SUPREME COURT OF NOVA SCOTIA

Citation: *Finkle v. Nova Scotia Health Authority,* 2025 NSSC 373

Date: 20251124
Docket: Hfx No. 524430
Registry: Halifax

2025 NSSC 373 (CanLII)

Between:

Dr. Simon Neil Finkle

Applicant

v.

Nova Scotia Health Authority

Respondent

Date: 20251124
Docket: Hfx No. 524433
Registry: Halifax

Between:

Dr. Kenneth West

Applicant

v.

Nova Scotia Health Authority

Respondent

DECISION

Judge:	The Honourable Justice Diane Rowe
Heard:	May 25 and 26, 2025, in Halifax, Nova Scotia
Counsel:	Catherine A. Fawcett, K.C. for the Applicants
	Roderick H. Rogers, K.C. for the Respondent

By the Court:

[1] Dr. Neil Finkle and Dr. Kenneth West seek judicial review of disciplinary decisions concerning each of them made by the Nova Scotia Health Authority (NSHA) pursuant to its Respectful Workplace Policy (Policy), as it was then in effect. They are each specialist physicians practising in the Nephrology Division of the Queen Elizabeth II Hospital (QEII), in Halifax.

[2] Dr. West is an experienced nephrologist, practising his specialty in excess of 29 years. He was formerly the Division Head of Nephrology at the QEII.

[3] Dr. Finkle also is a nephrologist and practised in his specialty for more than 20 years. He has acted in a senior administrative role within the NSHA as an interim head of the Nephrology Division.

[4] Neither doctor had been the subject of prior complaints or disciplinary proceedings before the filing of written formal complaints concerning them under the NSHA Policy.

[5] Complainant A filed two complaints respectively, dated March 21, 2022 and December 20, 2022, alleging Dr. Finkle and Dr. West had contravened the Policy.

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There was then a complaint filed by Complainant B on March 26, 2022, against Dr. West for contravening the Policy. Both Complainants are physicians.

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[6] The NSHA then appointed an investigator. Her work concluded that each of the two doctors engaged in conduct that constituted "harassment" under the Policy, as it was defined within. Upon review of each Investigator report, NSHA leadership issued formal decisions on May 1, 2023 concerning each doctor (Decisions), setting out a series of mandatory actions for Dr. West and Dr. Finkle to complete in a set time period, with an indication failure to comply may result in an escalated process under the *Medical Bylaws*.

[7] It is not contested that neither Dr. West nor Dr. Finkle are employees of the NSHA. Their specialist practices within the NSHA is mediated by their grant of privileges to carry on medical practice within the Health Authority, as the NSHA will grant on a cyclical basis.

[8] Both Applicants submit that the complaints process undertaken by the NSHA was inherently flawed and unfair considering the circumstances, such that they were denied natural justice. The Applicants request that the Court quash the decisions.

[9] The NSHA responds that there has not been any breach of the duty of procedural fairness owed to the Applicants in the course of the complaints process undertaken within the Policy, and requests that the applications be dismissed.

PRELIMINARY PROCEEDINGS AND THE CONTENT OF THE DUTY OF PROCEDURAL FAIRNESS

[10] The applications have been the subject of prior reported judicial decisions, at the trial and appellate level.

[11] The first is Keith, J.'s decision on a preliminary motion by the NSHA seeking to have Dr. West's and Dr. Finkle's Notices of Judicial Review struck, as reported in *Finkle v. NSHA*, 2023 NSSC 426. Keith, J. determined that the Supreme Court had jurisdiction to judicially review the challenged Decisions, on the basis of both the common law and *Nova Scotia Civil Procedure Rule* 7.

[12] *Finkle, supra* was appealed by the NSHA. The Court of Appeal in *Nova Scotia Health Authority v. Finkle and West*, 2024 NSCA 87 upheld Keith, J.'s decision. The appellate decision was explicit at para 56 that the Court of Appeal did not determine any of the following in making its decision: the merits of the allegations by Complainants A and B; the investigator's findings; or the applicants' challenges to either the findings or the NSHA Decisions.

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[13] Both of those preliminary judicial decisions detail the legislative framework of the NSHA, and includes brief factual backgrounds concerning the dates of the investigation of the complaints, portions of the content of the NSHA decisions concerning the doctors, the NSHA bylaws applicable, and the medical privilege system, and the Policy itself.

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[14] The Respectful Workplace Policy is included as an attachment to the *Finkle, supra* decision in its entirety. I will be referencing only portions of the Policy, and statutory framework, as I may require. I will also be making my own findings of fact and legal analysis to ground this decision concerning whether the NSHA breached its duty of procedural fairness to the applicants in the course of the complaints process.

[15] The Applicants and the Respondent have presented the Court with differing perspectives concerning the law that should inform the judicial review of the Policy complaints process.

[16] In *Jono Developments Ltd. v. North End Community Health Association,* 2014 NSCA 92 (leave to appeal refused [2014] S.C.C.A. No. 527) at paragraphs 41-42, it was remarked that:

> [41] The reviewing judge correctly identified the principle that no standard of review analysis governs judicial review, where the complaint is based upon a denial of natural

> justice or procedural fairness. (See for example, ***T.G. v. Nova Scotia (Minister of Community Services)***, 2012 NSCA 43, leave to appeal refused, [2012] S.C.C.A. No. 237, at ¶90).
>
> [42] Instead, a court will intervene if it finds an administrative process was unfair in light of all the circumstances. This broad question, which encompasses the existence of a duty, analysis of its content and whether it was breached in the circumstances, must be answered correctly by the reviewing judge (see: ***T.G. v. Nova Scotia (Minister of Community Services), supra***, at ¶8*;* ***Communications, Energy and Paperworkers Union of Canada, Local 141 v. Bowater Mersey Paper Co. Ltd.***,2010 NSCA 19, ¶28; ***Nova Scotia (Community Services) v. N.N.M.***, 2008 NSCA 69, ¶40; and ***Kelly v. Nova Scotia Police Commission***, 2006 NSCA 27, ¶21-33.

[17] With correctness then in mind, *Jono, supra* indicates that the first step to be undertaken by the reviewing Judge is to determine the threshold issue of whether there is a duty owed to the applicants. Only upon determining that there is such a duty should the reviewing Judge engage in applying the duty of fairness content analysis as set out in *Baker v. Canada (Minister of Citizenship and Immigration),* 1999 CanLII 699 (SCC). Neither of the parties made submissions disputing whether a duty is owed to the applicants, with submissions focused on the content of the duty, as per *Jono* and *Baker*.

[18] Each of the Decisions are identical, dated May 1, 2023. They each communicate findings that the doctor named had breached the Policy by engaging in harassing behaviors. They are each signed by the NSHA's Zone Medical Executive Director Dr. Aaron Smith and Mr. Alejandro Ocampo, Medical Affairs Lead for the Western Zone of the NSHA. They direct that the doctor addressed is to:

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complete a review of the Nova Scotia Health Respectful Workplace Policy; complete a certificate course in Psychologically Safe Leadership; and to complete a workshop entitled “Effective Team Interactions” offered through the Canadian Medical Protective Association. These tasks are to be completed within stipulated time periods, with self reporting required by the doctors to the NSHA executive upon completion, with potential for further review.

[19] The Decisions direct remediation steps, after findings of breach by the physicians. As each of the Decisions communicate findings and mandate actions that impact on the professional activities of each applicant, with judicial determinations that are reasonable, the duty of fairness is engaged. I will proceed to consider the content of the duty and whether it was appropriately met by the NSHA.

[20] In *Jono*, at para 52, Justice Farrar referenced Justice Cromwell’s analysis in *Kelly v. Nova Scotia Police Commission*, 2006 NSCA 27, paras 20-21, in which the first step for the reviewing Court to determine the content of the tribunal’s duty of fairness is to engage with “… careful attention to the context of the particular proceeding and show deference to the tribunal’s discretion to set its own procedures.” The second step then is to assess “… whether the Board lived up to its duty…”, with the Court to intervene if it determines that the procedures were unfair. Cromwell, J. notes that there must be caution exercised by the Court in determining

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what an appropriate procedure would have been in the circumstances, with court procedures "… not necessarily the gold standard for review."

[21] In *Jono*, at para 53, the Court provides a summary of the five primary *Baker*, *supra* factors for the Court to consider as follows, (noting that the list is intended to be non-exhaustive):

> "….
>
> 1. the nature of the decision being made and the process followed in making it;
>
> 2. the nature of the statutory scheme and the "terms of the statute pursuant to which the body operates;"
>
> 3. the importance of the decision to the individual or individuals affected;
>
> 4. the legitimate expectations of the person challenging the decision; and
>
> 5. the choices of procedure made by the agency itself, particularly when the statute leaves to the decision-maker the ability to choose its own procedures, or when the agency has an expertise in determining what procedures are appropriate in the circumstances."

The arguments by both Dr. Finkle and Dr. West overlap, as does the NSHA's response. I will undertake an analysis of the content of the duty owed by the NSHA and then determine whether it was breached, in keeping with *Baker*.

1. The nature of the decision being made and the process in making it

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[22] Each physician submits that the NSHA's administrative Decision concerning him is placed on the higher end of the spectrum, as the Decisions were adjudicative in nature rather than purely discretionary.

[23] The Applicants submit that the process undertaken by the NSHA to address the complaints are steps toward making an adjudicative decision: the NSHA appointed an investigator who gathered evidence, interviewed witnesses, and made findings for a report; the NSHA's committee then reviewed the factual findings and considered the recommendations of its appointed investigator in the report; and the NSHA then determined and communicated its Decision to the physician, which included mandatory actions for the physician to complete.

[24] Dr. Finkle and Dr. West submit that, given the regulatory and legislative scheme in which the Policy is formed and derives its authority, (which will be reviewed next) the adjudicative element exercised by the NSHA in the complaints process places the requirement for procedural fairness at the higher end, closer to a trial-like level.

[25] The NSHA submits that there is a low to moderate level of procedural fairness required with respect to the process of an investigation into a complaint against a

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physician under the Policy, extending to any decision the NSHA may make in regard to the remedy.

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[26] The NSHA submits that there is a higher degree of deference afforded to the decisionmaker by a reviewing court in circumstances where the exercise of authority is more discretionary than adjudicative.

[27] In support of its position that a low or moderate level of procedural fairness is appropriate, the NSHA submits that Section 5.1.4 of the Policy enables the NSHA to consider the need for external resources to assist with a Formal Resolution, in the context of an assessment of a formal complaint when it is received by "the People Services Designate". The NSHA then exercised its discretion and appointed Ms. Andrea Lowes, of Certitude Workplace Investigations to investigate (s. 5 of the Policy)and report back in accordance with Section 6.2.4 of the Policy to prepare a report to "… communicate(s) the findings to the parties and their manager(s)." The Policy provides that an investigator is bound by an obligation to proceed in a "… fair, unbiased and timely manner" (Policy 6.1.4).

[28] Section 6.3.1 of the Policy requires that 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."

[29] NSHA submits that the Policy provides another point for the exercise of its discretion as the manager and People Services representative may either adopt or disagree with the Investigator's findings and recommendations.

[30] In these matters, though, there was a variation by the NSHA from the provisions in the Policy regarding who received and reviewed the investigative report. The Policy provides that the persons who review the Investigative Report concerning an employee who is the subject of complaint are an employee's manager and People Services. That was not the case in relation to these complaints.

[31] The persons designated by the NSHA to review the Investigator's reports were two persons, with one in a management role in relation to physicians. They were the NSHA's Zone Medical Executive Director (ZMED) and the Medical Affairs Lead for the Western Zone of the NSHA. This exercise of discretion is not provided for in the Policy.

[32] Neither Dr. West or Dr. Finkle are employees of the NSHA. They are independent medical professionals who are engaged with the NSHA via physician contract and engage in their specialist practice subject to hospital privileges afforded by the NSHA. It appears that the NSHA chose the ZMED and the Medical Affairs Lead to make the decisions on these complaints as they occupy seemingly analogous

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roles to a physician in a manner like a "manager and People Services" representative in that they exercise administrative controls over the exercise of privileges and performance of the doctors' contracts. They are not analogous, however. Their leadership roles within the NSHA administration also extend into considering physician discipline under the NSHA medical bylaws (Part C of the Medical Staff-Discipline Bylaws) as is indicated in the Decision letters sent to Dr. West and Dr. Finkle.

[33] The decision letters sent by Dr Smith, ZMED and Mr. Ocampo, as Medical Affairs Lead, to each of Dr. West and Dr. Finkle state:

> As you are aware, the independent investigation under the NSH Respectful Workplace Policy has concluded. We have considered the Investigator's recommendations with respect to the appropriate actions to be implemented. As such, we would like to inform you of the actions that will be required of you.
>
> (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. <u>This Policy review and the module must be completed within the three months of the date of this letter.</u>
>
> (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. <u>This course will be completed within six months of the date of this letter.</u>
>
> (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/education-events/workshops/effective-team-interactions.
>
> <u>This workshop must be completed within 12 months of the date of this letter.</u>

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> Upon completion of each of these items, you will self-report in writing to the Central Zone Medical Executive Director. **Failure 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.**
>
> [Bolded Emphasis Added by the Court; underlined portions in original]

[34] While the NSHA submits that there is nothing explicitly in the Policy that would require a hearing before a manager or the opportunity to make submissions to the manager before the remedy is determined it is clear that the Decision letters indicate the NSHA considered that the "medical bylaws process", which could affect the doctors' privileges, might be invoked as a mechanism to drive remedial action. The "medical bylaws process" has a high degree of procedural fairness detailed within it, including a right to hearing and a right of appeal. The Policy does not, though.

[35] If the doctors did not comply with the NSHA Decisions then any unfairness to the doctors at the investigative or the decision-making stage could be compounded pursuant to further disciplinary action under the medical bylaws for failing to meet the requirements of the Decisions, even if they are later afforded that higher level of procedural fairness. The findings of fact by the Investigator and then the decision makers in regard to the formal complaints under the Policy would have been made at the front end.

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[36] I find that the process undertaken to investigate and determine the three complaints against Dr. West and Dr. Finkle required a moderate to high level of procedural fairness with a clear expression of process rather than a broad exercise of discretion.

[37] The NSHA decision makers who were chosen to consider the final report have roles that extend beyond the Policy. As ZMED and Medical Affairs they both occupy broader roles in relation to the exercise of the doctor's profession, with their roles within the NSHA including responsibilities to make determinations on privileges pursuant to the *Health Authorities Act*, its regulations, and the Medical Staff Bylaws. The NSHA decision makers demonstrated they are aware of this broader role in the decisions and make an explicit link to the "Medical Staff… Discipline…" bylaws process as a mechanism that may be activated to address the failure of either doctor to meet the mandatory remedial actions set out within.

2. The nature of the statutory scheme and the terms of the statute pursuant to which the body operates

[38] The NSHA, created pursuant to the *Health Authorities Act*, S.N.S. 2014, c.32 has established corporate bylaws pursuant to regulation. These are the *Nova Scotia Health Authority Corporate Bylaws*, N.S. Reg. 29/2017, amended by N.S. Reg. 58/2019. (*Corporate Bylaws*)

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[39] The *Corporate Bylaws* empower the NSHA Board to determine its own policies and procedures, and it may delegate these powers. The initial approval of human resource policies was delegated by the Board, via resolution, to a "responsible VP" (identified as the Vice-President, People and Organizational Development) with final approval of this Policy resting with the Executive Leadership Team.

[40] The Respectful Workplace Policy is a NSHA human resource policy, headed AD-HR-020 within the NSHA Administrative Manual. The version of the Policy under consideration was made effective on October 2, 2027, as the Vice President, People and Organizational Development, adopted it, and was then approved by the NSHA's Executive Leadership Team, in keeping with the delegation of authority set out within the *Corporate Bylaws* and policy resolution of the NSHA Board.

[41] The NSHA submits that neither the *Health Authorities Act* nor the *Medical Staff Bylaws* (N.S. Reg 29/2017) establish the Policy or establish a decision making framework or process to follow when considering physician complaints. The NSHA states that, as those two aspects of the overall statutory scheme is silent in regard to the Policy, then case law would suggest that the decision maker has a wide discretion to establish its own procedure and therefore has a very low level of procedural fairness.

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[42] In response, the Applicants cite s. 6.3 of the Policy which provides that a breach of the Policy may warrant "… discipline up to and including termination." They also direct the Court to consider that there is no appeal function within the Policy. They submit that should afford the Applicants greater procedural protections be employed in the course of investigating and making findings that a physician has breached a NSHA Policy.

[43] It is apparent that the Policy is applicable to all "Staff". "Staff" is a defined term in the Policy and includes "… unless specifically limited by a certain policy, … all Employees, physicians, learners, volunteers…. and other individuals performing work activities within NSHA." [emphasis added]

[44] NSHA submits that, in the event there was an investigation of a breach of the Policy with serious allegations of workplace harassment substantiated against a physician with privileges, and the NSHA then believed disciplinary action was necessary, it would not issue decisions under the Policy like the ones under review. The NSHA, it submits, would instead elect to initiate a disciplinary process under Part C of the *Medical Staff Bylaws* (referenced in the Decisions under review as the "medical bylaws").

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[45] NSHA submits therefore that a very low or low level duty of procedural fairness is owed to the Applicants, as the statutory scheme of the *Health Authorities Act* and the *Medical Staff Bylaw* is silent in regard to process and procedural fairness in the context of a complaint pursuant to the Policy.

[46] Again, I disagree with this submission. It is predicated on a limited interpretation of the scope and content of the statutory scheme and ignores the content and context of the Policy, as an expression of delegated authority of the Board made pursuant to the *Health Authorities Act*, intended to be applicable to all persons engaged in "work activity". The inclusion of physicians as "Staff" who might be subject to disciplinary action, up to and including termination of a relationship that permits entry and work activity in a hospital setting, would indicate NSHA contemplates the Policy was an overlap with the Part C of the Medical Staff-Discipline Bylaws, and specifically Part C, 5.1 (which provides for complaints including "behaviour otherwise contrary to the values, <u>policies</u> and procedures of the HA.."). [Emphasis added]

[47] Part C, Sections 5.2 and 5.3 confirm that only the CEO, the VP Medicine, a ZMED, or a Department Head can initiate a complaint under Part C, which can affect a physician's privileges by revocation, suspension or variation. Part C also provides

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for a formal procedure, with facilitated mediation, a hearing and an appeal process within the Medical Staff Discipline Bylaws.

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[48] I note that Dr. Aaron Smith, a ZMED, is one of the signatories to the decision letters under judicial review. As noted in the prior paragraph, the ZMED can initiate a complaint that may affect physician privileges and disciplinary measures that may be undertaken in response to a breach of the NSHA policies.

[49] It is difficult to separate how procedural fairness could be accorded at a lower level in the context of a complaint concerning a physician under this Policy when it is possible that Dr. Smith, as ZMED, upon receiving the Report, might unilaterally instead determine that the content of a complaint made under the Policy requires him to trigger a proceeding under the Medical Staff Discipline Bylaws. Again, the Applicants are potentially prejudiced if a higher level of procedural protections are not extended to them in the context of the earlier formal complaint made pursuant to the Policy. It is not clear what would constitute a "serious allegation" of harassment that would then trigger a Medical Staff Discipline Bylaws complaint, particularly when the Policy contains such a broad definition of "harassment." (Detail on the definition of "harassment" can be found in *Finkle, supra*.)

[50] The ZMED is the chair of the Zone Credentials Committee (Part B of the *Medical Staff Bylaws*, s. 7.8.2.1) and on the Health Authority Credentials Committee (s. 7.2.3) which makes recommendations to the Board concerning discipline and privileges of physicians. There is an overlap in the roles the ZMED would occupy in considering and deciding a complaint under the Policy as an analog to "manager" in the Policy, although the NSHA has submitted that the Policy and *Medical Staff Bylaws* operate separately.

[51] Further, s. 7.1.3 of the Policy provides that documentation of the complaints and disposition, including the Decisions under review, must be retained within the "Employee Record." In the case of a physician working within the NSHA it appears that disclosure of the complaint and the Decision made under the Policy is effectively mandatory. Under the *Medical Staff Bylaws*, the Zone Department Head is required to conduct an annual review of each physician 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 (Part B of the *Medical Staff Bylaws*). [Emphasis added]

[52] As I have already indicated, I am making my own findings but I am aware of the succinct statement of Justice Keith at para 85 of *Finkle, supra* that "… a reasonable reading of the *Medical Staff Bylaws* indicates that the Decisions directly

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affects the Applicants' privileges even if they complete the required training and no additional complaints are filed against them."

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[53] Therefore, while the Policy may be silent in regard to the specifics of procedural fairness it is apparent that the interpretation of the Policy in the overall statutory and regulatory schema as it applies to physicians with privileges working in the NSHA is that it is included within the interrelated bylaws addressing discipline and oversight for medical professionals in the NSHA. This necessarily attracts a high level of procedural fairness.

3. The importance of the decision to the individual or individuals affected

[54] The Applicants submit that a written confirmation in a physician's file concerning a harassment complaint, with disciplinary measures set out, would likely result in negative perceptions of the physician as a professional member of medical staff and could have an adverse impact on future determinations for privileges or promotion. They further submit that as there is no appeal process available to the physicians in regard to the Decisions that a high degree of procedural fairness is required, and relies on *Aylward v. Law Society of Newfoundland and Labrador*, 2013 NLCA 68, as authority that the absence of an appeal process would suggest greater procedural protections.

[55] The NSHA disagrees with this position, submitting that the Decisions merely required the doctors to undertake three training courses. It also notes that the College of Physicians and Surgeons is not involved in the proceedings. Therefore, a low to moderate degree of procedural fairness is applicable.

[56] Again, while I am making my own determination in relation to the judicial review subject matter, the NSCA in *Nova Scotia Health Authority, supra* observed that in its view:

> [79]…. This case is not about continuing education, to which Drs. Finkle and West have no objection. Rather, the NSHA's management functions at play are (1) the promotion of comity in the workplace through the Respectful Workplace Policy and (2) the sanctioning of physicians through the leverage of privileges. The former promotes the efficacy of care through leadership and teamwork. **The latter would generate a record of non-compliance with NSHA "policy" by Drs. Finkle and West that may imperil the renewal of their privileges. Without privileges, their career path is obstructed and their renal patients may not access the NSHA's services such as dialysis.** Both management functions are central to the NSHA's mandate to provide health services. [emphasis added]

[57] As I outlined in the preceding section, there is a regularly scheduled annual review of each physician by the ZMED, as provided in the *Medical Staff Bylaws* Part B, that includes a consideration of their individual compliance with NSHA policy. The inclusion of the complaint and the disciplinary letter in their file would inform professional decisions made in relation to each of them, inclusive of privileges (per NSHA *Medical Staff Bylaws*, s. 3.1 and s. 13.2.3.). There is a peril that the doctors may not be able to continue their specialized practice at the NSHA, as a negative

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determination can be made concerning them in the course of a required review of their file or in circumstances when they must disclose whether there have been any findings of professional misconduct concerning them.

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[58] I find that a Decision made pursuant to the NSHA Policy concerning a complaint of harassment by a physician with privileges is highly important to the individuals affected. As per *Baker, supra* (referring to *Kane v. Board of Governors of the University of British Columbia*, 1980 CanLII 10 (SCC) at 1113), a high degree of procedural fairness is owed "… when the right to continue in one's profession or employment is at stake."

4. The legitimate expectations of the person challenging the decision

[59] In submissions, it appears that Drs. West and Finkle interpret Justice Keith's decision in *Finkle, supra* that the NSHAs authority to make decisions under the Policy in relation to them is derived from the *Medical Staff Bylaws*. They therefore view the *Medical Staff Bylaws* as providing the basis for a legitimate expectation of procedural fairness set at the highest level, that includes a right to mediation, hearing and an appeal process.

[60] The NSHA disagrees with this submission as it is not possible for the Applicants to have a "legitimate expectation" of procedural fairness in this manner, as the Policy is outside the *Medical Staff Bylaws*.

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[61] The NSHA relies on *Maharaj v. Rosetown (Town),* 2020 SKQB 254 at para 51, as authority that before a legitimate expectation can arise that there must be a "… clear, unambiguous and unqualified representation by the decision maker about the procedure it will follow, or the decision maker must have consistently adhered to certain procedural policies." Therefore, as the NSHA did not provide clear, unambiguous and unqualified representations regarding procedure and there is no evidence that the NSHA has adhered to "certain procedural policies.." when investigating complaints under the Policy, then there is no ground for a legitimate expectation of a high degree of procedural fairness but it concedes there is a low level of procedural fairness on this factor.

[62] The *Medical Staff Bylaws* do not provide the authority for the NSHA to make decisions pursuant to the Policy, per se, but are apparently intertwined here, as the decision makers cite them as the next step in the event the doctors do not comply with their decisions.

[63] As I have indicated earlier, the discipline provisions of Part C of the *Medical Staff Bylaws* would logically inform the legitimate expectations of physicians who are the subjects of formal complaints that may rise to discipline. This would include complaints arising from the Policy. The decisions under review explicitly state that the NSHA could decide to proceed with further disciplinary steps under the "… medical bylaws" if the doctors failed to meet the remedial steps in a timely manner.

[64] I find that there is a legitimate expectation, grounded in the applicants' knowledge of clearly stated and consistent adherence by the NSHA to procedures in the context of complaints and discipline concerning physicians, to a moderate to high degree of procedural fairness.

5. The choices of procedure made by the agency itself, particularly when the statute leaves to the decision-maker the ability to choose its own procedures, or when the agency has an expertise in determining what procedures are appropriate in the circumstances

[65] The Applicants' submit that the NSHA's choice of procedure is in the Policy, insofar as the Policy sets out directions on the investigatory process and evidence, but was modified. They plead that they should have been treated in accordance with the *Medical Staff Bylaws* as the proper procedural choices in the course of the complaint process.

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[66] The NSHA, in response, points out that the Policy itself makes one reference to procedural fairness as the requirement that the investigation be carried out in a "… fair, unbiased and timely way." It agrees that there is some procedural safeguards concerning collection of evidence during the course of the investigation. There is, however, within the Policy a considerable discretion that may be exercised by an external investigator in the manner of conducting the investigation, with the NSHA enjoying a corresponding discretion when determining remedial actions, if any, upon receiving a report. It submits that a low level of procedural fairness is sufficient.

[67] Neither party made a submission that the NSHA had specific expertise in determining what procedures are appropriate, but it appears to me that the NSHA would have some expertise in addressing complaints concerning physicians with privileges and related discipline decisions in the context of the *Medical Staff Bylaws*. It also appears that the tasking of Dr. Smith, ZMED with Mr. Ocampo, Medical Affairs Lead for the Western Zone, was an exercise of the NSHAs discretion to appoint individuals who were familiar with addressing complaints concerning physicians with privileges (who were included as "Staff", defined within the Policy) and in crafting remedial responses.

[68] I agree that at the investigation stage of the Policy that the investigator appointed may determine the process so long as it is conducted in a "fair, unbiased

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and timely way." This would appear to attract a moderate degree of procedural fairness. The NSHA exercised its own discretion by choosing to appoint an external investigator, bound by the stated level of procedural fairness.

[69] In making its decision on the complaints the NSHA determined that its process was limited to receive the report and recommendations of the external investigator in a final form, without eliciting a reply from the Applicants, and would consider the report and then communicate its findings afterward to the doctors, with a remediation decision to follow again without input from the doctors. There was no invitation to the doctors to make submissions on potential sanctions.

[70] Given my determination on the prior four factors that a high degree of procedural fairness was appropriate in the circumstances, the choice of procedure would tend toward one that would afford a high level of fairness throughout.

[71] I conclude that these were decisions that were more adjudicative in nature, with a high impact on the Applicants. There was a higher degree of procedural fairness required for the NSHA to meet, at the moderate to high level on the investigative stage and at the higher level at the decision making stage for formal complaints made against privileged physicians pursuant to the Policy.

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WAS THERE A BREACH OF THE DUTY OF PROCEDURAL FAIRNESS OWED TO THE APPLICANTS

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[72] The facts setting out the procedural steps undertaken by the NSHA in addressing the formal complaints filed under the Policy are in the Record, as are the responses by both Drs. West and Finkle.

[73] Two fellow nephrologists, referred to as Complainant "A" and Complainant "B", filed formal written complaints concerning the doctors alleging breaches of the Policy.

[74] Complainant A filed the first complaint on December 20, 2022, alleging that Dr. West breached the Policy. This was followed by another complaint dated March 21, 2022, in which Complainant A alleged Dr. Finkle had breached the Policy.

[75] Complainant B alleged Dr. Finkle of breaching the Policy and filed that complaint on March 26, 2022,

[76] The NSHA received the complaints, then proceeded to appoint Certitude as the Investigator pursuant to the Police, charged to investigate the complaints. This appointment was made on May 2, 2022.

[77] A week later, Dr Finkle, then Head of the Nephrology Division, was asked to attend a meeting held on May 9, 2022. He was then verbally informed by the Head

of the Department of Medicine and Chief of Central Zone District, the Director of Medical Affairs, and the Senior Respectful Workplace Consultant with the NSHA that he was the subject of two formal complaints being made under the Policy. (Affidavit of Dr. Finkle, para 7).

[78] Dr. Finkle was told then that there were two formal written complaints by two fellow nephrologists. He received a brief oral summary of the complaints. He did not receive particulars, despite his request, and was told formal notification would follow with the appointment of an investigator. (Affidavit Dr. Finkle para 8-9).

[79] Also on May 9, 2022, Dr. West attended a meeting with the Head of the Department of Medicine and Chief of Central Zone District, the Director of Medical Affairs, and the Senior Respectful Workplace Consultant with the NSHA and informed about a complaint concerning him. He also requested detail and was also informed he would receive formal notification at a later date. (Affidavit of Dr. West, para 6-8).

[80] Drs. West and Finkle state in their evidence that on May 10, 2022, they were each contacted by email by the Respectful Workplace Consultant to connect them with Ms. Andrea Lowes, who was the appointed investigator. The email advised that Ms. Lowes would meet with the Complainants later in the week to interview

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them, and then Ms. Lowes would draft a list of allegations made by the Complainants and provide the particulars to the doctor for review.

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[81] On May 11, 2022, Drs. West and Finkle received emails from the Department Head with somewhat identical official notification letters in relation to the complaints, each dated May 9, 2022. The letters confirmed the NSHA had appointed an investigator in accordance with section 6.1 of the Policy. They set out the following complaints of "Offensive and Disrespectful behaviour and Harassment" (defined in the Policy), with specific reference within to each physician:

> a) Dr. West: Lack of respect for a person's dignity, self-esteem, comfort or privacy; Abuse of authority; and Exclusion.
>
> b) Dr. Finkle: Lack of respect for a person's dignity, self-esteem, comfort or privacy; Abuse of authority; and Undermining.

[82] The doctors each retained counsel, Mr. Jack Graham, K.C. He began corresponding with the Respectful Workplace Consultant for the NSHA and requested a copy of the original complaints filed.

[83] Counsel for the NSHA responded in regard to each doctor, indicating that the request for the written complaints would be reviewed. It was later determined by the NSHA that the materials would not be provided. The complaints are found in the Record filed for judicial review of the Decisions.

[84] On May 30, 2022, Ms. Lowes transmitted her summaries of the allegations made by the complainants to each doctor, specific to the notice of complaint. Neither doctor received a copy of the original complaints that had been filed in writing.

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[85] On June 10, 2022, Mr. Graham corresponded with NSHA requesting process clarification, citing s. 51 of the Policy which indicates that a “People Services Designate” was to conduct an initiation assessment of formal complaints, and enquiring as to that persons identity, and who from People Services would be reviewing the investigation findings for a determination of remedial action, if any. (Affidavit of Dr. Finkle, para 15-17)

[86] NSHA responded on June 29, 2022 indicating that (as per Exhibit “H” of the Affidavit of Dr. Finkle, referenced at paras 18-19) that:

> a) The initial assessment of the complaint was conducted through the Medical Affairs Office as all parties involved are physicians. The Director, Medical Affairs, Central Zone, engaged the Respectful Workplace Consultant to assist with engaging an external investigator.
>
> b) The findings and recommendations of the Investigation Committee will be reviewed by the Central Zone Medical Affairs office and Department Head. As Physicians are not employees of NSHA, the People Services Department will not be involved in this instance. Any documents prepared as a result of the investigation are confidential and will only be shared with those directly involved.

[87] Mr. Graham requested more particulars from the NSHA, and Ms. Lowes responded on June 14, 2022 with additional details to the complaint summaries she had drafted in her role as Investigator.

[88] Dr. West observed that there were substantive changes to the allegations made against him in the revised complaint summaries, specifically in regard to time frames. This was again addressed in another version of complaint summary by Ms. Lowes specific to Dr. West.

[89] Dr. Finkle and Dr. West each submitted responses to the final version of the Complaint Summaries on August 23, 2022.

[90] After this point, each doctor was interviewed by Ms. Lowes in late September, 2022 in relation to the complaints made against them. Each doctor provided potential witnesses who Ms. Lowes could contact for further information. Neither of them were advised if these persons were contacted or whether any information was gathered in the course of the investigation.

[91] On December 8, 2022, the Investigator delivered her three written reports to the NSHA concerning each of the complaints, made against each doctor.

[92] Ms. Lowes determined that in regard to Complainant A's complaint concerning Dr. West, 15 of 18 allegations did not constitute harassment or part of a course of conduct. She did find that 3 allegations by Complainant A were harassment "… albeit on the lower end of the spectrum."

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[93] In 7 of Complainant A's 9 allegations concerning Dr. Finkle, Ms. Lowes concluded that there was no breach of the Respectful Workplace Policy but she did find 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 Policy".

[94] Ms. Lowes' report indicated she 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". She interpreted Dr. Finkle's actions as "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". She made two findings of harassment concerning Dr. Finkle, and did not make a finding regarding the complaint of discriminatory behaviour.

[95] Dr. Aaron Smith wrote to each of Dr. West and Dr. Finkle separately to communicate the Investigators findings. Dr. Smith wrote these letters in his capacity as the Zone's Medical Executive Director or "ZMED". The letters summarized the Investigator's findings regarding Complainant A and Complainant B, specific to each doctor. Generically, both letters indicated they were copied to the "Investigation File".

[96] On April 25, 2023, Jack Graham, K.C., sent correspondence to Dr. Smith concerning his clients, outlining his concerns with the process undertaken, the investigation and issues with fairness. The concerns included:

a. The initial assessment or "screening" phase in the Policy had not been properly carried out;

b. The complaints were developed in the course of the investigation by Ms. Lowes;

c. The Policy and definitions were misapplied;

d. The Complaints were vexatious.

[97] The Decision letters, dated May 1, 2023, were then issued separately to each of Dr. West and Dr. Finkle, with the remedial measures as outlined earlier in this decision. There is no reference to the issues raised within Mr. Graham's letter concerning fairness and process concerns.

[98] Dr. Finkle and Dr. West submit that the NSHA failed to meet its duty of procedural fairness as follows:

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a. At the screening stage, the NSHA failed to clarify the details of the complaints and assess the allegations to determine if the actions met Policy or to offer an informal resolution process prior to moving toward an investigation.

b. The investigator failed to provide the Applicants an opportunity to provide additional or clarifying information following the investigator's interviews with witness or obtaining documents.

c. The Applicants did not receive full disclosure, and was not afforded the opportunity to be heard fairly in advance of the Decisions.

[99] The Applicants are correct in their submission that there is no evidence of an initial assessment being undertaken. However, as the NSHA indicates their counsel did reply outlining that the initial assessment was undertaken by the Medical Affairs Office as all the parties were physicians.

[100] It is apparent at this stage that the NSHA began exercising its discretion and began stepping outside of the bounds of the Policy, as there is no explicit provision within it to accommodate the inclusion of the Medical Affairs Office in the role of "manager" or People Services. It is the Medical Affairs Office that then exercises

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discretion to engage the Respectful Workplace Consultant, who then hires the external investigator. (Exhibit "H" to Dr. Finkle's Affidavit).

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[101] The NSHA submits that the option of informal resolution was offered to the complainants, and that they rejected it. It also submits that it is too late, on judicial review, for the Applicants to raise this as a failure of the NSHA to meet its obligation for fairness under the Policy, as the Applicants essentially "waived" this option by not having their counsel raise it with the NSHA at an earlier point in the process.

[102] Frankly, this argument is difficult to accept as the NSHA pre-emptively decided, at the complainants' choice, to not engage in informal resolution with the parties. There was no agency exercised by the Applicants in "waiving" an alternative process. The NSHA could have offered or informed the physicians in its notification of complaint that an informal resolution process was available within the Policy. It chose not to do so.

[103] The NSHA created a process not provided for within the Policy by instead exercising its discretion for an analog of the management structure captured in the Policy, but in doing so created an overlap with the *Medical Staff Bylaws*, that also reference a requirement for physicians to comply with all NSHA Policy, and contains processes when there is discipline considered for a high level of procedural

fairness. That is too broad an exercise of discretion under the Policy, and not congruent with the Applicants' legitimate expectations when responding to allegations they had breached a NSHA Policy.

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[104] The NSHA did not reply to the Applicants counsel's correspondence raising their legitimate concerns over process before making their final Decision, despite the potential seriousness of an adverse finding on the Applicants' reputations and practices.

[105] The Applicants submit this demonstrates that their right to be heard, in keeping with principles of natural justice, were denied. I would agree.

[106] The NSHA should have permitted the Applicants with an opportunity to be heard in relation to the findings and in relation to the disciplinary measures under consideration.

[107] The NSHA submits that the common law indicates that it is not a breach of procedural fairness if an investigator fails to interview a witness or provide ongoing disclosure to a person who is the subject of investigation. It points to *Andruszkiewicz v. Canada (Attorney General)*, 2023 FC 528 para 95-98 for authority in support of this, but I will note the comment that "The investigator is also entitled to control the investigative process, subject only to the requirements of fairness."

[108] The Applicants' state that the investigator failed to keep them informed of her efforts to interview other persons, or to complete interviews with them. The Record does indicate that Ms. Lowes did make efforts to interview the Applicants in a timely manner. There is no indication in the evidence that her failure to interview the witnesses the Applicants identified resulted in a failure to obtain "crucial evidence".

[109] Ms. Lowes appears to have met the moderate level of procedural fairness for the Applicants in regard to her engagement with the NSHA. The physicians were initially advised by Ms. Lowes of her initial summary of the complaints, later amended upon Ms. Lowes' subsequent interviews with the complainants. They did request additional particulars and received some materials from Ms. Lowes, but not the original text of the written complaints.

[110] The NSHA maintains that the Applicants were made aware in sufficient detail of the allegations against them (as per *Kuny v. College of Registered Nurses of Manitoba*, 2017 MBCA 111) to be able to respond in a meaningful fashion.

[111] However, the submission of the Applicants is that the disclosure was insufficient, and in the absence of the original written complaints it was not possible for them to understand how much was the product of Ms. Lowes' own perspective. The Policy does, however, permit the Investigator to make her own findings, and

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these were communicated to the Applicants accordingly. The Policy does not permit for a formal hearing before a decision maker proceeds in considering discipline, but the *Medical Bylaws* does, during which questions the Applicants had about the basis for the report's findings could be posed.

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[112] Further, the Applicants submit that the doctors should have been re-interviewed by Ms. Lowes in regard to her specific findings, in order to respond to them at the conclusion of her investigation prior to finalizing the report and recommendation. They rely on *Oberg v. Saskatchewan (Board of Education of the South East Cornerstone School Division No. 209)*, 2020 SKQB 96 in support of this point. *Oberg* concerned an employment matter, with the Court observing at para 36 that "…. While an employer need not be perfect, cumulative mistakes in an investigation can amount to a breach of procedural fairness and constitute a failure to act in good faith".

[113] In regard to the investigation stage, as the duty is at a moderate to high level, an additional level of protection for the Applicants for a re-interview prior to a final report determination may have afforded the Applicants more fairness.

[114] The NSHA though exercised its discretion by creating a process that departed from the plain language of the Policy's provisions for addressing formal complaints

and investigation at the outset, when it tasked the ZMED and Medical Affairs Office with responsibility for the determination of the physician complaints and discipline. It did so without considering the overall context of the physicians' obligations to meet NSHA policy and the scope of their procedural protections set out within the Medical Staff Discipline Bylaws in the event of a disciplinary proceeding. The Policy itself did not provide for a hearing, it is clear, but the link of a NSHA Policy with the disciplinary aspect of the Medical Staff Bylaw indicates fairness would be breached in its absence.

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CONCLUSIONS

[115] I find that Dr. Finkle and Dr. West were not afforded an appropriate level of procedural fairness by the NSHA in regard to the formal complaints made against them pursuant to the Policy. The process undertaken was insufficient to meet the higher duty of procedural fairness in the context of the NSHA addressing an allegation of breach of Policy, with disciplinary potential, involving a specialist physician with privileges.

[116] The Applicants have requested that the Decisions be quashed, and I would do so.

[117] The NSHA has advised the Court that the Policy has been amended since the Decisions were made. It was unclear at hearing whether the matters could be sent back to the decision maker due to changes in the Policy if they were quashed.

[118] As I have quashed the Decisions, I am requesting that the parties discuss and agree on a process to which the Applicants may be entitled and, if they are unable to agree, I will receive submissions on the point, as well as on costs, within the next 30 days.

Rowe, J.

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