Health Authority Medical Advisory Committee.

DR. FINKLE

[14] Doctor Simon Finkle is also a practising Nephrologist and has been with the NSHA for 23 years. On November 21, 2021, Dr. Finkle was appointed as Interim Division Head for Nephrology, replacing Dr. West as Division Head.

[15] By letter dated June 20, 2022, the NSHA granted to Dr. West a "Medical Staff Appointment (Division: Nephrology)" under the NSHA Medical Staff By-laws, Part B, section 2.2. The primary zone for these privileges was identified as zone central. The appointment was effective as of March 4, 2022, and expires as of March 3, 2025. The appointment was made with the approval of NSHA's Board of Directors and on the recommendations of the Zone Credentials Committee and the Health Authority Medical Advisory Committee.

THE COMPLAINTS AND THE INVESTIGATION

[16] In a formal, written complaint dated December 20, 2022, Complainant A accused Dr. West of breaching NSHA's Respectful Workplace Policy and more formally described in these proceedings as Policy AD-HR-020.

[17] In a formal, written complaint dated March 21, 2022, Complainant A also accused Dr. Finkle of breaching the Respectful Workplace Policy.

[18] In a formal and written complaint dated March 26, 2022, Complainant B accused Dr. Finkle of breaching the Respectful Workplace Policy.

[19] By agreement dated May 2, 2022, the NSHA appointed the Investigator to conduct an independent and neutral investigation/assessment regarding the three formal complaints described above.

[20] By separate letters dated May 9, 2022, the NSHA notified Dr. West and Dr. Finkle that:

1. Formal written complaints had been filed against them; and
2. The Investigator was appointed to conduct an independent investigation of these complaints in accordance with the process outlined in section 6.1 of the Respectful Workplace Policy entitled "Investigation".

[21] The May 9, 2022 letter to Dr. West described the allegations as "Offensive and Disrespectful behaviour and Harassment". Those terms are defined in Appendix A of the Respectful Workplace Policy. The underlying details of these allegations included:

1. Lack of respect for a person's dignity, self-esteem, comfort or privacy;
2. Abuse of authority; and
3. Exclusion.

[22] The May 9, 2022 letter to Dr. Finkle contained virtually identical allegations, although the allegation of "Exclusion" was removed and replaced with an allegation of "Undermining".

[23] The May 9, 2022 letters also confirmed that the NSHA was immediately altering Dr. West's and Dr. Finkle's shift rotation for the duration of the investigation "to ensure that the integrity of the investigation is upheld, and to protect all involved parties", including Dr. West and Dr. Finkle.

[24] On December 8, 2022, the Investigator delivered the following three written reports to the NSHA:

1. A report addressing Complainant A's allegations against Dr. West;
2. A report addressing Complainant A's allegations against Dr. Finkle; and

3. A report addressing Complainant B's allegations against Dr. Finkle.

Complainant A's allegations against Dr. West

[25] The Investigator wrote that fifteen (15) of the eighteen (18) allegations by Complainant A "appear to be issues in the personal dynamic between she and Dr. West and do not amount to harassment on their own, or as part of a course of conduct that Dr. West knew or ought to have known was unwelcome" (at page 54 of the Investigator's Report regarding Complainant A's allegations against Dr. West). However, as to the remaining three (3) allegations by Complainant A, the Investigator concluded that they "did amount to harassment, albeit on the lower end of the spectrum" (at page 54 of the Investigator's Report regarding Complainant A's allegations against Dr. West).

Complainant A's allegations against Dr. Finkle

[26] In seven (7) of Complainant A's nine (9) allegations, the Investigator's factual findings were in Dr. Finkle's favour in the sense that they did not amount to a breach of the Respectful Workplace Policy - either individually or collectively. With respect to the remaining two allegations, the Investigator concluded that Dr. Finkle's actions when "taken together" were "unwelcome by Complainant A"; that Dr. Finkle's actions demonstrated that he "knew that his conduct was not befitting his role" as Interim Head for Nephrology; and that, ultimately, Dr. Finkle's conduct "amounted to harassment under the [Respectful Workplace] Policy" (at page 40 of the Investigator's Report regarding Complainant A's allegations against Dr. Finkle).

Complainant B's allegations against Dr. Finkle

[27] The Investigator found that "all of conduct and/or behaviors by Dr. Finkle as alleged [by Complainant B] occurred, although in some cases I have found that the tone or intent alleged by was not present" (at page 36 of the Investigator's Report regarding Complainant B's allegations against Dr. Finkle).

[28] The Investigator concluded that certain discrete allegations, in isolation, would not rise to the level of harassment under the Respectful Workplace Policy. However, when taken together, they amounted to "a course of conduct that Dr. Finkle knew or ought to have known was unwelcome and amounts to harassment under the Policy, albeit on the low end of spectrum" (at page 37 of the Investigator's Report regarding Complainant B's allegations against Dr. Finkle.

[29] "Dr. Finkle's behaviour regarding the assignment of additional service to Complainant B was problematic" and amounted to harassment under the Respectful Workplace Policy (at page 38 of the Investigator's Report regarding Complainant B's allegations against Dr. Finkle).

[30] Dr. Finkle's "approach" to a potential complaint by a patient against Complainant B was "inappropriate, unfair, and unnecessary" and amounted to harassment under the Respectful Workplace Policy (at page 38 of the Investigator's Report regarding Complainant B's allegations against Dr. Finkle).

[31] The Investigator did not dismiss the allegation of discrimination outright but did conclude that "the available evidence is insufficient to indicate that the conduct noted above was borne out of discrimination" (at page 39 of the Investigator's Report regarding Complainant B's allegations against Dr. Finkle).

[32] I pause here to repeat that the word “harassment” is a defined term in the Respectful Workplace Policy. The definition is lengthy. Appendix A of the Policy states that:

> For the purposes of this Policy, Harassment includes Harassment based on the protected grounds under the *Nova Scotia Human Rights Act, as well as,* sexual Harassment, Discrimination, Bullying, and behaviour that creates a hostile and offensive Workplace. This includes any offensive or inappropriate persistent implicit or explicit behaviour by NSHA Staff that is directed towards any NSHA Staff and which a person knew or ought reasonably to have known to be unwelcome. Harassment is any behaviour that demeans, humiliates, or embarrasses an individual, and that a reasonable person should have known would be unwelcome. It includes objectionable conduct/actions, comments, or displays made on either a one-time or continuous basis that demeans, belittles, or causes personal humiliation or embarrassment.
>
> Although the following is not an exhaustive list, Harassment may include:
>
> - Verbal abuse or threats;
> - Threats, blackmail, intimidation or favouritism on the part of a person in authority;
> - Display of pornographic, racist or other offensive or derogatory material;
> - Vulgar and sexist speech, or slander concerning the moral reputation of a person;

- Unwelcome remarks, jokes, or taunting about a person's appearance, age, marital status, race, ethnic or national origin, religion, sexual orientation, gender or gender identity, disability or mental health;
- Practical jokes or jokes with double meaning causing embarrassment or awkwardness;
- Unwelcome invitations or requests, whether indirect or direct, which a person knew or ought reasonably to have known to be unwelcome;
- Lack of respect for a person's dignity, self-esteem, comfort or privacy;
- Abuse of authority;
- Demands for sexual favors;
- Making or threatening reprisals after a negative response to sexual advances;
- Physical or sexual assault/aggression;
- Stalking;
- Confinement
- Leering or other suggestive gestures;
- Unwanted/unnecessary physical contact;
- Severe and persistent interpersonal conflict that is manifested in Offensive Behaviour towards other Staff may be considered Harassment.
- Harassment is not limited to the aforementioned and includes such actions of exclusion, undermining, intimidation, coercion and verbal and nonverbal behaviour which is directed at another person or person(s).

Harassment is not:

- Appropriate exercise of management responsibilities
- Performance evaluation/management
- Scheduling and assignment of work
- Appropriate Discipline
- Lack of friendliness on an occasional basis. However, lack of friendliness that is so persistent over time as to constitute shunning can be considered Harassment;
- "Grumpy" or curt response on an occasional basis. However, behaviour that is so persistent over time that a reasonable person would be offended may be considered Harassment;

> - Other routine day-to-day interaction between Staff, including interpersonal relationship conflicts and/or difficulties, that occurs on an occasional basis. Severe and persistent interpersonal conflict that is manifested in Employees' Offensive Behaviour towards another person may be considered Harassment.

[33] By two letters dated January 30, 2023, Dr. Aaron Smith wrote to each of Dr. West and Dr. Finkle separately. Dr. Smith wrote these letters in his capacity as the Zone's Medical Executive Director or "**ZMED**" (this position was typically referred to by acronym). The letters summarized the Investigator's findings regarding Complainant A. The letters also indicated that they were being copied to the "Investigation File".

[34] By letter dated February 1, 2023, Dr. Smith (again in his capacity as ZMED) sent a separate letter to Dr. Finkle summarizing the Investigator's findings regarding Complainant B's allegations. This letter also indicated that it was being copied to the "Investigation File".

[35] By letters dated April 25, 2023, Jack Graham, K.C., legal counsel for Dr. Finkle and Dr. West at the time, sent two lengthy letters to Dr. Smith - one for each physician. Generally speaking, the letters outlined numerous concerns regarding the process and the Investigator's conclusions. Mr. Graham asked that these concerns be taken into account before Dr. Smith determined his response.

[36] By letters dated May 1, 2023, Dr. Smith wrote separately to each of Dr. West and Dr. Finkle. Once again, Dr. Smith wrote in his capacity as ZMED for the Northern Zone of Nova Scotia's Health Authority. However, unlike the earlier letters, the May 1, 2023 letters were also signed by Alejandro Ocampo, Medical Affairs Lead for the Western Zone of Nova Scotia's Health Authority.

[37] The May 1, 2023 letters are the Decisions being challenged in this proceeding. It is clear that the letters were considered "disciplinary letters" issued for a breach of the Respectful Workplace Policy. The content of these letters is virtually identical. Dr. West and Dr. Finkle were directed to take the following actions:

> 1. Dr. West and Dr. Finkle were directed (the language is mandatory) to complete the following courses:
>
> > (1) You will complete a review of the Nova Scotia Health Respectful Workplace Policy and complete the Learning Management System training module "Introduction to Respectful Workplace Policy". The module can be accessed through the LMS portal: https://elearning.nshealth.ca. This Policy

> review and the module must be completed within the three months of the date of this letter.
>
> (2) You will complete the certificate course in Psychologically Safe Leadership course offered jointly through Nova Scotia Health and the University of New Brunswick. The course is described in the attached document and can be accessed through NS Health People Services. This course will be completed within six months of the date of this letter.
>
> (3) You will complete the "Effective Team Interactions" workshop offered through the Canadian Medical Protective Association (CMPA). The course can be found here: https://www.cmpa-acpm.ca/en/educationevents/workshops/effective-team-interactions. This workshop must be completed within 12 months of the date of this letter. (Underlining in original)

2. Dr. West and Dr. Finkle were further directed (the language is mandatory) to "self-report in writing to the Central Zone Medical Executive Director" upon completion of these courses.

[38] Finally, Dr. Smith and Mr. Ocampo warned that "[f]ailure to complete these actions within the timeframes specified above may result in the consideration of a more comprehensive approach, which could include a medical bylaws process."

[39] It appears that neither Dr. West nor Dr. Finkle completed the disciplinary measures. Instead, the parties began to exchange correspondence regarding the nature and impact of these Decisions and confirming Dr. West's and Dr. Finkle's disagreement with both the process and the outcome.

[40] By email dated May 30, 2023, Meghan Russell of NSHA wrote to legal counsel for Dr. West and Dr. Finkle. In this email, Ms. Russell confirmed that the Decisions were considered "disciplinary letters", as indicated. Ms. Russell further stated that:

> Disciplinary letters to Physicians arising from a complaint under the NSH Respectful Workplace Policy are stored in the respective Zone Medical Executive Director's file for the particular physician. The letters are maintained on the file for 2 years and are then expunged. The letters are not stored with any other team, including Medical Affairs.

[41] The letter does not explain why the "Medical Affairs Lead" (Alejandro Ocampo) would be required to sign the Decisions if the Medical Affairs team does not "store" them. Nor does this letter clarify whether any other team (e.g. Mr. Ocampo's Medical Affairs team) may refer to (or rely upon) the Decisions - even if they do not "store" them.

[42] On June 6, 2023, Dr. West and Dr. Finkle filed their respective Notices of Judicial Review, as indicated.

[43] By subsequent email dated August 1, 2023, legal counsel for NSHA elaborated that:

1. The decisions regarding Dr. West and Dr. Finkle are "not kept or maintained by the Credentialing Office" and do not form part of these physicians' "credentialing files";

2. There is "no obligation on the physicians to disclose" either the original complaints or the investigation report or the eventual decision when submitting any reappointment application;

3. The decisions regarding Dr. West and Dr. Finkle are "held for two years in a file for the specific physician with the relevant Zone Medical Executive Director ("**ZMed**"), after which it is "removed from the record". In this case, I understand the ZMed at all material times was Dr. Aaron Smith;

4. The "intent of maintaining the decision on file for two years is that the past decision could be considered if a subsequent [Respectful Workplace Policy] complaint arises. Further, during the two year period, the [Respectful Workplace Policy] decision would be available for review by the ZMed if a physician is involved in a Medical Staff By-laws process." Pausing here, it is agreed that:

   a. As indicated in the May 1, 2023 letter, failure to complete the disciplinary measures imposed upon Dr. West and Dr. Finkle "could include a medical bylaws process";

   b. To date, no further, formal disciplinary process has begun under the Medical By-laws to revoke, suspend or vary any of Dr. West's or Dr. Finkle's existing medical privileges based on their failure to complete the disciplinary measures imposed in the Decisions. However:

      i. The May 9, 2022 letter to Dr. West confirmed that the NSHA was immediately "altering" his shift rotation for the duration of the investigation to allow for separation between himself and Complainant A; and "to ensure that that the integrity of the investigation is upheld". Based on the evidence, the extent of this shift alteration is unclear. It is also unclear whether this shift has continued;

      ii. The May 9, 2022 letter to Dr. Finkle confirmed that, for the duration of the investigation, Complainant A and Complainant B would report to someone other than Dr. Finkle, Interim Head for Nephrology "to ensure that the integrity of the investigation is upheld, and to protect all involved parties". Based on the evidence, it is unclear whether that change remains in place.

iii. The process by which the NSHA grants privileges to physicians occurs under a Medical Staff By-laws process (NSHA medical staff bylaws, part B, section 2.2);

c. Dr. Finkle's and Dr. West's existing privileges expire as of March 3, 2025. Thus, the challenged decisions would remain on Dr. West's and Dr. Finkle's files when their privileges next come up for renewal.

5. The "ZMed has no obligation to consider the decision (within the two year period) or to factor into any future decisions, but the option is there during that time period."

[44] Legal counsel for Dr. West and Dr. Finkle asked for the authority under which Respectful Workplace Policy decisions may be used by the NSHA in future decisions. By email dated August 3, 2023, legal counsel for the NSHA replied that:

1. The Respectful Workplace Policy decisions may be used and may influence future NSHA decisions on the basis of "standard operating procedure internal to NSHA"; and

2. This internal procedure is "not outlined in any particular source document."

ANALYSIS

Preliminary Comments on Rule 7

[45] Civil Procedure Rule 7 is entitled "Judicial Review and Appeal". It establishes the procedures which govern every application for judicial review.

[46] However, obviously, not every decision may be challenged by judicial review.

[47] Civil Procedure 7.01 provides the following definition for "decisions" which are presumptively subject to judicial review:

> In this Rule,
>
> "decision", includes all of the following:
>
> (i) an action taken, or purportedly taken, **under legislation**,
>
> (ii) an omission to take action required, or purportedly required, by **legislation**,
>
> (iii) a failure to make a decision;
>
> (Emphasis added)

[48] Note that this definition of "decision" which may be challenged through judicial review is not exhaustive. It clearly states that a "decision" which may be challenged under Rule 7 "includes" those which conform to the listed, prescribed criteria. If Rule 7 were supposed to define and codify any and all "decisions" which

may be challenged though judicial review, it would have stated that a "decision means" (or “is limited to”) those which meet the prescribed criteria. Moreover, it is notable that Rule 7.02(2)(a) speaks more broadly to the fact that Rule 7 applies to "judicial review of a decision within the supervisory jurisdiction of the court …". (Emphasis added)

[49] In short, the definition of “decision” in Rule 7.01 is not comprehensive. Ruth Sullivan's text, *The Construction of Statutes*, 7th ed. (Toronto: LexisNexis Canada Inc., 2022) supports this interpretative conclusion. At §4.04, the author writes:

> Non-exhaustive definitions do not purport to displace the meaning that the defined term would have in ordinary usage; they simply add to, subtract from or exemplify that meaning. Non-exhaustive definitions are generally introduced by "includes" or "does not include" (or "excludes") …
>
> Non-exhaustive definitions are used to expand or narrow the ordinary meaning of terms, to deal with borderline applications of terms or to illustrate their range of application by setting out examples. While definitions that begin with "includes" are non-exhaustive in the sense that they do not displace the ordinary meaning of the defined term and often enlarge it, they are exhaustive in the sense that, for the definition to apply, the person or thing in question must come either within the ordinary meaning of the defined term or within the meaning of the terms following "includes". … (Emphasis added)

[50] Furthermore, in *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall*, 2018 SCC 26 ("***Highwood***"), the Supreme Court of Canada clarified and confirmed the common law test for determining the scope of decisions which are subject to judicial review. In my view, the challenged Decisions are subject to judicial review under the common law test in *Highwood*. As such, they come "within the supervisory jurisdiction of the court" (Rule 7.02(2)(a)) and are subject to the procedural code created by Rule 7. Given this finding, it is unnecessary to consider whether the Decisions also fall within the definition of a "decision" under Rule 7.01.

The Highwood Test to determine the scope of the Court's Jurisdiction under Common Law

[51] The scope of the Court's supervisory jurisdiction was considered in *Highwood*, where Rowe J. began by confirming that "Judicial review is a public law concept that allows s. 96 courts to 'engage in surveillance of lower tribunals' in order to ensure that these tribunals respect the rule of law…" (at para. 13; emphasis added).

[52] In defining the scope of "public law" decisions, *Highwood* provided the following preliminary observations to help frame the analysis:

1. There is a distinction to be drawn between decisions which are "public", in the generic sense of the word, and those decisions which are more narrowly and technically grounded in what is known as “public law”. Thus, even though a decision may generally be of interest to (or broadly impact) the public at large, this does not mean it is either subject to judicial review or "public in the administrative law sense of the term". (at para. 20. See also para. 21)

2. "The relevant inquiry is whether the legality of state decision making is at issue." (at para. 21 of *Highwood*) In turn, this requires the Court to draw a clear distinction between decisions grounded in public law, on the one hand, and those decisions that involve the exercise of a private power such as, for example, decisions made under private contractual arraignments. Rowe, J. explained that:

> Judicial review is only available where there is an exercise of state authority and where that exercise is of a sufficiently public character. Even public bodies make some decisions that are private in nature - such as renting premises and hiring staff - and such decisions are not subject to judicial review…" (at para. 14, emphasis added)

[53] This underlined sentence from paragraph 14 of *Highwood* ("Judicial review is only available where there is an exercise of state authority and where that exercise is of a sufficiently public character.") is the key analytical tool used to identify decisions which are grounded in public law - and not from private legal arrangements. This analytical tool can be broken down into its two constituent parts: “exercise of state authority”; and “the exercise is of a sufficiently public character”. It is helpful to review these concepts in greater detail.

(a) The challenged decision must constitute the "exercise of state authority"

[54] The most relevant authorities which help define the "exercise of state authority" were cited by Mandziuk J. in *Sedgwick v. Edmonton Real Estate Board Co-Operative Listing Bureau Ltd. (c.o.b. Realtors Assn. of Edmonton),* 2021 ABQB 59, affirmed at 2022 ABCA 264 ("***Sedgwick***") and reviewed by Arnold J. in *Chedrawy v. Nova Scotia (Health Authority),* 2023 NSSC 116. ("***Chedrawy***")

[55] In many cases, Courts gloss over this first requirement and decide the matter based entirely on the second part of the test. As Mandziuk, J observed in *Sedgwick*,

part of the problem is that *Highwood* "does not define the term ["exercise of state authority"]. Additionally, subsequent case law applying the test in *Highwood* is also silent on what amounts to an "exercise of state authority" (at para. 61).

[56] In my view, the state is exercising its authority when engaging the power being exercised:

1. Is central to the decision-maker's administrative mandate conferred by the legislature - as opposed to the exercise of a private power under contract, for example. (*Highwood* at para. 14). By way of illustration, in *Chedrawy*, Arnold J. held that there was no exercise of state authority in that case because NSHA's authority to terminate Dr. Chedrawy as Division Head for cardiac surgery in NSHA's Central Zone was derived from contract, not statute:

> I conclude that the authority to terminate Dr. Chedrawy as Division Head was derived from the contractual relationship between Dr. Chedrawy and NSHA. NSHA entered into that arrangement as a matter of internal management. That conclusion is not changed by the fact that NSHA ultimately derives its power and authority from statute. Accordingly, Dr. Chedrawy's termination was not an exercise of state authority for the purpose of the analysis. (at para. 52; emphasis added)

Similarly, in *J.W. v. Canada (Attorney General*), 2019 SCC 20, Côté J. wrote in a concurring judgment:

> Because the purpose of judicial review is to ensure the legality of state decision making (*Highwood Congregation*, at para. 13) and because the powers of IAP adjudicators are not conferred by the state, but are instead derived from a contract, judicial review of IAP decisions is not available. (at para. 108; emphasis added)

2. Directly affect the rights, interests, property, privileges, or liberties of a person over whom the public body has authority. In *Martineau v. Matsqui Institution (No. 2)* (1979), [1980] 1 S.C.R. 602 (S.C.C.), Dickson J. (as he then was), concurring, wrote: "In my opinion, certiorari avails as a remedy wherever a public body has power to decide any matter affecting the rights, interests, property, privileges, or liberties of any person." (at page 628)

[57] I pause to address an argument which would narrow the "exercise of state authority" to only those decisions in which the decision-maker was acting under a specifically identified power or right conferred by legislation.

[58] In *Ngalim v. ICBC*, 2022 BCSC 1822 ("**Ngalim**"), Ahmad, J. considers the Ontario Divisional Court's decision in *Astro Zodiac Enterprises Ltd. v. Board of Governors of Exhibition Place*, 2022 ONSC 1175 (Div. Ct.) ("***Astro Zodiac***"). At para. 82 of its written submissions, the NSHA quotes the following passage from para. 26 of Ahmad, J's decision:

> In its analysis, the Court first considered whether the decision to enter into the leasing contract was an "exercise of state authority". Despite being authorized by its enabling legislation to enter into the contract, the Court concluded it was not. It held at para. 26:
>
> > The Board did not exercise a statutory power of decision in relation to the decision not to enter a contract with the applicants. As the Court of Appeal held in *Paine v. University of Toronto et al*. (1981), 1981 CanLII 1921 (ON CA), 34 O.R. (2d) 770 (C.A.), at p. 722, 'it is not enough that the impugned decision be made in the exercise of a power conferred by or under a statute; it ... must be a specific power or right to make the very decision in issue.' In this case, while the Board's authority to enter contracts is based on authority delegated under COTA [the City of Toronto Act] and the Toronto *Municipal Code*, the manner of the exercise of the power to contract - including the decision to enter into any particular contract - is not subject to any constraining statutory requirements except as to duration and type. The power to contract is permissive. COTA, the Toronto *Municipal Code*, and the Relationship Framework, do not dictate how the Board's discretion to enter, negotiate, or terminate the type of contract in issue here is to be exercised. (Emphasis in original)

[59] In my view, the interpretation and import of *Astro Zodiac* needs to be placed in its proper context - having regard to, for example, para. 22 - 25 which both precede and then follow the above paragraph quoted in *Ngalim*.

[60] In *Astro Zodiac* several companies challenged the decision of the Board of Governors of Exhibition Place denying them the right to rent space to run private for-profit events at Exhibition Place, such as a Halloween-themed haunted house. The Divisional Court's comments at para. 26 in *Astro Zodiac* (quoted in *Ngalim*) were not in relation to whether the Board's decision not to enter into the leasing contract was an "exercise of state authority". Rather, the Divisional Court was considering whether the Board exercised "a statutory power of decision" for the purposes of the statutory definition of the phrase "statutory power" under section 2(1)1 of Ontario's *Judicial Review Procedure Act*, R.S.O. 1990, c. J.1, as amended ("***JRPA***"). This becomes clear when reading para. 22 - 28 of the *Astro Zodiac* decision which state:

22 I find that the decision does not fall under the scope of public law and is not subject to judicial review. The decision whether to rent space at Exhibition Place to a private company for a profit-making activity is not an exercise of state authority of sufficiently public character that public law remedies are available.

23 Subsection 2(1) of the JRPA sets out this court's jurisdiction to hear an application for judicial review:

> 2 (1) On an application by way of originating notice, which may be styled "Notice of Application for Judicial Review", the court may... grant any relief that the applicant would be entitled to in any one or more of the following:
>
> 1. Proceedings by way of application for an order in the nature of mandamus, prohibition or certiorari.
>
> 2. Proceedings by way of an action for a declaration or for an injunction, or both, in relation to the exercise, refusal to exercise or proposed or purported exercise of a statutory power.

24 Section 1 of the JRPA defines "statutory power" to include a power or right conferred by or under a statute "to exercise a statutory power of decision." "Statutory power of decision" is defined in s. 1 to mean a power or right conferred by or under a statute to make a decision deciding or prescribing:

> (a) the legal rights, powers, privileges, immunities, duties or liabilities of any person or party, or
>
> (b) the eligibility of any person or party to receive, or to the continuation of, a benefit or licence, whether the person or party is legally entitled thereto or not ...

25 Section 1 of the JRPA defines licence to include: "any permit, certificate, approval, registration, or similar permission required by law."

26 The Board did not exercise a statutory power of decision in relation to the decision not to enter a contract with the applicants. As the Court of Appeal held in *Paine v. University of Toronto et al*. (1981), 34 O.R. (2d) 770 (C.A.), at p. 722, "it is not enough that the impugned decision be made in the exercise of a power conferred by or under a statute; it ... must be a specific power or right to make the very decision in issue." In this case, while the Board's authority to enter contracts is based on authority delegated under COTA and the Toronto *Municipal Code*, the manner of the exercise of the power to contract--including the decision to enter into any particular contract--is not subject to any constraining statutory requirements except as to duration and type. The power to contract is permissive. COTA, the Toronto *Municipal Code*, and the Relationship Framework, do not dictate how the Board's discretion to enter, negotiate, or terminate the type of contract in issue here is to be exercised.

> 27 In any event, jurisdiction to issue an order in the nature of *certiorari* under s. 2(1)1 of the JRPA is not limited to statutory powers of decision, and not all statutory powers of decision are subject to judicial review.
>
> 28 The issue is whether the decision to not enter a contract is (a) an exercise of state authority, and (b) of sufficiently public character that public law remedies are available. In *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall*, 2018 SCC 26, [2018] 1 S.C.R. 750, at para. 14, the Supreme Court explained the limited reach of public law:
>
> > Not all decisions are amenable to judicial review under a superior court's supervisory jurisdiction. Judicial review is only available where there is an exercise of state authority and where that exercise is of a sufficiently public character. Even public bodies make some decisions that are private in nature -- such as renting premises and hiring staff -- and such decisions are not subject to judicial review: *Air Canada v. Toronto Port Authority*, 2011 FCA 347, [2013] 3 F.C.R. 605, at para. 52. In making these contractual decisions, the public body is not exercising "a power central to the administrative mandate given to it by Parliament" but is rather exercising a private power (*ibid*.). Such decisions do not involve concerns about the rule of law insofar as this refers to the exercise of delegated authority.
>
> (Emphasis added)

[61] In short, the phrase "exercise of state authority" at common law neither equates to nor is synonymous with the phrase "the exercise of a statutory power of decision", as that phrase is found in section 2(1) of Ontario's *JRPA*. Had the Supreme Court of Canada in *Highwood* intended to find that judicial review is only available where a public body exercises a "statutory power of decision" under Ontario's *JRPA*, it would have said so.

[62] In further support of this conclusion, I also note *Setia v. Appleby College*, 2013 ONCA 753 ("**Setia**"), which was also mentioned in *Highwood*. In *Setia*, the Ontario Court of Appeal rejected the notion that judicial review is only available where the relevant legislation expressly authorizes the decision-maker to make the decision in question. In this decision, the appellant Appleby College ("**Appleby**") was a private school in Oakville, Ontario. It was incorporated in 1911 by a Special Act of the Ontario Legislature.

[63] As a private school, Appleby received no public funding pursuant to the *Education Act*, R.S.O. 1990 c. E.2. Nor was it governed by the provisions of the *Act* concerning behaviour, discipline and safety.

[64] Upon a student's admission to Appleby, his or her parents were required to sign a contract with the school which acknowledged that their child's continued

attendance at Appleby was dependent upon the student's compliance with Appleby's Code of Conduct and such other rules as may be announced from time to time. The Code of Conduct provided that smoking on school property, or possessing illegal drugs, may result in expulsion. Appleby also had a Lighting of Substances Policy which stated that students found smoking in the college will be expelled.

[65] On his last day of grade 12, the respondent Gautam Setia was discovered smoking marijuana in the school residence. He admitted doing so. He was expelled the next day (June 15, 2010) by Dr. Peirce, the Head of School, who informed Gautam's parents that he would require Gautam to withdraw from the school immediately. Both sides treated Dr. Peirce's decision as an expulsion.

[66] Gautam and his parents brought an application for judicial review of the decision to expel him. The Setias sought an order quashing the decision. The application was brought under s. 2(1)1 of the *JRPA*.

[67] The issue before the Ontario Court of Appeal was whether the Divisional Court was correct in finding that it had jurisdiction under the *JRPA* to grant an order for judicial review quashing Dr. Pierce's decision. The Court of Appeal allowed the appeal and concluded that the dispute was not subject to judicial review. However, in reaching that decision the Court of Appeal equally confirmed:

> … There is nothing in the JRPA that expressly suggests that the jurisdiction to make an order under s. 2(1)1 is determined by whether the decision under review is the exercise of a statutory power of decision.
>
> As Professor Mullan has said in *Administrative Law: Cases, Text and Materials*, 5th ed., (Toronto: Edmond Montgomery, 2003) at p. 1111, while early judicial interpretations of the *JRPA* linked the availability of relief in the nature of the prerogative writs under s. 2(1)1 to the requirement of a statutory power of decision under s.2(1)2, that approach was not sustainable, and has since been clearly rejected by cases like *Bezaire (Litigation Guardian of) v. Windsor Roman Catholic Separate School Board* (1992), 9 O.R. (3d) 737 (Ont. Div. Ct.). The public law remedies giving relief in the nature of the prerogative writs are not dependent on the presence of a statutory power of decision.
>
> The same is true in British Columbia which has legislation in most respects identical to the *JRPA*. In *Mohr v. Vancouver, New Westminster & Fraser Valley District Council of Carpenters* (1988), 32 B.C.L.R. (2d) 104 (B.C. C.A.), the British Columbia Court of Appeal made clear that an order for judicial review quashing a decision was not dependent upon that decision being a statutory power of decision.
>
> In my view the jurisdiction to make an order for judicial review quashing the expulsion decision does not depend on whether the decision is the exercise of a

> statutory power of decision. Rather, the jurisdiction provided by s. 2(1)1 of the JRPA turns on whether the expulsion decision is the kind of decision that is reached by public law and therefore a decision to which a public law remedy can be applied. This reflects the purpose of the JRPA, namely to provide a simplified process to obtain public law remedies in those circumstances where public law applies.
>
> (at paras. 29 - 32, emphasis added)

[68] *Setia* also clarifies that the Court's jurisdiction to review an administrative decision does not depend on whether the decisions were made through the exercise of a "statutory power of decision", as that term is defined under the *JRPA*. Rather, again, the issue is whether the decision was made through the "exercise of statutory authority", as described by the Supreme Court of Canada in *Highwood*.

(b) The challenged decision must be of a "sufficiently public character"

[69] The public-private distinction is discussed in Donald J.M. Brown and John M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf) at §1:13:

> Not all decisions are amenable to judicial review under a superior court's supervisory jurisdiction. Such review is only available where there is an exercise of state authority and where it is of a sufficiently public character. However, in the overwhelming majority of cases, whether the exercise of a decision-making power has a sufficiently public character to be subject to the court's jurisdiction to issue certiorari and prohibition will be clear. The paradigm of a public body is one that exercises statutory powers in the discharge of regulatory or other governmental responsibilities in respect of persons with whom it is not in a contractual or other private law relationship. At the other extreme, powers exercised by a corporation in the conduct of its business are governed by the appropriate branch of private law, such as employment law, contract law, and property law. However, some decision-making will not have all the characteristics of either paradigm, and consequently may be difficult to classify as either public or private for the purpose of the availability of the prerogative remedies.
>
> Accordingly, in such circumstances, it will be necessary to consider a range of factors in deciding into which category the activity should fall, since the remedies are not limited to reviewing decisions made pursuant to a statutory power. The first factor looked to by the courts is the nature of the decision-maker, including whether it derives its funding from the public purse, whether its members are appointed by the government, and the extent to which it is subject to government control. The second factor focuses on the source and nature of this decision-making power. Is it statutory and, if so, is the power general or specific? As well, a determination must be made as to whether the statute requires resort to the decision-making in question and, where the power is not exclusively derived from a statute, the extent to which the power in question derives from another source such as a contract or the

> ownership of property. The third perspective is to consider the description of the decision-making body's functions as found in the enabling statute or other constitutive document. In particular, the inquiry ought to address whether those functions advance only the interests of members, or whether they serve the broader public interest. In other words, are they regulatory in nature, performing functions that would otherwise be undertaken by government, or do they enable the body to conduct a business or other "private" activities? In the result, although it is possible that an entity could have more than one facet, for practical reasons the decision will likely turn on whether the "primary" character of the body is of a "public" nature or whether it is primarily "private". (Emphasis added)

[70] In *Setia*, the Ontario Court of Appeal provided the following useful summary to guide the analysis:

> [33] The assessment of whether a particular decision is subject to public law and its remedies requires a careful consideration of the relevant circumstances of the particular case informed by the experience of the caselaw. I agree with the approach of Stratas J.A. in *Air Canada v. Toronto Port Authority*, 2011 FCA 347 (F.C.A.). He said this at para. 60:
>
> > There are a number of relevant factors relevant to the determination whether a matter is coloured with a public element, flavour or character sufficient to bring it within the purview of public law. Whether or not any one factor or a combination of particular factors tips the balance and makes a matter "public" depends on the facts of the case and the overall impression registered upon the Court.
>
> [34] In his very helpful reasons, Stratas J.A., at para. 60, described a number of relevant factors disclosed by the case law:
>
> - the character of the matter for which review is sought;
> - the nature of the decision-maker and its responsibilities;
> - the extent to which a decision is founded in and shaped by law as opposed to private discretion;
> - the body's relationship to other statutory schemes or other parts of government;
> - the extent to which a decision-maker is an agent of government or is directed, controlled or significantly influenced by a public entity;
> - the suitability of public law remedies;
> - the existence of a compulsory power;
> - an "exceptional" category of cases where the conduct has attained a serious public dimension.
>
> (Emphasis added)

[71] Justice Stratas' decision in *Air Canada v. Toronto Port Authority*, 2011 FCA 347 ("***Air Canada***") (and especially the non-exhaustive list of factors enumerated in that decision) has become an often quoted and critical analytical tool for assessing whether a decision is "of a sufficiently public character".

APPLICATION TO THE FACTS

(a) The Decisions constitute the "exercise of state authority"

[72] Unlike in *Chedrawy*, the source of NSHA's authority to make the decisions is not derived from contract. The Applicants are not NSHA employees whose employment contracts require them to comply with NSHA policies. Nor is NSHA's authority to make decisions in relation to the Applicants derived from the Respectful Workplace Policy itself. Indeed, the terms of the Policy are expressly directed towards employees only - and not persons who, like the Applicants, are not employees. I note the following:

1. Appendix A to the Respectful Workplace Policy contains definitions for terms used in the Policy. These include:

> "Employee: A person working at NSHA whose salary and compensation are provided by NSHA.
>
> Employee Record: The individual personnel file of an Employee, which is maintained by the employer, and contains all of the relevant employment history and information for the Employee."

2. The Preamble to the Policy includes the following statement:

> Incidents involving individuals who are <u>not</u> NSHA Employees will be reviewed by People Services and directed toward the respective employer or <u>accountable body</u>. (Emphasis added)

3. Section 7.1 and 7.2 of the Respectful Workplace Policy related to documentation confirm that the Policy only contemplates complaints against "Employees". They read:

> 7.1. People Services keep any and all information related to the investigation and/or resolution of a Formal Complaint in a confidential investigation file. Documentation of the Offensive or Disrespectful Behaviour follows the following criteria:

> 7.1.1. If the Complaint is unfounded, no documentation will be retained on the Employee Record of either the Complainant or Respondent.
>
> 7.1.2. If the Complaint is found to be made in Bad Faith, frivolous, or vexatious, documentation of the resulting Discipline will be retained on the Complainant's Employee Record. In this case, no documentation is to be retained on the Respondent's Employee Record.
>
> 7.1.3. If the Complaint is founded, documentation of the resulting Discipline will be retained on the Respondent's Employee Record. In this case, no documentation is to be retained on the Complainant's Employee Record.
>
> 7.2. Investigation records are not kept in the Employee Record of Complainants, Respondents, Witnesses, or any other Staff involved in a Formal Complaint and/or investigation with the following exceptions:
>
> > 7.2.1. Where there is a finding of Offensive or Disrespectful Behaviour, any resulting disciplinary letter is kept on the Respondent's Employee Record.
> >
> > 7.2.2. Where the Formal Complaint is determined to have been made in Bad Faith, any resulting disciplinary letter is kept on the Complainant's Employee Record.
>
> (Emphasis added)

[73] The reason the NSHA may presume the power to impose compliance with the Respectful Workplace Policy upon the Applicants is because that authority is recognized in the Medical Staff By-laws. Section 3 of Part C to the Medical Staff By-laws provides for that authority state, in part:

> **3 Appointments & privileges-general**
>
> 3.1 **Appointment of medical staff-general**
>
> 3.1.1 The Board may appoint medical practitioners, dentists and other health professionals in its sole and absolute discretion to the medical staff in the manner provided for in these by-laws.
>
> 3.1.2 Any medical staff whose relationship with the HA is established solely through granting of privileges shall be subject to these by-laws with respect to variation, suspension, revocation or other non-renewal of privileges.
>
> 3.1.3 All appointments to the medical staff shall be conditional on the member agreeing in writing to abide by:
>
> 3.1.3.1 all by-laws, policies and procedures;

> 3.1.3.2 the rules and regulations;
>
> 3.1.3.3 the limits of the appointment and privileges as specified in these by-laws and granted to the member; and
>
> 3.1.3.4 the NSHA Code of Ethics and these by-laws must govern the professional conduct of members. In the absence of a NSHA code of ethics, the codes of ethics adopted by the College of Physicians and Surgeons of Nova Scotia and the Provincial Dental Board of Nova Scotia must govern the professional conduct of the members.

(Emphasis added)

[74] The Medical Staff By-laws further define "policy" as "such guidance and directives approved by the health authority respecting the operation of health care facilities, services or programs within the health authority."

[75] No party has challenged the NSHA's authority to enforce or apply the Respectful Workplace Policy against the Applicants as a "policy" contemplated by section 3.1.3.1 in Part C of the By-laws. In short, the source of the NSHA's authority to make decisions under this policy in relation to the Applicants (and the Applicants' obligation to comply with those decisions) is necessarily derived from the Medical Staff By-laws - not some private law arrangement.

[76] I further find that the Decisions in question:

1. Were made in the exercise of a “power central to the administrative mandate given to it by Parliament” – and not some other authority conferred under private law; and
2. Directly affected the interests of the Applicants.

[77] In reaching these conclusions, I begin by observing that all parties appear to agree with the following propositions:

1. Imposing discipline on a medical staff member is “a power central to the administrative mandate” given to NSHA by the legislature; and

2. Imposing disciplinary measures upon a medical staff member directly affect the rights and interests of a physician who has been granted privileges.

[78] However, the parties disagree on whether the Decisions, in the circumstances of this case, are disciplinary in nature.

[79] The NSHA argues that the Decisions are not “disciplinary” and that “[t]he appointments and privilieges of Dr. West and Dr. Finkle – which are in effect until March 2025 – are unaffected by the Decisions” (at paragraph 62 of its written submissions). In support of this argument, the NSHA says that:

> 1. No formal disciplinary proceedings were against the Applicants under Part C of the Medical Staff Bylaws, entitled “NSHA Medical Staff/Credentialing/Discipline By-law”;
>
> 2. The Decisions merely mean that Dr. West and Dr. Finkle are merely “required to undertake” education, training and/or coaching” under the [Respectful Workplace Policy] in the form of three training courses.” (at paragraph 62 of the NSHA’s written submissions). This requirement to take additional courses should not reasonably be interpreted as contituting “discipline” under the Policy.

[80] Respectfully, I disagree. In my view, the Decisions are disciplinary in nature and issued in response to the Investigator’s determination that Dr. West's and Dr. Finkle's actions constituted “harassment” under the terms of the Respectful Workplace Policy. I emphasize that I make this finding for the purposes of this preliminary jurisdictional issue.

[81] First, by email dated May 30, 2023, Meghan Russell of NSHA wrote to legal counsel for Dr. West and Dr. Finkle. In this email, Ms. Russell explained how the Decisions would be "stored". In doing so, she began by describing these types of documents issued against Dr. West and Dr. Finkle as "disciplinary letters" (her words).

[82] The express terms of the Respectful Workplace Policy confirm the disciplinary nature of actions taken in response to perceived breaches. Consider the following:

> 3. The Policy defines "discipline" broadly, as follows:
>
> > Discipline: <u>A process between a manager and Employee to address an employee’s failure to adhere to policies or standards of performance, conduct or behaviour</u>. This process can include verbal or written warnings, suspension and/or termination of employment. (Emphasis added)

4. Under the heading "Procedure", the Respectful Workplace Policy outlines the formal complaint procedure, which includes the establishment of an Investigation Committee. Once the Committee has concluded its investigation, it prepares a report and communicates the findings to the parties and their managers. The Investigation Committee also makes recommendations regarding actions to be taken to address the formal complaint. Section 6.3 of the Policy deals with "Remedial Actions and Discipline" (Emphasis added):

> 6.3. Remedial Actions and Discipline:
>
> 6.3.1. The findings and recommendations of the Investigation Committee are reviewed by the manager(s) and People Services to determine the appropriate remedial action(s) to be taken, including but not limited to:
>
> 6.3.1.1. Mediation or conflict resolution;
>
> 6.3.1.2. Education, training, or coaching; and/or
>
> 6.3.1.3. Discipline, up to and including termination.

While the heading "Remedial Actions and Discipline" might suggest that "remedial actions" and "discipline" are two different things, section 6.3.1. indicates that "education, training, or coaching" and "discipline" both fall within the umbrella of "remedial actions." Further muddying the waters, section 7.1.3. provides that where a complaint of offensive or disrespectful behaviour is founded, "documentation of the resulting Discipline will be retained on the Respondent's Employee Record." In other words, a finding of offensive or disrespectful behaviour, like the one made against the Applicants, leads to "discipline." Likewise, section 7.2.1. states:

> Where there is a finding of Offensive or Disrespectful Behaviour, any resulting disciplinary letter is kept on the Respondent's Employee Record.

[83] In my view, a reasonable reading of the terms of the Respectful Workplace Policy supports the conclusion that decisions imposed in response to actions deemed to have breached that Policy are disciplinary in nature. I recognize that the NSHA cites several cases where physicians sought judicial review of decisions by their respective regulatory bodies requiring them to undertake additional training. In

assessing the reasonableness of those decisions, the reviewing courts described educational upgrading as "remedial" rather than "disciplinary." However, the availability of judicial review for these decisions was neither in issue nor even contested. These decisions are further distinguishable on the basis that they did not consider the interaction between medical staff by-laws and the challenged decisions.

[84] Furthermore, the Decisions contained a written warning. They explicitly warned the Applicants that a failure to complete the three training courses by the stipulated deadlines "may result in the consideration of a more comprehensive approach, which could include a medical bylaws process." Put differently, failure to comply with the Decision puts the Applicants' privileges at risk and directly affects their interests. On this, I also note that according to NSHA, the Decisions will be held for two years in a file for each Applicant with the ZMED. The NSHA further advises that the Decisions could be considered if a subsequent Respectful Workplace Policy complaint is filed against the Applicants and would also be available for review by the ZMED if the Applicants are involved in a Medical Staff By-laws process.

[85] While NSHA takes the position that the Applicants' appointments and privileges are "unaffected" by the Decisions, in my view, a reasonable reading of the Medical Staff By-laws indicates that the Decisions directly affects the Applicants' privileges even if they complete the required training and no additional complaints are filed against them.

[86] The Applicants' privileges are up for renewal in 2025. The Decisions will still be in their files with the ZMED at that time. They will also be considered as part of the Applicants' annual review. Under Part B of the Medical Staff By-laws, the applicable Zone Department Head must conduct an annual review of each member, which includes "a determination as to compliance with Code of Ethics and workplace behaviour requirements as outlined in these by-laws, the rules and regulations and in the HA's policies and procedures", "information on any discipline actions taken by the member's professional regulatory college or by the HA", and "a finding by the applicable Zone Department Head that the member continues to meet the requirements for continuing appointment to the category and level of privileges granted by the Board" (s. 13.2). The review must be provided to the member who is given an opportunity to respond to it in writing, and the review and the member input "must be stored in the member's credential files and such information must be made available to any committee of the HA which is vested with assessing the credentials

of the member or to the Board for purposes of making a decision as to the member's medical staff privileges" (s. 13.5).

[87] In addition, the ZMED, who maintains a file for the Applicants containing the Decisions, serves as the chair of the Zone Credentials Committee (s. 7.8.2.1), and is also a member of the Health Authority Medical Advisory Committee (s. 7.2.3), which makes "recommendations to NSHA's Board concerning appointments, reappointments, discipline, and privileges of the medical staff" (s. 7.7.4).

[88] The challenged Decisions were made (and signed) by both Dr. Smith in his role as a ZMED with the NSHA and Mr. Ocampo in his role as a Medical Affairs Lead. It is very clear from the record that the Medical Affairs team is responsible for approving medical staff appointments and granting hospital privileges. Indeed, the existing appointment letters for both Dr. West and Dr. Finkle were from the Medical Affairs team not the ZMED alone. The fact that the Medical Affairs team would be involved in this matter reinforces the impact and affect of the Decisions on Dr. West and Dr. Finkle regardless of who might "store" the Decisions.

[89] Lastly, the Applicants will be required to disclose the Decisions if they apply for privileges in at least three other jurisdictions outside Nova Scotia. In each case, the physician is required to identify and explain any past disciplinary decisions.

[90] In my view, the Decisions, which require the Applicants to undertake mandatory training in response to a finding of offensive or disrespectful behaviour are disciplinary in nature and may have significant ramifications for the Applicants' careers and professional reputations. In making them, NSHA exercised a power central to the administrative mandate given to it by Parliament.

(b) The Decisions are of "sufficiently public character"

[91] The second part of the *Highwood* test requires the Court to consider all the circumstances to determine if the exercise of power at issue is of sufficiently public character. The Court in *Air Canada* noted that "[w]hether or not any one factor or a combination of particular factors tips the balance and makes a matter 'public' depends on the facts of the case and the overall impression registered upon the Court" (at para. 60).

[92] The non-exhaustive list of potential factors enumerated in the passage from *Air Canada*, quoted at paragraph 70 above.

[93] In my view, the following factors are relevant in this case, and demonstrate that the Decisions are of a sufficiently public character:

1. **The character of the matter for which review is sought**: This is not a private, commercial matter. It involves the imposition of discipline by a public body in respect of physicians with whom it is not in a contractual or other private law relationship.

2. **The nature of the decision maker and its responsibilities**: NSHA is charged with various duties under the Health Authorities Act, including the granting, variation, suspension and revocation of privileges in relation to physicians not employed by a health authority. Its duties in this regard are prescribed by the regulations. As noted in *Mazek v. Southern Health-Sante*, 2018 MBQB 122:

> … The public has a stake in the question of medical staff privileges as our health system is publicly funded. (at para. 26)

Although the Decisions did not suspend or revoke the Applicants' privileges, the Decisions are closely related to NSHA's responsibilities in relation to medical staff privileges. The Decisions will form part of the Applicants' annual reviews and those reviews will be made available to any NSHA committee vested with assessing their credentials of the member or to the Board for purposes of making a decision as their medical staff privileges.

3. **The extent to which a decision is founded in and shaped by law as opposed to private discretion**: With respect to this factor, the Court in *Air Canada* noted:

> If the particular decision is authorized by or emanates directly from a public source of law such as statute, regulation or order, a court will be more willing to find that the matter is public … Matters based on a power to act that is founded upon something other than legislation, such as general contract law or business considerations, are more likely to be viewed as outside of the ambit of judicial review … (at para. 60)

As previously mentioned, the source of NSHA's authority to make the Decisions, and the Applicants' obligation to comply with them, is derived from the Medical Staff By-laws. While the character of this power to act is not as "public" as a statutory power of decision, it is more public than one founded upon general contract law or business considerations.

4. **The suitability of public law remedies**: Public law remedies are not only useful in this case, but essential - they are the only remedies available. Unlike in *Chedrawy* or *Dunsmuir*, the Applicants have no private law remedies if judicial review of the Decisions is unavailable. As the Supreme Court of Canada noted in *Martineau v. Matsqui Disciplinary Bd*. [1980] 1 S.C.R. 602, at p. 628:

> In my opinion, certiorari avails as a remedy wherever a public body has power to decide any matter affecting the rights, interests, property, privileges, or liberties of any person.

Contrary to NSHA's submissions, the Decisions have directly affected the Applicants' professional interests and privileges. As the Applicants note in their brief at para. 36:

> In the Respondent's characterization of the Decisions, it trivializes the ramifications that a finding of misconduct and the resulting punitive measures will have on the Applicants. The written confirmation in a physician's file of discipline arising from a harassment complaint due to misconduct, even I fit does not immediately affect privileges, factors into the perception of the physician's professional reputation. It can only be for this reason that a decision is maintained in the file of the body that conducts the performance review - the Zone Department Head. Future privileging applications involve comprehensive evaluations, and any documented instance of misconduct negatively impacts the perception of the physician's professional conduct and suitability for privileges …

5. **The existence of compulsory power**: In *Air Canada*, Stratas, JA stated:

> The existence of compulsory power over the public at large or over a defined group, such as a profession, may be an indicator that the decision is public in nature. This is to be contrasted with situations where parties consensually submit to jurisdiction. (at para. 60)

CONCLUSION

[94] In my view and in the circumstances of this case, the NSHA exerts a compulsory power over physicians such as Dr. West and Dr. Finkle who have been appointed to Medical Staff and granted associated privileges under the By-Laws. Neither the Respectful Workplace Policy requirements nor the process initiated against Dr. Finkle and Dr. West were voluntary in nature. Dr. West and Dr. Finkle were required to submit to the investigation and were further directed to comply with the disciplinary Decision, failing which they faced further disciplinary procedures.

[95] In terms of costs, after issuing my "bottom line" decision on December 28, 2023, counsel agreed that the NSHA would pay costs in the amount of $375.00 to each of Dr. Finkle and Dr. West ($750.00 in total).

Keith, J .

Appendix “A” - Nova Scotia Health Authority Administrative Policy Manual

nova scotia health authority

ADMINISTRATIVE MANUAL
Policy

Title:	Respectful Workplace	Number:	AD-HR-020
Sponsor:	Senior Director, People Services	Page:	1 of 17
Approved by:	VP, People & Organizational Development	Approval Date:	Sept. 25, 2017
		Effective Date:	Oct. 2, 2017
Applies To:	All Staff		

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(Note: All capitalized terms are defined in Appendix A – Definitions)

PREAMBLE

Nova Scotia Health Authority (NSHA) is committed to fostering an environment that values diversity, and where all Staff, Patients, families, visitors, and others are treated and treat others with respect and dignity in accordance with the Mission, Vision and Values and the NSHA Code of Conduct. This commitment applies whether at the Workplace or elsewhere in the course of employment responsibilities, including work-related social events, travel, off site meetings, or provision of services outside NSHA facilities.

The purpose of the policy is to:

- Establish a culture of shared responsibility and cooperation in promoting a positive work environment free of all forms of Offensive Behaviour;

- Create an understanding of what is considered Offensive or Disrespectful Behaviour;
- Promote prevention and prompt resolution of Offensive and Disrespectful Behaviour.

For incidents involving Patient Complaints, refer to NSHA AD-QR-001 Abuse Prevention and Response.

For incidents involving Violence in the Workplace, refer to NSHA AD-OHS-010 Violence in the Workplace.

Incidents involving individuals who are not NSHA Employees will be reviewed by People Services and directed toward the respective employer or accountable body.

POLICY STATEMENTS

1. NSHA is committed to providing a healthy, safe, and Respectful Workplace that values diversity; where all persons are treated and treat others with respect and dignity.
2. All Staff have a shared responsibility to promote and sustain a Respectful Workplace, and are responsible for respecting the dignity and human rights of their co-workers and the communities served by NSHA. All Staff are expected to actively welcome diversity, as well as participate in and work collaboratively towards ensuring a healthy Workplace that is free from Offensive or Disrespectful Behaviour.
3. This Policy is not intended to discourage or prevent any person from:
   - 3.1. Pursuing a Complaint under any applicable legislation (including the Nova Scotia Human Rights Act and Criminal Code of Canada);
   - 3.2. Filing a grievance under any applicable collective agreement;
   - 3.3. Pursuing a Complaint under the provisions of any governing professional association; and/or
   - 3.4. Exercising any other legal rights under any other law.
4. In accordance with Workplace rights set out under the *Nova Scotia Human Rights Act* , every Staff has the right to be free from Harassment and Discrimination on the following protected grounds:
   - Age
   - Race
   - Colour
   - Religion
   - Creed
   - Sex (includes pregnancy)
   - Sexual orientation
   - Gender identity
   - Gender expression
   - Physical disability
   - Mental disability
   - An irrational fear of contracting an illness or disease
   - Ethnic, national or aboriginal origin
   - Family status
   - Marital status
   - Source of income
   - Political belief, affiliation or activity

- Individual's association with another individual or class of individuals having characteristics of one or more of the protected grounds

5. All Staff have the right to bring forward allegations of Offensive or Disrespectful Behaviour and make either an Informal or Formal Complaint.
   - 5.1 Staff are responsible to report incidents of Offensive or Disrespectful Behaviour they witness or become aware of – either through an Informal or Formal Complaint;
   - 5.2 Complaints are made as soon as reasonably possible;
   - 5.3 If a member of a union, as the Complainant or the Respondent, Staff have the right to be accompanied and assisted by a union representative of their choosing through an Informal or a Formal Complaint process.
6. Complaints are taken seriously and addressed in an appropriate and timely manner. Discipline up to and including termination may result if:
   - 6.1. There is a failure to abide by this Policy;
   - 6.2. There is a finding of a substantiated Complaint of Offensive or Disrespectful Behaviour;
   - 6.3. There is Retaliation against a party involved in the incident of alleged Offensive or Disrespectful Behaviour. This includes, but is not limited to, Retaliation against Staff for:
     - 6.3.1. Filing a Complaint or expressing an intention to file a Complaint;
     - 6.3.2. Providing evidence, information, or assistance in relation to a Complaint;
     - 6.3.3. Participating in any process under this Policy; and
     - 6.3.4. Being identified as the Respondent to a Complaint.
7. All Staff are responsible to fully cooperate with the procedures contained in this Policy, including but not limited to, cooperating during an investigation and/or resolution process, and maintaining confidentiality and respecting the privacy of those involved.
8. Complaints must be made in good faith. A Complaint that is frivolous, vexatious, or malicious in nature and/or is knowingly false may result in Discipline up to and including termination.
9. Nothing in this policy compromises NSHA's obligation and authority to take immediate action to ensure a safe, Discrimination-free, and Harassment-free Workplace.
10. This policy promotes Staff involvement in resolving situations. There are various resolution options such as Informal Resolution, Mediation, and Formal Resolution. Depending on the Complaint, Staff may be supported and encouraged to pursue the Informal Resolution process initially. However, they may proceed directly to Formal

Resolution if they feel it is necessary. Mediation is encouraged at any point in the process.

11. Privacy and Confidentiality

    11.1. Staff are expected to maintain confidentiality and respect the privacy of all other parties involved in an incident of Offensive or Disrespectful Behaviour.

    11.2. Recognizing the sensitivity and complexity of Complaints of Offensive or Disrespectful Behaviour, confidentiality is critical and is maintained to the extent practical and appropriate.

    11.3. All parties to a Complaint, including Witnesses, are expected to maintain confidentiality and respect the privacy of all parties involved. This requires that discussion of the Complaint be limited to those who need to know and to those participating in any attempts to resolve the Complaint.

GUIDING PRINCIPLES AND VALUES

1. NSHA has a duty to protect all Staff from Harassment and Discrimination and to fulfill its responsibilities under the Nova Scotia Human Rights Act. NSHA is committed to raising awareness of Staff rights and responsibilities and ensuring an appropriate process for filing, assessing, investigating, and resolving Complaints.
2. Respect is a Value of NSHA and underlies our interactions with each other and the people we serve. It insists on caring, compassion, understanding, and embraces our diversity to foster a positive Workplace for good health. Offensive or Disrespectful Behaviour in the health care Workplace has a negative impact on Patient care, as well as the health, safety, morale, and productivity of Staff.

ROLES AND RESPONSIBILITIES

> Respectful Behaviour is a requirement of all Staff and an expectation of all Patients, families, visitors, and others within NSHA.

1. Senior Leadership

1.1. Take steps to create a Workplace that promotes respectful behaviour between Staff, Patients, families, visitors, and others;

1.2. Treat all Staff, Patients, families, visitors, and others with dignity and respect;

1.3. Make resources available to Staff to assist in understanding and resolving incidents of Offensive or Disrespectful Behaviour;

1.4. Maintain a procedure for addressing incidents of Offensive or Disrespectful Behaviour; and

1.5. Let Staff, Patients, families, visitors, and others know through their own actions that respectful behaviour is expected.

2. Managers/Supervisors

2.1 Treat all Staff, Patients, visitors, and others with dignity and respect;

2.2 Inform all Staff of this Policy, including their roles and responsibilities;

2.3 Provide Staff with opportunities to develop skills in dealing with Offensive or Disrespectful Behaviour;

2.4 Coach Staff regarding resources for addressing Offensive or Disrespectful Behaviour;

2.5 Address Offensive or Disrespectful Behaviour demonstrated by Staff by coaching, facilitating conversations, and/or enacting Discipline in a timely manner;

2.6 Address Offensive or Disrespectful Behaviour demonstrated by Patients, families, visitors, and others in a respectful, private manner to ensure appropriate conduct in our Workplace;

2.7 Collaborate with People Services in addressing repeated and/or escalated incidents of Offensive or Disrespectful Behaviour;

2.8 Advise Staff of available support resources, including union representatives, Employee and Family Assistance Program (EFAP), and People Services;

2.9 Let Staff, Patients, families, visitors, and others know through their own actions that respectful behaviour is expected;

2.10 Participate in any resolution process by ensuring that the requirements of the process are adhered to in a timely and appropriate manner.

3. Staff:

3.1. Treat all Staff, Patients, families, visitors, and others with dignity and respect;

3.2 Develop skills to constructively address Offensive or Disrespectful Behaviour in a professional manner;

3.3 Access resources and supports to address Offensive or Disrespectful Behaviour;

3.4 Follow resolution processes and/or participate in resolution processes;

3.5 Acknowledge their role in incidents of Offensive or Disrespectful Behaviour;

3.6 Hold others accountable for incidents of Offensive or Disrespectful Behaviour; and

3.7 Let Staff, Patients, families, visitors, and others know through their own actions that respectful behaviour is expected.

4. People Services:

4.1. Develop training, policies and procedures related to the Respectful Workplace policy, and monitor compliance with the policy;

4.2. Respond to allegations of Offensive Behaviour through the Informal, Formal, and/or Mediation Resolution process;

4.3 Ensure Complaints are processed in a fair, efficient and transparent manner. Determine the best approach based on the facts and circumstances of the situation;

4.4 Act in a coaching and advisory capacity on issues of Offensive or Disrespectful Behaviour and on Workplace restoration or Discipline.

PROCEDURE

1. All Staff use the resources available to them to increase their capacity to address Offensive or Disrespectful Behaviour in the Workplace.

   1.1 Sources of support and skill development include:

      1.1.1 Formal and informal leaders, and colleagues;

      1.1.2 Employee and Family Assistance Program (EFAP);

      1.1.3 People Services;

      1.1.4 Conflict resolution and communication competence building activities;

      1.1.5 Union Representatives; and

      1.1.6 Incident reporting systems (to seek guidance and determine whether an incident is Offensive or Disrespectful Behaviour or meets the criteria for Workplace Violence).

2. Informal Resolution: When faced with Offensive or Disrespectful Behaviour, the Complainant:

   2.1 If appropriate, attempts an Informal Resolution with the Respondent in a respectful and professional manner by calmly informing the Respondent of the impact of their behaviour and requests that it not happen again. The Complainant should ensure the choice of an appropriate time and place for the Informal Resolution – one that respects that maintains confidentiality and privacy;

   2.2 Documents all efforts made to resolve the situation;

   2.3 If the Offensive or Disrespectful Behaviour continues, and if comfortable in doing so and it is appropriate, speaks with the Respondent again and attempts to resolve the situation. If required, the Complainant should seek guidance and assistance from the manager and/or the Respondent's manager and/or People Services;

   2.4 If uncomfortable in addressing again, Informal Resolution is not appropriate, or unsuccessful, the Complainant may make a Formal or Informal Complaint of Offensive or Disrespectful Behaviour against the Respondent, verbally, in person, electronically, or in writing to a manager or People Services Designate.

3 Assessment of Informal Complaint

   3.1 If a Complaint is made under the Informal Resolution process, the Complainant, Manager, and People Services Designate discuss the alleged Offensive or Disrespectful Behaviour with the Respondent(s).

3.2 Together, the parties involved attempt to resolve the matter through Informal Resolution and/or Mediation.

3.3 If Informal Resolution and/or Mediation is unsuccessful, the matter may be escalated to the Formal Resolution process.

3.4 At any time, the Complainant or Respondent to Complaint may choose to escalate the matter to a Formal Complaint.

4 Making a Formal Complaint

4.1 Staff may choose to file a Formal Complaint. Individuals filing formal Complaints must do so in good faith and have reasonable grounds for the Complaint.

4.2 Complainants may make Formal Complaints either verbally or in writing, to a manager or People Services Designate.

4.3 The Formal Complaint contains as much detail as possible, including:

4.3.1 Specific behaviour being alleged as Offensive or Disrespectful Behaviour;

4.3.2 Dates, times, and locations of incidents;

4.3.3 Names and details regarding the persons involved;

4.3.4 Names and details regarding potential Witnesses;

4.3.5 Any relevant documentation;

4.3.6 Information about any attempts at Informal Resolution, Mediation, or conflict resolution of any kind; and

4.3.7 Remedy being sought by the Complainant.

5. Assessment of Formal Complaint

5.1 In consultation with the Complainant's manager (only if appropriate), the People Services Designate conducts an initial assessment to determine the appropriate next steps, including:

5.1.1. Clarifying the details of the Complaint with the Complainant;

5.1.2. Determining whether the allegations, if substantiated, meet the definition of Offensive or Disrespectful Behaviour;

5.1.3. Determining the appropriateness of any intermediate steps to ensure the health and safety of the parties involved; and

5.1.4. Assessing the need for external resources to assist with the Formal Resolution. When possible and depending on the nature of the Complaint, efforts will be made to resolve the Complaint at this stage prior to moving to formal investigation.

6. Formal Resolution Process

6.1. Investigation:

6.1.1. If an Informal Resolution is not possible, the Complaint will be escalated and a formal investigation will be conducted.

6.1.2. An Investigation Committee is established.

6.1.3. The Investigation Committee is comprised of one or more People Services Designates, and/or other appointed Investigators.

6.1.4. The Investigation Committee conducts the investigation in a fair, unbiased, and timely manner.

6.1.5. Every effort is made to complete the investigation within 90 days. However, the circumstances of each situation are considered. The time frame to complete the investigation may be extended where it is necessary to ensure procedural fairness, including sufficient opportunity for the parties to provide information, and adequate time to interview all Witnesses and gather relevant information. The parties will be informed of the status of the ongoing investigation and advised of the reasons for any delay.

6.1.6. The parties to a Formal Complaint (including the Complainant, Respondent, Witnesses, and the manager(s) involved) are required to cooperate fully during the investigation and/or resolution process. This includes maintaining confidentiality and respecting the privacy of those involved.

6.1.7. The Investigation Committee has the authority to speak with anyone, examine any documents (whether physical or electronic), and enter any NSHA Workplace which, in their opinion, is deemed relevant to the investigation.

6.2. Evidence and Findings:

6.2.1. The Respondent is advised in writing of the Formal Complaint with details of the allegations. The Respondent has an opportunity to provide a written response and to meet with the Investigation Committee.

6.2.2. Members of the Investigation Committee interview relevant Witnesses and gather all pertinent information and documents.

6.2.3. The Complainant and Respondent are provided with opportunities to respond to the evidence gathered from Witnesses and/or documents in order to provide additional or clarifying information.

6.2.4. Upon reviewing all the evidence, the Investigation Committee prepares a report and communicates the findings to the parties and their manager(s). The Investigation Committee also makes recommendations regarding actions to be taken to address the Formal Complaint.

6.3. Remedial Actions and Discipline:

6.3.1. The findings and recommendations of the Investigation Committee are reviewed by the manager(s) and People Services to determine the appropriate remedial action(s) to be taken, including but not limited to:

6.3.1.1. Mediation or conflict resolution;

6.3.1.2. Education, training, or coaching; and/or

6.3.1.3. Discipline, up to and including termination.

7. Documentation

7.1. People Services keep any and all information related to the investigation and/or resolution of a Formal Complaint in a confidential investigation file. Documentation of the Offensive or Disrespectful Behaviour follows the following criteria:

7.1.1. If the Complaint is unfounded, no documentation will be retained on the Employee Record of either the Complainant or Respondent.

7.1.2. If the Complaint is found to be made in Bad Faith, frivolous, or vexatious, documentation of the resulting Discipline will be retained on the Complainant's Employee Record. In this case, no documentation is to be retained on the Respondent's Employee Record.

7.1.3. If the Complaint is founded, documentation of the resulting Discipline will be retained on the Respondent's Employee Record. In this case, no documentation is to be retained on the Complainant's Employee Record.

7.2. Investigation records are not kept in the Employee Record of Complainants, Respondents, Witnesses, or any other Staff involved in a Formal Complaint and/or investigation with the following exceptions:

7.2.1. Where there is a finding of Offensive or Disrespectful Behaviour, any resulting disciplinary letter is kept on the Respondent's Employee Record.

7.2.2. Where the Formal Complaint is determined to have been made in Bad Faith, any resulting disciplinary letter is kept on the Complainant's Employee Record.

8. Staff involved in a Formal Complaint may choose to retain their own independent legal counsel; however, NSHA will not be responsible for any associated costs/legal fees of Staff retaining their own legal counsel.

9. If either party to a Complaint (Complainant or Respondent) believes that the Complaint is not being handled in accordance with this Policy, they should contact the Senior Director, People Services.

REFERENCES

Legislative Acts

Government of Canada. (2017). R.S.C., 1985, c. C-46, *Criminal Code*. Retrieved from http://laws-lois.justice.gc.ca/PDF/C-46.pdf

Province of Nova Scotia. (2009). Violence in the Workplace Regulations made under Section 82 of the Occupational Health & Safety Act. Retrieved from http://novascotia.ca/just/regulations/regs/ohsviolence.htm

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Province of Nova Scotia. (2016). Chapter 5 of the Acts of 1993. Retrieved from: Freedom of Information and Protection of Privacy Act. Retrieved from http://nslegislature.ca/legc/statutes/freedom%20of%20information%20and%20protection%20of%20privacy.pdf

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References

The Regents of the University of California, Davis campus. (2017). *Human Resources: Corrective Action (Discipline).* Retrieved from http://www.hr.ucdavis.edu/Elr/er/corrective_action/index.html

Nova Scotia Health Authority. Diversity & Inclusion. Retrieved from http://www.cdha.nshealth.ca/diversity-inclusion

RELATED DOCUMENTS

Policies and Statements

NSHA AD-QR-001 Abuse Prevention and Response – Protection of Persons in Care

NSHA Code of Conduct

NSHA-AD-HR-030 Discipline (Pending)

NSHA-AD-OHS-010 Violence in the Workplace

NSHA Workplace Violence Prevention Statement

NSHA Workplace Violence Program

NSHA Vision, Mission, and Values

Appendices

Appendix A – Definitions

Replacing the Following District Health Authority Policies/Version History

* * *

Appendix A – DEFINITIONS

Bad Faith: In terms of a Complaint, it is frivolous, vexatious, or malicious in nature and/or is knowingly false, which may result in Discipline for the Complainant.

Balance of Probabilities: This is the civil standard of proof requiring that the Complainant establish on a Balance of Probabilities that it is more likely than not that the alleged events occurred.

Bullying: Behaviour that could mentally hurt or isolate a person in the Workplace. Bullying usually involves repeated incidents or a pattern of behaviour that is intended to cause or should be known to cause, whether directly or indirectly, fear, intimidation, humiliation, exclusion, distress, or other harm to another person's body, feelings, self-esteem, reputation or property, and includes assisting or encouraging such behaviour in any way. The behaviour may be verbal, non-verbal, written, via computer, social networks, text messaging, instant messaging, electronic mail, or any other electronic medium. It can be an assertion of power through aggression. Comments that are intended to provide constructive feedback are not normally considered Bullying.

Bullying may be indicated by:

- Criticism that is persistent and non-constructive
- False allegations of incompetence
- Unreasonable/impossible work targets being set with inadequate or no negotiation
- Disparaging comments being made behind a person's back
- Yelling or using profanity
- Belittling a person's opinions
- Tampering with a person's personal belongings or work equipment

Complainant: A person (or persons) alleging that Offensive or Disrespectful Behaviour has occurred. The Complainant need not be the target of the alleged behaviour. NSHA may act as a Complainant when, in NSHA's sole opinion, the circumstances are appropriate for it to do so.

Complaint: An Informal Complaint or a Formal Complaint of Offensive or Disrespectful Behaviour.

Discipline:	A process between a manager and Employee to address an Employee's failure to adhere to policies or standards of performance, conduct or behaviour. This process can include verbal or written warnings, suspension and/or termination of employment.
Discrimination:	Making a distinction, whether intentional or not, based on a protected ground or perceived protected ground under the *Nova Scotia Human Rights Act* that has the effect of imposing burdens, obligations or disadvantages on an individual or class of individuals not imposed on others or which withholds or limits access to opportunities, benefits and advantages available to others as per the *Nova Scotia Human Rights Act*.
Disrespectful Behaviour:	Behaviour toward others that is undesirable, inappropriate, Offensive, unsuitable or improper which leads to an uncomfortable, hostile and/or intimidating work environment. The behaviour may be verbal, non-verbal, written or electronic. It can also be described as the assertion of power through aggression. Disrespectful Behaviour that is repeated with intent to embarrass or humiliate may be considered Bullying or Harassment.
Employee:	A person working at NSHA whose salary and compensation are provided by NSHA.
Employee Record:	The individual personnel file of an Employee, which is maintained by the employer, and contains all of the relevant employment history and information for the Employee.
Formal Complaint:	A Complaint being addressed through the Formal Resolution Process.
Formal Resolution:	Consists of a formal investigation wherein the findings are based on an objective assessment of the evidence sufficient to determine, on the Balance of Probabilities, if Offensive or Disrespectful Behaviour occurred or did not occur.
Harassment:	For the purposes of this Policy, Harassment includes Harassment based on the protected grounds under the *Nova Scotia Human Rights Act, as well as,* sexual Harassment, Discrimination, Bullying, and behaviour that creates a hostile and offensive Workplace. This includes any offensive or inappropriate persistent implicit or explicit behaviour by NSHA Staff that is directed towards any NSHA Staff and which a person knew or ought reasonably to have known to be unwelcome. Harassment is any behaviour that demeans, humiliates, or embarrasses an individual, and that a reasonable person should have known would be unwelcome. It includes objectionable conduct

/actions, comments, or displays made on either a one-time or continuous basis that demeans, belittles, or causes personal humiliation or embarrassment.

Although the following is not an exhaustive list, Harassment may include:

- Verbal abuse or threats;
- threats, blackmail, intimidation or favouritism on the part of a person in authority;
- Display of pornographic, racist or other offensive or derogatory material;
- Vulgar and sexist speech, or slander concerning the moral reputation of a person;
- Unwelcome remarks, jokes, or taunting about a person's appearance, age, marital status, race, ethnic or national origin, religion, sexual orientation, gender or gender identity, disability or mental health;
- Practical jokes or jokes with double meaning causing embarrassment or awkwardness;
- Unwelcome invitations or requests, whether indirect or direct, which a person knew or ought reasonably to have known to be unwelcome;
- Lack of respect for a person's dignity, self-esteem, comfort or privacy;
- Abuse of authority;
- Demands for sexual favors;
- Making or threatening reprisals after a negative response to sexual advances;
- Physical or sexual assault/aggression;
- Stalking;
- Confinement
- Leering or other suggestive gestures;
- Unwanted/unnecessary physical contact;
- Severe and persistent interpersonal conflict that is manifested in Offensive Behaviour towards other Staff may be considered Harassment.

- Harassment is not limited to the aforementioned and includes such actions of exclusion, undermining, intimidation, coercion and verbal and nonverbal behaviour which is directed at another person or person(s).

Harassment is not:

- Appropriate exercise of management responsibilities
- Performance evaluation/management
- Scheduling and assignment of work
- Appropriate Discipline
- Lack of friendliness on an occasional basis. However, lack of friendliness that is so persistent over time as to constitute shunning can be considered Harassment;
- "Grumpy" or curt response on an occasional basis. However, behaviour that is so persistent over time that a reasonable person would be offended may be considered Harassment;
- Other routine day-to-day interaction between Staff, including interpersonal relationship conflicts and/or difficulties, that occurs on an occasional basis. Severe and persistent interpersonal conflict that is manifested in Employees' Offensive Behaviour towards another person may be considered Harassment.

Informal Complaint:	A Complaint being addressed through the Informal Resolution Process.
Informal Resolution:	An early intervention involving discussion between the Complainant and the Respondent, initiated by the Complainant to address the Respondent's Behaviour as being Offensive or Disrespectful, where the outcome of the intervention is satisfactory to both parties. Informal Resolution may include discussions with the Human Resources Consultant or People Services Designate, conflict resolution specialists and/or manager(s). Participation in the Informal Resolution process is voluntary.
Investigation Committee:	One or more People Services Designates, and/or appointed investigators designated by People Services to conduct assessments and investigations into allegations of Offensive or Disrespectful Behaviour, and to determine if the alleged behaviour has occurred.
Mediation:	A voluntary process used to resolve conflict with the assistance of a neutral person to help the parties attempt to find a mutually acceptable solution.

Offensive Behaviour:	Means Harassment, including sexual Harassment, and Discrimination.
Patient:	For NSHA, defined as all individuals including clients, residents and members of the public who receive or have requested healthcare or services from NSHA and its healthcare providers.
People Services Designate:	Individual operating on behalf of People Services
Respectful Workplace:	A Workplace that is healthy, safe, and respectful that values diversity where all persons are treated with dignity and respect, and where conflict is resolved in a constructive manner, and allegations of Offensive or Disrespectful Behaviour are addressed in accordance with this Policy and the NSHA Code of Conduct.
Respondent:	A person (or persons) alleged to have committed Offensive or Disrespectful Behaviour.
Retaliation:	A reprisal, threat or attempt to intimidate against any person for alleging a violation of this Policy, providing information relevant to a Complaint, or participating in any process under this Policy.
Staff:	Unless specifically limited by a certain policy, refers to all Employees, physicians, learners, volunteers, board members, contractors, contract workers, franchise Employees, and other individuals performing work activities within NSHA.
Witness:	Any person who has personal knowledge of the alleged incident(s) or who may have information relevant to the Complaint investigation.
Workplace:	Any place where Staff is or is likely to be engaged in any occupation and includes, but is not limited to: NSHA facilities, including all leased properties, Patients' residences, community meeting places, any vehicle used or likely to be used by Staff in an occupation, washrooms, cafeterias, business travel, conferences, work related social functions, locker rooms, phone calls, faxes, email, and any location, event or activity where actions of Staff, on duty or not, will have serious repercussions on the work environment.
Violence in the Workplace:	(1)Threats, including a threatening statement or threatening behaviour, that give Staff reasonable cause to believe that they – or someone else – are at risk of physical injury; and/or, (2) Conduct or attempted conduct of a person that endangers the physical health or physical safety of Staff.

This definition has been adapted from the *Violence in the Workplace Regulations*, pursuant to the Nova Scotia *Occupational Health and Safety Act*.

Workplace Violence includes, but is not limited to:

Threats

- Threats of physical harm delivered in person, through phone calls, or in writing via letters or electronically (including social media);
- Intimidating or frightening gestures, such as shaking fists at another person, pounding a desk or counter, punching a wall, or screaming;
- Threatening to throw or strike objects;
- Stalking.

Physical Violence

- Kicking, hitting, biting, grabbing, pinching, scratching, spitting, etc.;
- Injuring a person by using an object such as a chair, cane, or a weapon such as a knife, gun, sharp or blunt instrument.
- Within this Program, Violence includes aggression and responsive behaviour, whether intentional or not, if it meets the definition of Violence.

District Health Authority Policies Being Replaced

SSDHA AD-110-309 Harassment Complaint Process

SSDHA AD-110-308 Harassment

PCHA 2-w-10 Non Harassment/Non Violence

GASHA 3-120 Harassment in the Workplace

CHDA 08-085 Harassment (Staff Behaviour)

SSDHA AD-110-342 Respectful Workplace

CBDHA 70-50 Respectful Workplace

CDHA CH-08-106 Respectful Workplace

AVDHA 140.091 Respectful Workplace

SWH 1103.0 Respectful Workplace

Version History

Major Revisions (e.g. Standard 4 year review)	Minor Revisions (e.g. spelling correction, wording changes, etc.)
New 2017-09-26	Changed link to Violence Prevention Statement and minor style changes 2018-12-13