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FILE COPY

October 19, 2010

Saskatchewan Association of Licensed Practical Nurses
100 – 2216 Lorne Street
Regina, Saskatchewan
S4P 2M7

Attention: Colin Hein, Executive Director

Dear Mr. Hein,

Re: Darlene Nikolaisen, Discipline Hearing
Saskatchewan Association of Licensed Practical Nurses
My File No. 1004-7

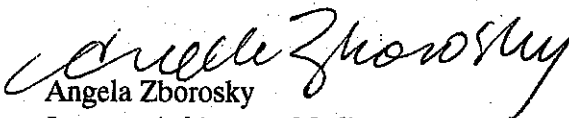
Please find enclosed the written decision and orders of the Discipline Committee in relation to the above noted matter, along with a copy of correspondence sent to the member and to legal counsel for the Counselling and Investigation Committee, Merrilee Rasmussen, Q.C.

In accordance with recent practice, I have, as chairperson of the Discipline Committee, delivered the decision and orders directly to the member and to counsel for the Counselling and Investigation Committee. I would kindly ask that your office deliver the Discipline Committee's decision to the person who made the complaint, in accordance with section 30(3) of *The Licensed Practical Nurses Act, 2000*.

If you have any further questions or concerns about this matter, please do not hesitate to contact me.

Yours truly,

ZBOROSKY LAW OFFICE


Angela Zborosky
Lawyer, Arbitrator, Mediator

Encl.

cc. Merrilee Rasmussen, Q.C.

Zborosky Law Office

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October 19, 2010

Rasmussen Rasmussen & Charowsky
Barristers and Solicitors
2012 Athol Street
Regina, Saskatchewan
S4T 3E5

Darlene Nikolaisen
1478 - 1st Street East
Prince Albert, Saskatchewan
S6V 0E5

Attention: Merrilee Rasmussen, Q.C.

Dear Ms. Rasmussen and Ms. Nikolaisen,

Re: Darlene Nikolaisen, Discipline Hearing
Saskatchewan Association of Licensed Practical Nurses
My File: 1004-7

Further to the discipline hearing held on May 11, 2010, inquiring into charges of professional misconduct and professional incompetence against Darlene Nikolaisen, please find enclosed the written decision and orders of the Discipline Committee of the Saskatchewan Association of Licensed Practical Nurses.

Thank you.

Yours truly,

ZBOROSKY LAW OFFICE

Angela Zborosky
Lawyer, Arbitrator, Mediator

Encl.

✓ cc. Colin Hein, Executive Director,
Saskatchewan Association of Licensed Practical Nurses

**IN THE MATTER OF THE LICENSED PRACTICAL NURSES ACT, 2000
AND BYLAWS AND IN THE MATTER OF A COMPLAINT AGAINST
DARLENE NIKOLAISEN OF PRINCE ALBERT, SASKATCHEWAN**

DECISION OF:

**SASKATCHEWAN ASSOCIATION OF LICENSED PRACTICAL NURSES
DISCIPLINE COMMITTEE**

INTRODUCTION:

The hearing by the Discipline Committee into the complaints against Darlene Nikolaisen was convened in the Maple Room of the Park Town Hotel in Saskatoon, Saskatchewan, on May 11, 2010 at 9:30 a.m., being the location, date and time set out in the Notice of Hearing sent to Darlene Nikolaisen.

The Discipline Committee waited approximately 15 minutes before commencing the hearing but the member did not attend the hearing, nor did she do so at any time during the course of the hearing. Present at the hearing were Merrilee Rasmussen, Q.C., legal counsel for the Counselling and Investigation Committee of the Saskatchewan Association of Licensed Practical Nurses, (referred to as the "Investigation Committee") and Della Bartzten (investigator).

PRELIMINARY ISSUE:

Given the member's failure to attend the hearing at the designated time, date and place set out in the Notice of Hearing, it was necessary to ensure that the member was properly served with the Notice of Hearing. Legal counsel for the Investigation Committee explained the series of attempts made to locate Ms. Nikolaisen and to serve her with a Notice of Hearing. Affidavit evidence shows that personal service of a Notice of Hearing dated April 1, 2009 was attempted by an independent process server. The process server details the attempts he made to locate and serve Darlene Nikolaisen with the Notice of Hearing. After locating Ms. Nikolaisen's parents and leaving a message for her to contact him, Ms. Nikolaisen did telephone the process server but refused to meet with him so that he could serve her with the documents from SALPN. At this point, there was insufficient time to attempt alternate methods of service given the legislative requirement of 14 days' notice of a hearing and the hearing date set out in that Notice of Hearing was April 22, 2009.

In an affidavit sworn on May 10, 2010, by Sherry Husband, office manager of SALPN, Ms. Husband states that she served Ms. Nikolaisen with a Notice of Hearing dated February 16, 2010, by sending it by registered mail to Ms. Nikolaisen's last address known to the Registrar of SALPN. Attached to Ms. Husband's affidavit is a copy of the Canada Post acknowledgment and signature obtained from the Canada Post website. This document indicates that the item was successfully delivered on February 22, 2010, and the signature obtained appears to be that of Ms. Nikolaisen.

Section 29(11) of *The Licensed Practical Nurses Act, 2000* (the "Act") allows the Discipline Committee to proceed with a hearing in the absence of the member charged. It states:

29 (11) Where the member whose conduct is the subject of the hearing fails to attend the hearing, the discipline committee, on proof of service of the notice mentioned in subsection (1), may proceed with the hearing in his or her absence.

Therefore, on the basis of s. 29(1) and (11), the Discipline Committee may proceed with this hearing without Ms. Nikolaisen in attendance provided there is adequate proof that the Notice of Hearing dated February 16, 2010, setting out the date, time and place of the hearing, was served on Ms. Nikolaisen at least 14 days before the date of the hearing.

Section 50 of the Act sets out the rules governing the service of notices under the Act, including a Notice of Hearing provided for in s. 29(1). Section 50 states:

50(1) Unless otherwise provided for in this Act or the bylaws, any notice or other document that is required to be served pursuant to this Act may be served by:

- (a) personal service made:*
 - (i) in the case of an individual, on that individual;*
 - (ii) in the case of a partnership, on any partner; or*
 - (iii) in the case of a corporation, on any officer or director; or*
- (b) registered mail addressed to the last business or residential address of the person to be served known to the registrar.*

(2) A notice or document sent by registered mail is deemed to have been served on the seventh day following the date of its mailing, unless the person to whom it was mailed establishes that, through no fault of that person, the person did not receive the notice or document or received it at a later date.

(3) If it is for any reason impractical to effect service of any documents in the manner provided for in subsection (1), the court may, on application that may be made ex parte, make an order for substituted service.

(4) A document served in accordance with the terms of an order mentioned in subsection (3) is deemed to have been properly served.

Based on the evidence before us, the Discipline Committee finds that proper service of the Notice of Hearing was made on Ms. Nikolaisen such that it is proper to proceed with the discipline hearing in her absence. The Notice of Hearing was sent on February 16, 2010 by registered mail to Ms. Nikolaisen at the last known address according to the registrar of SALPN, with evidence that the item was delivered and signed for on February 22, 2010, well in excess of the 14 days' notice required by the *Act*. In addition, or in the alternative, proper service was effected by reason of the deeming provision in s. 50(2), that is, that the Notice of Hearing is deemed to have been served seven days after it is sent by registered mail. The deemed service date would be February 23, 2010, again well in excess of the 14 days' notice required by the *Act*.

Lastly, we were advised by legal counsel for the Investigation Committee that Ms. Nikolaisen has made no contact with her, the Investigation Committee or SALPN since service of the Notice of Hearing. Based on all the circumstance, we find it appropriate to proceed with the hearing in Ms. Nikolaisen's absence. To find otherwise would be to ignore the provisions of the *Act* cited above and permit members whose conduct is the subject of a hearing to avoid the disciplinary process and any possible consequences for a finding of professional incompetence and/or professional misconduct.

EVIDENCE:

Legal counsel for the Investigation Committee introduced affidavit evidence to support the charge of professional misconduct against Ms. Nikolaisen. In her sworn affidavit, lawyer Zena Charowsky stated that on March 30, 2010 she requested and later received a certified copy of criminal proceedings against Darlene Nikolaisen regarding the theft of prescription medication from Mont St. Joseph Home in Prince Albert, Saskatchewan. Appended to her affidavit are copies of a number of court documents including a sworn Information (the charging document), Endorsements (detailing Ms. Nikolaisen's court appearances), a court file form, Conditions of Probation Order form, and a Probation Order made by the Provincial Court for Saskatchewan. The information in these documents reveals that in January 2006, Darlene Nikolaisen was charged under s. 334(b) of the *Criminal Code* with stealing prescription medication from Mont St. Joseph, Prince Albert, between June 3, 2005 and October 31, 2005. The records show that Ms. Nikolaisen pled guilty to the charge and was sentenced on May 15, 2006. She received a suspended sentence and two years' probation. The Probation Order contained a number of conditions including a requirement to report to a probation officer, to refrain from having or using alcohol or any drugs not prescribed to her, to take any assessment, counselling or treatment required by her probation officer, and to pay into court restitution of \$1739.07 in favour of Mont St. Joseph.

According to the *Report of the Counselling and Investigation Committee to the Discipline Committee* made pursuant to s. 26 of the *Act* dated March 31, 2009, Sharon de Santis, Director of Care, Mont St. Joseph Home Inc., filed a complaint with SALPN as an employer is required to do under s. 43(1) of the *Act* when the employer terminates an employee for cause and reasonably believes the cause is professional incompetence and/or professional misconduct.

No other evidence was led at the hearing, although the Discipline Committee was advised by legal counsel for the Investigation Committee that Ms. Nikolaisen has not renewed her license to practice as a licensed practical nurse since 2006.

SUBMISSIONS OF PARTIES:

Legal counsel for the Investigation Committee submitted that Ms. Nikolaisen's conduct, that is, her theft of prescription medication from her employer, amounts to professional misconduct within the meaning of s. 24 because it is harmful to the best interests of the public or the members, it tends to harm the standing of the profession, and is a breach of the bylaws, specifically, the first and ninth provisions of the *Code of Ethics*. In addition, it was submitted that according to s. 32 of the *Act*, the Discipline Committee can make an order under s. 30 of the *Act* in circumstances where: (i) a member has been convicted of an offence under the *Criminal Code*; (ii) the Counselling and Investigation Committee has made a report to the Discipline Committee regarding the conviction; (iii) the member has had an opportunity to be heard; and (iv) the Discipline Committee finds that the conduct giving rise to the conviction (in this case, the theft of prescription medication) is professional misconduct. Legal counsel submitted that the first three of these conditions have been met, and that the Discipline Committee should find that Ms. Nikolaisen's theft of prescription medication amounts to professional misconduct. Legal counsel asserted that Ms. Nikolaisen's conduct would be considered completely inappropriate for a member of any profession, but is particularly so for a member of a health care profession.

Legal counsel for the Investigation Committee urged the Discipline Committee to make an order under s. 30 of the *Act* that Ms. Nikolaisen be expelled from the association and her name struck from the register as a penalty for this professional misconduct. Given the severity of the conduct and length of time since the member has had dealings with SALPN, this is the most appropriate penalty. Legal counsel explained that although there has been some delay in moving this matter to a hearing, in part because of the lack of participation of the member and her avoidance of service of the Notice of Hearing, the matter must be dealt with by the Discipline Committee, adding that if the Discipline Committee does not make such an order, there is nothing preventing Ms. Nikolaisen from obtaining her license here or elsewhere in Canada.

DECISION:

The primary issue before the Discipline Committee is whether the conduct of Ms. Nikolaisen, in terms of both her theft of prescription medication from her employer and her *Criminal Code* conviction in relation to that theft, is "professional misconduct" as defined in s. 24 of the *Act*. If it is, the Discipline Committee must decide on an appropriate penalty under s. 30 of the *Act*.

Before examining that issue, a side issue was identified by the Discipline Committee following the hearing. Although it does not affect the ultimate result, it is necessary to comment upon it briefly.

In the *Report of the Counselling and Investigation Committee to the Discipline Committee* made pursuant to s. 26 of the *Act*, dated March 31, 2009, the Counselling and Investigation Committee made a

unanimous recommendation that the Discipline Committee hear and determine the formal complaint against Ms. Nikolaisen. The formal complaint is attached to that Report as an appendix and asserts that Ms. Nikolaisen is guilty of: (a) professional misconduct contrary to s. 24 of the Act; and (b) a breach of the *Code of Ethics*, in particular the first and ninth statement of the Code. The grounds for those assertions are set out as follows: “...that, on or about November 2006, the member was convicted of an offence under s. 334(b) of the Criminal Code in relation to the theft of prescription medication from her then employer, Mont St. Joseph Home Inc.”

The court documents in evidence show that Ms. Nikolaisen’s sentence for her conviction was actually passed on May 15, 2006 (rather than in approximately November 2006), however, this is of no consequence. What is of note is that the Notice of Hearing dated February 16, 2010, which was properly served on Ms. Nikolaisen and sets out the hearing date on which the Discipline Committee heard this matter, refers not only to the specific recommendations set out in the s. 26 *Report of the Counselling and Investigation Committee*, but also states that the Counselling and Investigation Committee recommends a hearing on the charge of “professional incompetence” contrary pursuant to s. 23 of the *Act*. This charge is clearly in error because the s. 26 Report makes no recommendation that the Discipline Committee hear and determine a complaint of professional incompetence by reason of Ms. Nikolaisen’s theft of prescription medication and/or her conviction for that theft. In the view of the Discipline Committee, it appears that the inclusion of a charge of professional incompetence in the Notice of Hearing was an oversight or typographical error. There were no submissions made at the hearing concerning the issue of professional incompetence; all submissions related to the issue of professional misconduct, its definition in s. 24 of the *Act*, and the applicability of s. 32 of the *Act*. It would appear that the Discipline Committee is without jurisdiction to hear and determine a complaint of professional incompetence, it not being included in the s. 26 Report. Based on all of these circumstances, the Discipline Committee dismisses the charge of professional incompetence and will proceed to consider the case as one of professional misconduct only. We find that there is no prejudice to Ms. Nikolaisen as a result of the mistaken inclusion of a charge of professional incompetence in relation to the same conduct that forms the grounds for a finding of professional misconduct – she received notice of the hearing outlining both of these allegations, and she chose not to attend the hearing. In any event, our dismissal of the incompetence charge ensures there is no question of any possible prejudice to Ms. Nikolaisen.

Turning to the primary issue before us, that is, whether Ms. Nikolaisen is guilty of professional misconduct as a result of her theft and/or her conviction for theft, it is necessary to consider the definition of “professional misconduct” in s. 24 of the *Act*, as well as s. 32 dealing with criminal convictions. These sections read as follows:

Professional misconduct

24 *Professional misconduct is a question of fact, but any matter, conduct or thing, whether or not disgraceful or dishonourable, is professional misconduct within the meaning of this Act if:*

- (a) *it is harmful to the best interests of the public or the members;*
- (b) *it tends to harm the standing of the profession;*

- (a) Ms. Nikolaisen was convicted of an offence under s. 334(b) of the *Criminal Code* (a guilty plea results in her having a conviction);
- (b) the Counselling and Investigation Committee made a report to the Discipline Committee (pursuant to s. 26 of the *Act*) on March 31, 2009, regarding Ms. Nikolaisen's criminal conviction for theft of prescription medication from her employer, Mont St. Joseph Home Inc.;
- (c) the Discipline Committee has given Ms. Nikolaisen the opportunity to be heard at the hearing held on May 11, 2010, as set out in the Notice of Hearing dated February 16, 2010, which Notice was properly served on Ms. Nikolaisen. The fact that Ms. Nikolaisen chose not to attend the hearing and take advantage of the opportunity to be heard is of no consequence; and
- (d) the Discipline Committee finds that the conduct of Ms. Nikolaisen that gave rise to the criminal conviction is professional misconduct.

Our finding in (d) above that the underlying conduct for Ms. Nikolaisen's conviction is professional misconduct is based on our consideration of the definitions of that term contained in s. 24(a) and (b) of the *Act*. Ms. Nikolaisen's theft of over \$1700 in prescription medication from her employer is clearly conduct that is harmful to the best interests of the public and tends to harm the standing of the profession. Theft by an employee from her employer is a very serious matter and an obvious breach of the trust in an employee-employer relationship. The theft of medication is even more significant in these circumstances where the employee is a member of a health care profession, the employee has access to and is entrusted with the safe and secure care of medication, and in some cases, the administration of that medication. To breach that trust damages the standing of the profession of licensed practical nurses as a whole and reflects poorly on other members. Furthermore, Ms. Nikolaisen's conduct violates the trust of her patients, as members of the public, and the confidence patients should have in their health care providers. In our view, there is a substantial connection between Ms. Nikolaisen's unlawful conduct and her professional duties, so as to warrant a finding of professional misconduct under s. 32.

Our finding in (d) above that the underlying conduct for Ms. Nikolaisen's criminal conviction is professional misconduct is also based on the definition of professional misconduct under s. 24(c), that is, it is a breach of the by-laws. The Regulatory Bylaws for the *Act* include a *Code of Ethics*. We find that the conduct underlying the conviction for theft contravenes the first and ninth statements in the *Code of Ethics*, which read as follows:

I will fulfill my obligations to society in a professional, competent manner;

...

I will, as a Licensed Practical Nurse, continuously strive to uphold and maintain high standards.

In addition, or in the alternative, the Discipline Committee finds Ms. Nikolaisen guilty of professional misconduct on the basis of s. 24(a) (b) and (c) alone, without the need to resort to consideration of the provisions of s. 32. We find, as a fact, that Ms. Nikolaisen did steal prescription medication from her

former employer and that this constitutes professional misconduct for the same reasons that are set out in the preceding paragraphs where we concluded that Ms. Nikolaisen was guilty of professional misconduct under s. 32 of the *Act*. Therefore, even without the criminal conviction (acting as proof of the theft of medication), we reach the same conclusion – that Ms. Nikolaisen is guilty of professional misconduct. To be clear, each of s. 24(a), s. 24(b), s. 24(c) and s. 32, would, on its own, form a basis for a finding of professional misconduct in this case.

PENALTY:

Having found Ms. Nikolaisen guilty of professional misconduct pursuant to sections 24(a), 24(b), 24(c) and/or 32, it is necessary for the Discipline Committee to make an order under s. 30 of the *Act*. Section 30 states as follows:

Disciplinary powers

30(1) Where the discipline committee finds a member guilty of professional misconduct or professional incompetence, it may make one or more of the following orders:

- (a) an order that the member be expelled from the association and that the member's name be struck from the register;*
- (b) an order that the member's licence be suspended for a specified period;*
- (c) an order that the member's licence be suspended pending the satisfaction and completion of any conditions specified in the order;*
- (d) an order that the member may continue to practise, but only under conditions specified in the order, which may include, but are not restricted to, an order that the member:

 - (i) not do specified types of work;*
 - (ii) successfully complete specified classes or courses of instruction;*
 - (iii) obtain medical or other treatment or counseling or both;**
- (e) an order reprimanding the member;*
- (f) any other order that the discipline committee considers just.*

(2) In addition to any order made pursuant to subsection (1), the discipline committee may order:

- (a) that the member pay to the association, within a fixed period:

 - (i) a fine in a specified amount not exceeding \$5,000; and**

- (ii) *the costs of the investigation and hearing into the member's conduct and related costs, including the expenses of the counselling and investigation committee and the discipline committee and costs of legal services and witnesses; and*
- (b) *where a member fails to make payment in accordance with an order pursuant to clause (a), that the member's licence be suspended.*
- (3) *The executive director shall send a copy of an order made pursuant to this section to the member whose conduct is the subject of the order and to the person, if any, who made the complaint.*
- (4) *Where a member is expelled from the association or a member's licence is suspended, the registrar shall strike the name of the member from the register or indicate the suspension on the register, as the case may be.*
- (5) *The discipline committee may inform a member's employer of the order made against that member where that member has been found guilty of professional misconduct or professional incompetence.*

Legal counsel for the Investigation Committee urged the Discipline Committee to make an order of expulsion against Ms. Nikolaisen, given the seriousness of the misconduct and the length of time since Ms. Nikolaisen's annual practicing license expired.

The Discipline Committee finds the professional misconduct by Ms. Nikolaisen, that is, the theft of prescription medication from her employer and her criminal conviction for that theft, warrants the making of an order under s. 30(1)(a) expelling Ms. Nikolaisen from the association and having her name struck from the register. While the type of medication stolen was not specified, the order of the Provincial Court for Saskatchewan includes a requirement for Ms. Nikolaisen to pay restitution for the benefit of her former employer in an amount in excess of \$1700.00. This is not an insignificant amount. In addition, it appears, based on the wording of the criminal charge and the Probation Order, that the theft of medication occurred over a period of a few months or so. This suggests the theft was not a one-time event or an aberration. Even aside from a consideration of these factors, the act of a health care professional stealing medication from her employer is extremely serious. Ms. Nikolaisen, as a professional licensed practical nurse, had access to and was entrusted with the care of medications. Ms. Nikolaisen's acts of theft in violation of that trust are so completely contrary to her professional duties as to warrant her expulsion.

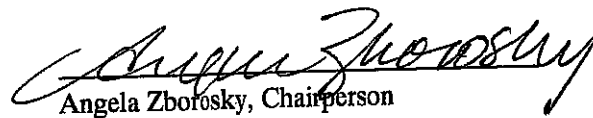
The fact that Ms. Nikolaisen has not renewed her license since 2006 and her decision not to attend this hearing might suggest she is no longer interested in continuing to practice as an LPN. Whether or not that is true, the Discipline Committee finds it necessary to make an order for expulsion in order to ensure the safety of the public. If we did not make such an order, Ms. Nikolaisen could, at any time, apply for licensure in Saskatchewan or elsewhere in Canada, without restriction.

Therefore, the Discipline Committee makes the following order pursuant to s. 30 of the Act:

1. *That Darlene Nikolaisen be expelled from the Saskatchewan Association of Licensed Practical Nurses and her name struck from the register.*

DATED at Regina, Saskatchewan, this 19 day of October, 2010.

**SASKATCHEWAN ASSOCIATION OF
LICENSED PRACTICAL NURSES,
DISCIPLINE COMMITTEE**


Angela Zborosky, Chairperson

Marjorie Molsbery, LPN, Member
Andrea Reynolds, LPN, Member
Tony Linner, Public Representative, Member