To: Bargaining Unit Presidents

From: Linda Haslam-Stroud, RN, President

Date: February 15, 2013

Re: Members Completing Performance Appraisals (PAs) on Other Staff – Direction Included

C: Board of Directors, Local Coordinators, District Service Teams

The Issue
In some workplaces, employers are requesting ONA members complete performance appraisals (PAs) on other staff. This practice occurs most commonly in the long-term care sector, where some homes are requesting registered nurses (RNs) complete PAs on other staff, including registered practical nurses (RPNs) and personal support workers (PSWs). In some cases, this practice has gone on for years, whereas in others, the practice has only recently been introduced.

ONA has genuine concerns about our members completing PAs on other staff, as this is traditionally a management function. Moreover, this becomes a potential conflict if these PAs are relied on to support discipline or become a factor in the selection of job-posting candidates. In most cases, PAs are being done on staff represented by other unions, such as CUPE, SEIU or CAW. However, it is not hard to imagine that the next step will be RNs completing PAs on other RNs or RPNs in the same Bargaining Unit. This presents a potential conflict of interest between members.

It becomes more troubling given that some employers have attempted to remove positions out of ONA’s Bargaining Unit under the guise that they are managerial in nature. Moreover, given the trend of RPNs increasingly requesting ONA organize them, the potential for conflict may become more prevalent.

The purpose of this direction is to clarify ONA’s position and provide a strategy to address this issue in the future.

Direction
1. ONA’s central bargaining teams or Bargaining Unit Leaders and staff, as appropriate, should negotiate language in their collective agreement that either restricts or sets parameters around the scope of members completing PAs on other staff. See page 4 for proposed language.

2. If employers are requiring members to complete PAs, staff and Bargaining Unit Leaders should consider filing grievances based on the following criteria:
   a. Will the PAs be used for disciplinary purposes or be used as an assessment in a job competition? If the answer is “no,” then there may be no conflict in members performing PAs.
   b. Review your particular collective agreement language to see if the contract is being violated i.e. Central Homes Article 19.02 (a).
c. Is there a longstanding practice in the workplace of members performing PAs, or was this recently introduced? If there is a longstanding practice, ONA may be faced with an estoppel argument. If the practice was recently introduced, then it may be challenged.

d. Do our members object to completing PAs? In some workplaces, members take no issue with performing PAs, and have requested that ONA not file grievances in the circumstances.

e. Are PAs completed on other Bargaining Unit members? Completed PAs on non-Bargaining Unit members present less of a conflict of interest. However, completing these PAs may result in retribution for ONA members and we are trying to prevent this from occurring.

f. Alternatively, withdraw the grievance and remain silent on the issue entirely. This is a better outcome than Minutes of Settlement that work against ONA’s goals or bad case law.

3. Grievances that are referred to arbitration are to be reviewed on their merits and we will take the best facts case forward. The ONA Litigation Team will monitor these cases ongoing.

4. If grievances are settled, ONA staff and Bargaining Unit leaders are to negotiate the following provision into the minutes of settlement:

   - Employers will only use PAs for learning purposes and/or professional development. PAs completed by members will not be used for any disciplinary purpose or for the purpose of assessing candidates in a job competition.

5. The priority when settling grievances is to achieve #4 above. If unable to achieve the language above, staff and Bargaining Unit leaders can attempt to negotiate the following provisions into the minutes of settlement, in addition to #4 above:

   a. Agreement that members will only provide input into PAs on employees outside of ONA’s Bargaining Unit.

   b. Parties will meet at the next Labour-Management Committee meeting to discuss the tool that will be used to provide input into PAs. The Union will have the opportunity to provide input into amending any parts of the PA tool that should be properly completed by a member of management.

   c. That members will be provided adequate time and space to provide input into PAs during working hours.

   d. Members will be provided adequate training on how to provide input into PA forms.

   e. Members will not be required to provide input into PAs on employees for whom they have not had sufficient opportunity to observe their work.

6. In addition to the above, ONA staff and Bargaining Unit leaders are to explore other provisions of the collective agreement to deal with issues, such as occupational health and safety concerns, violence and harassment language, as a result of harassment or backlash.

**Background**

ONA has taken the position that ONA members should not complete PAs on other employees and grievances should be filed whenever ONA members are required to do so.\(^1\) ONA believes PAs/evaluations of employees are the responsibility and function of management.

At least two grievances have been referred to arbitration and settled over the last year.\(^2\) Both settlements were reached with the assistance of Arbitrator McNamee and contemplate that ONA members will complete PAs on non-ONA staff, but that such appraisals cannot be used for disciplinary purposes.

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\(^1\) See ONA Position Paper “Peer Review and Performance Appraisals” dated December 2011. See also ONA position on “Workplace Peer Review” dated September 2006.

\(^2\) ONA and Casselhome Home for the Aged (ONA File No. 200900515); and ONA and Alexander Place (ONA File No. 201102633).
A third grievance is proceeding to arbitration at Extendicare Scarborough before Arbitrator McNamee. The hearing commenced in November 2012 and the parties are canvassing continuation dates for 2013.\(^3\) In the case of Extendicare Scarborough, the employer has established a formalized process whereby the RN will meet with RPNs and complete a standardized form that discusses topics ranging from competency to attendance. Other areas of the form speak to team work, dedication to the organization and identifying skill gaps and putting plans in place to fill those gaps. The issues identified are traditionally management functions. ONA understands that Extendicare has RNs completing PAs in the following homes: Peterborough, Fairhaven, Cobourg, Lakefield, Medex and Ottawa. Grievances have been filed at each of these homes and are being held in abeyance pending the Scarborough decision.

In some cases, ONA has instructed Labour Relations Officers (LROs) to settle grievances where there has been a longstanding practice in the workplace to have RNs complete PAs. ONA has also been advised that in some workplaces, nurses welcome the role of performing PAs and are not following ONA’s position on the matter.

**Case Law**

There is very little case law on this issue. The case law that does exist is not helpful to ONA’s cause. In a decision from Alberta, Arbitrator Ponak dealt with this issue in the context of a job-posting grievance, wherein the union objected to the hospital using other Bargaining Unit members to sit on an interview panel.\(^4\) In that case, the union argued it was improper for the hospital to place nurses in a conflict of interest and that the collective agreement itself contemplated that only managers could evaluate Bargaining Unit members. Unfortunately, the arbitrator rejected the union’s arguments, stating there was no language in the collective agreement that restricted the hospital from having Bargaining Unit members sit on interview panels.

The issue of PAs arises more commonly in cases involving managerial exclusions. In those cases, both arbitrators and the Ontario Labour Relations Board (OLRB) have stated that completing PAs is indicative of a managerial function. Whether an individual is excluded from the Bargaining Unit will depend, however, on a number of factors regarding the level of managerial duties.

In some cases, arbitrators have excluded positions that perform PAs among other managerial functions.\(^5\) In other cases, arbitrators have concluded that there is nothing improper in the parties including in the Bargaining Unit persons who perform duties that are otherwise management functions.\(^6\)

The OLRB has ruled that completing PAs are not necessarily a managerial function, and that in order for it to be managerial, the person performing the PA must have the ability to decide or make effective recommendations that affect the economic lives of others. Simply completing a PA is not sufficient evidence to prove that someone is working in a managerial capacity.\(^7\)

Overall, the case law has not been supportive of ONA’s position. In order to succeed at arbitration, ONA will need clear language in its collective agreements that restrict members from

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\(^3\) ONA & Extendicare Scarborough (ONA File No. 201203736).


\(^5\) ONA & Georgian Bay General Hospital (E. Newman, February 6, 2012)

\(^6\) ONA & Joseph Brant Memorial Hospital (G. Brandt, January 21, 2008)

\(^7\) ONA & Simcoe Muskoka Health Unit, 2012 CanLII 70333 (ON LRB)
Members doing Performance Appraisals/Direction Included

Memo to Bargaining Unit Presidents/February 15, 2013

Members completing PAs. Relying on Bargaining Unit scope language or the management rights clause to argue these cases will not be enough to win at arbitration.

**Current Collective Agreement Language**

There is little by way of collective agreement language that restricts or sets parameters around our members’ participation in a PA process for other employees.

The Hospital Central Agreement sets out certain restrictions on PAs completed as part of the College of Nurses of Ontario (CNO) Quality Assurance Program.

The language reads:

**9.14 The Peer Feedback Process of the Quality Assurance Program Required by the College of Nurses of Ontario**

The above referenced Peer Feedback is confidential information which the nurse is expected to obtain by requesting feedback from peer(s) of her or his choice, for the sole purpose of meeting the requirements of the Quality Assurance Program required by the College of Nurses of Ontario. The parties recognize the importance of supporting the confidential nature of the Peer Feedback component of the Quality Assurance Program. For further clarity, the above referenced Peer Feedback will not be used as a performance evaluation under Article 9.12.

Identical language exists in Article 19.02 of the Nursing Homes Template Agreement:

**19.02 (a) Employees are expected, as part of their regular duties, to provide leadership, supervision, guidance and advice to members of the health care team. Nothing in this clause amends, modifies or clarifies any interpretation under Article 2.01, nor does it prejudice the employees’ continued membership in the Bargaining Unit or the employee’s entitlement to qualify and receive benefits under Article 22.06.**

However, these provisions have little to do with an employer mandated PA process.

**Proposed Collective Agreement Language**

ONA’s central bargaining teams and/or staff and Bargaining Unit leaders, if appropriate, are to table language that either restricts or sets parameters around members’ involvement in any type of PA process. Sample language to restrict such involvement could include the following:

“The parties agree that members will not be requested or required to complete performance appraisals or evaluations on other employees in the workplace. This applies regardless of whether the employee is in the ONA Bargaining Unit or not.”

If ONA is unable to negotiate restrictions on members completing PAs, staff and Bargaining Unit leaders should attempt to negotiate parameters around members’ involvement in the process.

Sample language could include the following:

- Employers will only use PAs for learning purposes and/or professional developments. PAs completed by members will not be used for any disciplinary purpose or for the purpose of assessing candidates in a job competition.
- Agreement that members will only provide input into PAs on employees outside of ONA’s Bargaining Unit.
• Parties will meet at next Labour-Management Committee meeting to discuss the tool that will be used to provide input into PAs. The Union will have input into amending any parts of the PA tool that should be properly completed by a member of management.
• That members will be provided adequate time and space to provide input into PAs during working hours.
• Members will be provided adequate training on how to provide input into PA forms.
• Members will not be required to provide input into PAs on employees for whom they have not had sufficient opportunity to observe their work.

If you have any questions regarding this memo and its application to you please speak to your LRO.