IN THE MATTER OF AN ARBITRATION
PURSUANT TO THE *LABOUR RELATIONS ACT*, 1995

BETWEEN

CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 1623

(Hereinafter referred to as the "Union")

AND

HEALTH SCIENCES NORTH
(Hereinafter referred to as the "Employer")

Policy Grievances: CS2017-167 - (Service Unit)
CC2017-003 - (Clerical Unit)

ARBITRATOR: Tatiana Wacyk

APPEARANCES:

FOR THE UNION: Wassim Garzouzi, Counsel, and Roger Richer, CUPE Local 1623, Vice President

FOR THE EMPLOYER: Andrew Cogswell, Counsel, and Aurel Malo, Managing Partner, DiBrina Human Resources

DATE OF HEARING: October 4, 2017

LOCATION OF HEARING: Sudbury, Ontario

DATE OF DECISION: October 26, 2017

DECISION

I.

1. These policy grievances arise from a dispute between the parties regarding whether "counselling notes" received by some employees are more appropriately characterized as letters of reprimand.

2. This distinction between a counselling note and a letter of reprimand is significant, in that Article 8.02 of both the Service and Clerical Unit Collective Agreements provide for the removal of letters of reprimand, as well as other disciplinary sanctions, eighteen months following their receipt, provided the employee's record has been discipline free for one year. On the other hand, there is no provision addressing the removal of counselling notes from employees' records.

3. There was no dispute that concerns set out in a counselling note cannot be held against the employee, and that such notes do not constitute the first step of discipline or part of the progressive discipline process.

4. Nor, in the large part, did the parties disagree with the arbitral principles articulated in the jurisprudence in this area, addressed below.

5. Rather, the dispute between the parties is regarding the application of those principles in crafting the counselling notes given to employees.

6. The Employer also expressed reservations regarding the appropriateness of addressing this issue as a policy grievance rather than through individual grievances.

7. In any event, the parties asked that, rather than determining the character of any particular counselling note, I provide guidance regarding specific elements of the Employer's practices. To assist me in this exercise, the

parties put before me samples of counselling notes received by various employees.

8. My comments are set out below.

JURISPRUDENCE:

9. The distinction between "counselling" and "disciplinary" letters has been addressed by a number of arbitrators. To that end, in addition to referring to Donald J.M. Brown and David M. Beatty, *Canadian Labour Arbitration*, 4th ed. (Toronto: Thomson Reuters Canada Ltd, 2012), 7:4210 - The nature of disciplinary sanctions, the parties referred to the following decisions: *Alberta Hospital Edmonton (Provincial Mental Health Advisory Board) v HSAA*, 69 LAC (4th) 289 (Price); *Dufferin-Peel Roman Catholic Separate School Board v OECTA*, 1998 CarswellOnt 6679 (Knopf); *Hilton Villa Care Centre v BCNU*, 116 LAC (4th) 154 (Gordon); *Hamilton Community Care Access Centre v OPSEU, Local 274,* 149 LAC (4th) 340 (Briggs); *Peel District School Board v ETFO*, 2007 CarswellOnt 8882 (Rose); *Limestone District School Board v CUPE, Local 1480*, 163 LAC (4th) 428 (Newman); *Keewatin-Patricia District School Board v ETFO*, 2010 CarswellOnt 4903 (Humphrey); *University of British Columbia and CUPE, Local 116*, 2009 CarswellBC 4027(McPhillips); *Ontario Public Service Employees Union v. Ontario (Ministry of Community and Social Services)* (*Barillari Grievance*), [2006] O.G.S.B.A. No, 176 (Dissanayake); *Elementary Teachers Federation of Ontario v. District School Board of Niagara* (*Werezak Grievance*), [2016] O.L.A.A. No. 262 (Dissanayake);

10. Arbitrator Newman in her decision in *Limestone District School Board v. C.U.P.E., Local 1480, supra* provided a comprehensive list of considerations undertaken by arbitrators in determining whether a letter or note is "counselling" or "disciplinary". Her list, set out in paragraph 50 of her decision, is as follows:

> 50 In the *Dufferin-Peel* award of Arbitrator Knopf, … they are listed [at page 5] as:

1. Whether the employer intended to impose discipline;

2. The impact upon the employee’s career;

3. The employ[er's] stated intention as to whether the document would be relied upon to support disciplinary action in the future;

4. Whether the alleged incident could amount to culpable behaviour;

5. Whether there was an intent to punish or correct undesirable behaviour through the imposition of the sanction;

6. Whether the substance of the document is an expression of employer disapproval (non-disciplinary) or a punitive measure intending to correct (disciplinary);

7. Whether the document sets out standards to meet in the future and is prospective in nature (non-disciplinary) or has an immediate effect upon the grievor (disciplinary).

In the Hamilton Community Care award of Arbitrator Briggs, useful factors are listed (with reference to an award in *Hilton Villa* (2003) 115 L.A. C. (4th) 154, (Gordon), as:

1. the degree to which other relevant correspondence and surrounding circumstances help the arbitrator interpret the memo;

2. whether the memo was specifically directed at particular employees;

3. whether the letter referred to possible disciplinary action if the conduct persisted;

4. whether the letter suggested that the employee's action[s] were ill-founded or improperly handled;

5. whether the language used in the memo refers to communications expectations rather than the identification of concerns or unacceptable or insubordinate behaviour possibly warranting discipline in the future;

6. whether the purpose appears to have been to correct undesirable behaviour by specific employees;

7. whether the employer addresses its concerns in a supportive manner and whether any support is offered to improve the perceived problems;

8. whether the memo itself is in a disciplinary format.

51 Arbitrator Briggs also made reference to a useful summary, taken from *Ontario* (*Ministry of Health*) *v. O.P.S.E.U.* (July 16, 1996),

Kennedy Member (Ont. Arb.) [hereinafter Crown in Right of Ontario] (unreported):

> A. The character of a communication cannot be judged simply by the title it is given by the employer. The critical consideration is the substantive effect of the letter or note.
>
> B. the disciplinary communication is one which is intended to punish or chastise the employee for failure to perform properly ...
>
> C. A non-disciplinary communication may counsel or recommend certain conduct to the employee, but has no significance for future discipline ... [and] cannot prejudice the employee.
>
> 52 Arbitrator Price, in his *Alberta Hospital Edmonton* (*Provincial Mental Health Advisory Board*) award, contributes to the lists by adding (in a chart that is here paraphrased) the following concepts [at page 13]:
>
> Performance Expectations letters have as their purposed to counsel and communicate, to identify or clarify expected behaviour, while Disciplinary letters correct poor performance.
>
> In the former, the employer's purpose is helpful. In the latter, it is disciplinary.
>
> In the former, examples are used only as a means to clarify inappropriate behaviour. In the latter, specific culpable incidents of infraction are cited.
>
> In the former, the employer develops, with the employee's input, mutual goals to encourage the employee's commitment to change. In the latter, the employee will have to grieve to be able to respond effectively to the allegations.
>
> In the former, the employer assumes that the employee's behaviour will change once he or she is informed of the standard. In the latter, consequences are expected to have to apply in order to affect present or future change.
>
> In the former, a review period is set to give feedback on change. In the latter, compliance is anticipated.
>
> In the former, the letter may be used only to document employee awareness of the standard. In the latter, the document will negatively impact the employee's record, and will be relied upon to determine future sanctions or levels of discipline.

11. I would add to the above list, the following passage from Arbitrator McPhillips' decision in *University of British Columbia and CUPE, Local 116*, *supra,* in which he considered the meaning of "letter of reprimand". While the context

was somewhat different, his comments are of interest, as they address the generic characteristics of letters of reprimand, which are customarily considered a form of discipline in the labour relations context. They also demonstrate that "tone" is important:

> 38. The next term which must be given some meaning is "letter of reprimand". The term "reprimand" was defined by Arbitrator Hickling in *Lifestyle Retirement Communities Ltd.* (*Whitecliff*) as an "official or sharp rebuke for a fault". In *OJ Canada,* [2006] B.C.C.A.A.A. No. 68, April 3, 2006, he also observed, at para. 75:
>
> > In a colloquial sense, "reprimand" might include any rebuke, a "dressing down", a "talking to" a "telling off', a "ticking off', a "rap on the knuckles", a "slap on the wrist", a "tongue lashing", a "raking over the coals". In the ordinary dictionary sense it means "a rebuke, especially a formal or official one" [Oxford American Dictionary], "an official or sharp rebuke (for a fault, etc.)", [Oxford Canadian Dictionary].

12. Whether the letter or note is placed in the employee's personnel file is also of significance. At paragraph 64, Arbitrator Dissanayake, in *Ontario Public Service Employees Union* (*Barillari*), *supra,* gave weight to the fact the letters at issue had never been placed in the grievor's personnel file.

13. The panel chaired by Arbitrator Price in *Alberta Hospital Edmonton (Provincial Mental Health Advisory Board), supra,* acknowledged the potential prejudice of such non-disciplinary letters remaining on employees' personnel files. Specifically, at paragraph 76, Arbitrator Price pointed out the result would be that the letters at issue, which concluded the grievors' conduct constituted insubordination, "would remain **on an employee's personnel file**, not as discipline to be sure, but as information, unchallenged and unexplained, that might be available for an indefinite period in the future for non-disciplinary reasons. [emphasis added]

14. The panel found the letters in that instance to be disciplinary, despite the (albeit delayed) undertaking by the employer that the letters did not form part of the grievors' disciplinary record, and would not be used to establish

the level of discipline in respect of any future disciplinary action involving the grievors.

15. Arbitrator Gordon in *Hilton Villa Care Centre, supra* articulated a similar concern at paragraph 33. Arbitrator Gordon pointed out that while management at the time may give assurances regarding the limited future use of any such letter, it may remain on a grievor's file long after that member of management has moved on, and could be referred to inadvertently in the future, to the employee's detriment.

16. This is not to suggest that in all instances, maintaining such documentation outside of the personnel file is sufficient to render it non-disciplinary.

17. As seen in Arbitrator Knopf's decision in *Dufferin-Peel Roman Catholic Separate School Board*, *supra,* where the allegations contained in the documentation make findings of professional misconduct that could potentially affect a grievor's career, both in terms of a disciplinary record and in terms of professional evaluations, such documentation may simply be too potentially prejudicial to be found non-disciplinary, even if not contained in a personnel file.

18. A similar result was reached by Arbitrator Rose, in *Peel District School Board, supra*. The employer in that instance had indicated the letters in dispute would not be placed in the grievors' files (although there was some uncertainty regarding the location of the letters). In any event, at paragraph 14, Arbitrator Rose found the letters to be disciplinary and noted that while it could not be said with certainty that the letters at issue actually threatened the grievors' careers, they arguably raised uncertainty and apprehension about the future.

ANALYSIS:

19. As is seen above, arbitrators have adopted similar analyses and parameters in distinguishing counselling letters from letters of reprimand or discipline.

20. While there is no dispute that each case must be decided on its own particular facts and circumstances, it is evident that many of the above elements are determined from the face of the written communication at issue.

21. According, the written communication is of primary importance. Indeed, it is often all that remains after the passage of time, and must be considered in that context.

Statement That Not Disciplinary

22. Most of the letters placed before me stated they were non-disciplinary.

23. While different arbitrators have given different weight to such statements, I do not understand any to take the positon that such a statement will prevail, when the content of the statement suggests the contrary. Rather, I am in agreement with the following comment, adopted by Arbitrator Price in *Alberta Hospital Edmonton (Provincial Mental Health Advisory Board, supra* at paragraphs 46 and 48:

> If a communication is disciplinary by its intent or on its face, a statement that it is not disciplinary or that it will not be used in future disciplinary proceedings cannot alter its basic character.... In the Board's view, ... the contents of the letter are disciplinary; the bona fide undertaking of the Employer cannot change that.

24. This was echoed by Arbitrator Humphrey in *Keewatin-Patricia District School Board, supra*, at paragraph 15, where he states that the intent regarding the nature of the letters should be ascertained by a reasonable and objective reading of the letters at the time they were issued.

General Comments

Establishing Expectations

25. The primary purpose of counselling notes is to clarify expectations. They may also be used demonstrate the employee was aware of such expectations, in the event the conduct is not corrected.

26. As stated by Arbitrator Dissanayake in his *Ontario Public Service Employees Union* decision, supra, at paragraph 65: "If the non-disciplinary approach does not produce the corrective results, it is open to the employer to initiate a disciplinary response. The non-disciplinary directions, letters etc. will not form a step in the progressive discipline system, but may well serve to establish that the grievor was made aware of the employer's expectations, should that be an issue.

27. Accordingly, I begin from the premise that both employers and employees have an interest in the employer investigating and bringing conduct the employer views as problematic to an employee's attention, without such a correction being "disciplinary".

28. No one benefits if the first or only corrective action available to the employer is a disciplinary one. Employees may be unclear regarding expectations, and receptive to a clear articulation of those expectations without the adversarial tone of a letter of reprimand. Such communications allow managers and employees to have full and frank discussions regarding such expectations, without having to resort to the grievance process to sort out their differences.

29. Accordingly, as stated by Arbitrator Price at paragraph 42, in *Alberta Hospital Edmonton (Provincial Mental Health Advisory Board), supra,* "Not every

expression of disapproval by an employer should be taken as an act of discipline."

30. Rather, the potential difficulty arises when, following an investigation and/or discussion with the employee, the employer commits the events and issues to writing.

31. The cases are clear that a counselling letter or note should not be disadvantageous to the employee. A non-disciplinary communication may counsel or recommend certain conduct to the employee, but has no significance for future discipline ... [and] cannot prejudice the employee. [see *Hamilton Community Care Access Centre*, *supra,* at paragraph 26.]

32. The cases referred to by the parties did not differentiate between comment and correction verbally given to employees, and those communicated in writing. However, in my view, this is a critical distinction.

33. It may be entirely appropriate, and indeed necessary for a manager to verbally set out the details of his or her concerns to demonstrate how the employee's conduct falls short of expectations. However, such details may not be appropriate or necessary in any resulting counselling letter or note. This is particularly the case if the employer wishes to ensure its "non-disciplinary" status.

34. Given the narrow purposes to which counselling letters can be put, simply articulating the expectation, in many or most instances, may be all that need be said. An example of such a counselling letter is set out in *Ontario Public Service Employees Union, supra* at paragraph 26:

Letter of Counsel

> Further to our conversation on Tuesday, August 20, 2002 this letter is to advise you to refrain from any religious based conversations/ invitations within this workplace.
>
> Your continued co-operation in this matter is greatly appreciated.

35. Also consistent with the notion of "counselling" is a neutral statement of what the employer is prepared to do to assist the employee to meet expectations. For example, a letter at tab 1 of exhibit 10, dated July 16, 2012, which stated:

> I will have our clerk lead meet with you to provide more training, to ensure you have the education/knowledge to respond appropriately.

36. On occasion, there may be detailed directions that must be followed, as was the case with tab 4 of exhibit 10, dated March 4/March 9, 2015, which clearly, and in arguably neutral language, set out the charting requirements the employee was to meet. However, the letter then continued with what was somewhat problematic language, addressed below.

Caution Re Future Discipline

37. Some arbitrators have held that merely cautioning an employee that discipline may result if they fail to alter their conduct, is not itself a penalty that can be grieved. However, any notation on a record that can subsequently be used against the employee is usually sufficient for that notation to be found to be a disciplinary sanction. (Brown and Beatty, *supra,* at paragraph 4)

38. Careful thought ought to be given, then, to whether that warning need be committed to writing. A verbal caution puts the employee on notice that the employer views the issue seriously, and consequences may follow if a correction is not made. However, depending on the tone and language used, committing such a warning to writing may contribute to altering the tone of the letter, so that it crosses the threshold from counselling to disciplinary.

39. For example, several of the letters submitted by the parties, while stating they are non-disciplinary in nature, contain language that potentially undermines that statement of intent. For example:

> **Exhibit 5, dated November 7, 2106 [sic] states:**
>
> …failure to comply with this request could also result in **further** corrective action. [emphasis added].
>
> **Exhibit 6, dated October 13, 2016 states:**
>
> Any further behavioural incidents will result in "**more"** formal corrective action". [emphasis added].
>
> **Exhibit 7, dated April 10, 2014 states:**
>
> Any further incidents may result in "**more**" formal disciplinary action.

40. Such language is ambiguous and can be interpreted to mean the letter itself is a form of "corrective or disciplinary action" – albeit less formal that what might follow. At the very least, it unnecessarily muddies the water.

Statements of Disapproval or Findings of Culpable Behavior

41. While there may be situations where there is a legal duty to investigate and/or document errors, such as involving patient care for example, careful consideration ought to be given to both the essential details required, as well as the tone in which such details are addressed.

42. The closer the tone of the letter reflects disapproval, or a finding of culpable behavior, the more likely it is to be seen as potentially prejudicial to the employee, and therefore disciplinary. Examples of this can be seen as follows:

Exhibit 5 – dated November 7, 2106 [sic]:

In this instance, a finding of fact is made regarding the conduct at issue, which is described in detail, and the employee is advised that the conduct is "considered insubordinate behaviour".

Exhibit 7 – dated April 10, 2104:

Similarly, following a detailed finding of fact regarding the employee's actions, the letter indicates "this is considered inappropriate behavior and will no longer be accepted."

Exhibit 8 – dated May 19, 2016:

This letter sets out accusations of "**non-adherence to standard work and standards of care**" [emphasis in original]. These included the following:

> It was also noted by other staff through the investigation process that you were sitting at the nursing station at 18:45 socializing with other staff and you were not doing any "actual" work.

Following an indication the Employer continued to "see deficiencies" in the employee's work performance, the letter stated:

> As a result, please consider this a formal verbal warning which sets out our concerns and expectations **and which is non-disciplinary in nature but will be attached to your employee file**. Any further incidents will result in more formal corrective action. [emphasis in original]

Exhibit 9 – dated September 29, 2017:

This letter is particularly perplexing in that it states:

> Further to our meeting on September 29, 2017, **this letter serves a record of formal verbal discipline and will be placed on your employee file in accordance with Article 8.02** of the CUPE collective agreement. Your union representative Dave Shelefontiuk, was also present at the meeting. [emphasis added]
>
> This **is a coaching note which is not disciplinary in nature** and is the result of medication errors on September 21 and 26, 2017. [emphasis in original]

Exhibit 10, tab 2, dated August 12, 2013:

This letter sets out findings of fact and states:

> Leaving your assigned area is unacceptable; an abandonment of post is serious. It demonstrated extremely poor judgement on your part.

Exhibit 10, tab 4, dated March 4/March 9, 2015:

In this instance, as indicated earlier, having set out, in arguably neutral language, the charting requirements the employee was to meet, the letter then continued with:

> This is a practice that you are very familiar with; but consistently fail to comply with…

43. These letters set out findings of fact and conclusions and arguably read much like disciplinary letters – without the accompanying opportunity for the employee to challenge them. The more the tone of the letters is consistent with that of a "reprimand", as described by Arbitrator Hickling in *Lifestyle Retirement Communities Ltd.* (*Whitecliff*), set out in paragraph 11 above, the more likely it will be viewed as disciplinary.

44. In other words, the more the letters resemble disciplinary notes in detail and tone, the more likely they are to be found to be disciplinary.

Retention of Counselling Notes in Employee's Personnel File

45. Most of the letters placed before me were placed and retained in the affected employees' personnel files.

46. Given their limited utility, the necessity or appropriateness of placing counselling notes on the affected employee's personal file is not apparent.

47. Rather, the indefinite retention of such a note in a personnel file makes it more likely it will come to the attention of persons in a position to make or comment upon decisions that ultimately impact on the employee's career

prospects. In other words, such a practice increases the risk of the note being prejudicial to the employee.

48. While the notes ostensibly do not constitute discipline, and can only be used to establish an employee's awareness of expectations, negative comments may, as Arbitrator Knopf pointed out at paragraph 22 of her decision in *Dufferin-Peel Roman Catholic School Board*, *supra,* affect an employee's career, in terms of that employee's professional evaluations. Such comments also have the potential to, perhaps several or even many years later, affect the employee's success in applying for a promotion, lateral transfer, or secondment opportunity.

49. Accordingly, inclusion of counselling letters in employees' personnel files will, no doubt, attract greater scrutiny, in order to avoid any potential prejudice to the employee.

50. For that reason, as with all other elements of the letter, the need for retention of the letter in an employee's personnel file, rather than being the norm, should be carefully considered in each instance.

Reference to the Employee Assistance Program

51. The Union also took issue with versions of the following statements, included in the counselling letters:

> Please also note that the Employee Assistance Program is always available to you should you wish to utilize this service;
>
> We have also included an EAP brochure for your information and use.

52. Context, of course, is critical. On their own, the above statements are consistent with an employer's effort in assisting an employee who may be having difficulty and who may benefit from the support of an EAP program.

53. However, if the overall tone of the letter is punitive or one of reprimand, and/or strongly suggestive of the need for such assistance, this may contribute to a finding the letter is disciplinary rather than counselling.

54. Accordingly, as with all aspects of counselling notes, inclusion of this element must be carefully considered in its particular context.

55. As stated by Arbitrator Knopf in *Dufferin-Peel Roman Catholic Separate School Board, supra* states at the end of paragraph 17:, "[e]ach case must be decided on its own particular facts and be based on the specific circumstances facing the parties".

56. That being said, there may be some merit in providing guidance to managers, in the form of a template, to be used as a basic format for counselling notes. This would require managers to consider the need for or appropriateness of information or comments which may inadvertently result in notes intended to be "counselling", being found to be letters of reprimand or disciplinary letters.

DATED AT TORONTO, THIS 26TH DAY OF OCTOBER, 2017.

"Tatiana Wacyk"
Arbitrator