

IN THE MATTER OF *THE LICENSED PRACTICAL NURSES ACT, 2000* AND
BYLAWS AND IN THE MATTER OF A COMPLAINT AGAINST LICENSED
PRACTICAL NURSE, KEVIN HENRY, OF SASKATOON, SASKATCHEWAN

REASONS FOR DECISION BY:

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

INTRODUCTION:

A hearing was held on June 29, 2015 in Regina, Saskatchewan, to inquire into a complaint made against Licensed Practical Nurse, Kevin Henry. At the hearing, Darcia Schirr, appeared as legal counsel for the Counselling and Investigation Committee (referred to as “the Investigation Committee”). The Member, Mr. Henry, did not appear at the outset of the hearing, but joined the hearing later in the proceeding.

The complaint against Mr. Henry that is the subject of this hearing involves an allegation of professional misconduct related to his failure to renew his license. Appendix A to the Notice of Hearing dated April 25, 2015, contains the formal complaint and sets out the allegations as follows:

1. For the 2014 year, you failed to renew your license to practice by December 1, 2014. Through the 2014 year, you worked over 1,300 hours and did so without a license to practise.
2. For the 2014 year, you used the title “licensed practical nurse” although you were not a practising member.
3. For the 2015 year, you failed to renew your license to practice by December 1, 2014. From December 2, 2014 to January 2, 2014,¹ you worked approximately 20 hours and did so without a license to practice.
4. From December 1, 2014 to January 2, 2015, you used the title “licensed practical nurse” although you were not a practising member.

Appendix A of the Notice of Hearing also cites a number of provisions of *The Licensed Practical Nurses Act, 2000* (including sections 2, 21, 22(1), 24 and 49); the *Regulatory Bylaws* (sections 9,

¹ The date “January 2, 2014” was a typo and was amended at the hearing to read “January 2, 2015.”

19 and 20), the *Code of Ethics for Licensed Practical Nurses in Canada* (including Principles 3 and 5) and *Standards of Practice* (Standards 1, 3 and 4), as all having application to the formal complaint against the Member.

PROCEDURAL BACKGROUND:

These proceedings were somewhat protracted, requiring that a first hearing date be adjourned. The first hearing was set for and convened on May 27, 2015. Mr. Henry did not appear at the hearing. Legal counsel for the Investigation Committee filed proof of service of the Notice of Hearing and advised the Discipline Committee of her recent communications with Mr. Henry. These communications suggested that he could not attend the hearing on May 27, 2015 but wished to have the proceedings adjourned so that he could participate on a later date. On the basis of this information, the Discipline Committee granted Mr. Henry's request for an adjournment of the hearing and set a fixed date for hearing of June 29, 2015 at 1:30 PM. The Discipline Committee also made a finding that the Notice of Hearing had been properly served and indicated in its order that the Discipline Committee may choose to proceed with the discipline hearing on June 29, 2015 in Mr. Henry's absence. The Discipline Committee issued these orders, along with full reasons for its decision, on May 27, 2015.

On June 29, 2015, the Discipline Committee convened the hearing at 1:30 PM. At the outset, Ms. Schirr was present as counsel for the Investigation Committee but Mr. Henry was not. Ms. Schirr indicated that she had had some recent communications with Mr. Henry which suggested that he may be participating in the hearing via telephone.

Legal counsel for the Investigation Committee introduced a series of email messages, all dated June 29, 2015, between Mr. Henry and SALPN's investigator, and between Mr. Henry and legal counsel for the Investigation Committee (which later came to be marked as Exhibit P-3). In Mr. Henry's initial email communication to the investigator, sent at 3:45 AM, Mr. Henry indicated that he is currently at work and will be working until 8:00 or 9:00 AM that morning (and therefore would not be able to attend a hearing in Regina at 10:00) but that he would like to participate in the hearing. He asked if the hearing start time could be delayed or if he could participate by phone. He also stated, "I really am not fighting anything here. I am hoping to find a way [to] maintain my [license] if possible." He also provided his phone number so that he or legal counsel could contact him.

The investigator forwarded Mr. Henry's email message to legal counsel for a response. Ms. Schirr notified Mr. Henry that the hearing does not begin until 1:30 PM and he may either appear in person at that time or he may provide a telephone number at which he may be reached by the Discipline Committee during the hearing, adding that the number he had provided results in a message advising that the cellular customer is not available. Ms. Schirr also advised Mr. Henry that if does not appear in person at 1:30 PM or cannot be reached by phone, she will be asking

the Discipline Committee to proceed in his absence. Ms. Schirr also provided Mr. Henry with a copy of the penalty submission the Investigation Committee intended to make that afternoon at the hearing.

Mr. Henry responded to Ms. Schirr's email message confirming that the phone number he had previously provided will work if she calls him and that he will stay up and await her call.

Having received this information, the Discipline Committee attempted to contact Mr. Henry at the phone number he provided using the conference speaker phone set up in the hearing room. Unfortunately, the call did not go through to Mr. Henry; it resulted in an audio recording stating that "the cellular customer is unable to receive your call." The Chairperson of the Discipline Committee also used a cell phone to attempt to contact Mr. Henry at the same phone number but to no avail; the response was the same audio recording. The Chairperson then sent a text message to Mr. Henry at approximately 2:00 PM, at the same phone number, reminding him that the hearing started at 1:30 PM, that our phone calls to his cell phone would not go through, and notifying him that if he still wished to participate in the hearing, he must call this cell phone number immediately.

The Discipline Committee determined that it would proceed with the hearing in Mr. Henry's absence, but that the Chairperson's cell phone would remain on in the event that Mr. Henry attempted contact. The Committee made the decision to proceed based on the fact that the email communications that were exchanged on the date of the hearing demonstrated that Mr. Henry was aware of the hearing. In addition, the evidence demonstrated that Mr. Henry had been properly served with a copy of the Notice of Hearing and of the Discipline Committee's May 27, 2015 Order. Legal counsel for the Investigation Committee had entered into evidence a copy of the Affidavit of Service (Exhibit P-1) which proves that the Notice of Hearing was served on the Member on May 12, 2015. In addition, an Affidavit of Service was entered into evidence which proves that the following documents were served on the Member on June 12, 2015: (i) the May 27, 2015 Order of the Discipline Committee (containing the terms upon which Mr. Henry's request for an adjournment of the first hearing date was granted); and (ii) a letter from legal counsel for the Investigation Committee confirming the new hearing date of June 29, 2015, as set out in the Discipline Committee's Order, along with an indication that if Mr. Henry does not appear on June 29, 2015 for the hearing, the Investigation Committee will be asking the Discipline Committee to proceed in his absence.

The Discipline Committee proceeded to hear the evidence led by the Investigation Committee. Following the completion of the evidence, legal counsel for the Investigation Committee began her closing submissions on the issues of whether Mr. Henry was guilty of professional misconduct under the *Act* and the appropriate penalties for such misconduct. However, near the conclusion of those submissions, at approximately 4:00 PM, the Chairperson of the Discipline Committee received a text message response from Mr. Henry in which he explained that he had

been unable to drive to Regina or to stay awake for the hearing (having worked the night before). He indicated that he should now be able to receive a phone call on his phone.

Having received Mr. Henry's message near the conclusion of the hearing, the Discipline Committee asked legal counsel for the Investigation Committee for her submissions on the appropriate process to follow. After hearing those submissions, the Discipline Committee decided to contact Mr. Henry, to explain what had occurred at the hearing to this point, and to obtain his position about the charges and the proposed penalties, including any submissions he wished to make on the issue of his ability to pay any proposed fines and costs. The Discipline Committee had determined that based on the whole of Mr. Henry's prior communications, his ability to pay was relevant to the determination of penalties and he should be permitted to convey his personal circumstances to the Committee.

The hearing resumed and at approximately 4:30 PM, the Chairperson of the Discipline Committee attempted to contact Mr. Henry at the phone number he provided. However, the response to the phone call was the same automatic recording indicating that the customer was unable to receive the call. The Chairperson immediately sent a text message to indicate that the hearing was nearly complete and that if Mr. Henry wants to communicate any information to the Discipline Committee, he must phone this number immediately. Eventually, Mr. Henry phoned Ms. Schirr's telephone number instead, and a brief recess was taken so that legal counsel for the Investigation Committee could speak privately to Mr. Henry. The hearing ultimately resumed, at which time Ms. Schirr had an alternate phone number at which to contact Mr. Henry. The Discipline Committee made contact with Mr. Henry via teleconferencing and his evidence and submissions were received on the record. Before the conclusion of the hearing, Mr. Henry confirmed his email address to allow for any further communications to occur via email.

Following the hearing, the Discipline Committee issued an order dated July 6, 2015. The order included a finding that Mr. Henry was guilty of professional misconduct and set out the penalties imposed for that misconduct, while further indicating that full written reasons for decision would follow. These are those reasons.

EVIDENCE:

The Investigation Committee introduced two affidavits (Exhibit P-4) which were intended to comprise the entire evidence in this case. These affidavits included: the Affidavit of Noelle Odegard, Associate Registrar of SALPN, sworn May 26, 2015; and the Affidavit of [REDACTED] [REDACTED] employment consultant with the Saskatoon Health Region, sworn May 28, 2015.

Though the Discipline Committee received the affidavits as evidence (which it is entitled to do), the Discipline Committee had concerns about this form of evidence being the sole evidence produced at the hearing. While the Discipline Committee recognizes that this course of action was likely taken because the facts were relatively straightforward and doing so might reduce the

costs of the proceeding, the Committee indicated at the hearing that it would have preferred to have received oral testimony from the individuals, particularly in a case such as this where there was no agreed statement of facts presented. A primary reason for requiring oral testimony is to allow the party opposite to test the evidence through the cross-examination of witnesses. Even though the Member was not present at the hearing during the presentation of the evidence, the Discipline Committee indicated that it had several questions arising from the affidavit evidence. One of the affiants, Noelle Odegard, was present at the hearing and upon our expression of concern about the affidavit evidence, counsel for the Investigation Committee agreed to have Ms. Odegard testify as a witness so that she could answer the Discipline Committee's questions. Ms. Odegard was sworn in and questioned on the content of her affidavit. The Committee also asked questions about SALPN's process for renewal. When it appeared that Ms. Odegard could not answer a number of the questions asked, counsel for the Investigation Committee produced Cara Brewster, Registrar of SALPN, as a witness, given that she was also present observing the hearing. The Discipline Committee questioned Ms. Brewster.

It is with this background in mind that the evidence that is relevant to the determinations that must be made in this case will be summarized. Ms. Odegard's affidavit explained the process for annual renewal of a member's registration with SALPN, a process which is prescribed by the Bylaws. It requires completion of an annual renewal form and payment of a \$400 registration fee by December 1st of the year prior to the year in which registration is effective. Should a member not renew by December 1st, a \$100 late payment fee is assessed. If registration is not completed until after January 1st of the effective registration year, there is also a reinstatement fee. This has been the renewal process for at least the last 10 years.

Ms. Odegard also noted that SALPN had recently introduced an on-line renewal process and a pre-authorized fee payment process. Ms. Brewster testified that the on-line renewal process was introduced as one option for renewal in the fall of 2012 (for the 2013 registration year), its use became mandatory in the fall of 2013 for the 2014 registration year. Given this change to the renewal process, SALPN sent multiple email messages to its members in the fall of 2013, reminding members of the requirement to renew their licenses and explaining the on-line renewal process. SALPN repeated this communication process in the fall of 2014 for the 2015 registration year.

Ms. Odegard's affidavit also provided information about Mr. Henry's past and present registration status, gained through SALPN's membership records and the SALPN Register. She indicated that Mr. Henry has been a member of SALPN since January 1, 2006 and he has maintained his registration and held a practicing license for every year between January 1, 2006 and December 31, 2013. The affidavit evidence suggests that Mr. Henry was well aware of the renewal process and deadlines because in three of those years (2009, 2010 and 2013), Mr. Henry failed to renew his license and make payment until January and was thus required to pay the necessary reinstatement/late fees in those registration years.

Ms. Odegard also provided evidence about her attempt to follow up with Mr. Henry when he failed to meet the deadline for renewal for the 2014 registration year. On January 7, 2014, she sent an email message to Mr. Henry at the address he had provided on past renewal forms. The email message appears in the form of a standard notification that SALPN's records indicate that he has not renewed his licence for the 2014 year and that working without a license is a violation of the *Act* subject to disciplinary action. The email message goes on to outline his options for renewal and reinstatement. Ms. Odegard did not receive a response to her email message to Mr. Henry. Therefore, on January 10, 2014, Ms. Odegard, sent an email message to the payroll department of the Saskatoon Health Region, with the subject heading "SALPN Late Renewals 2014," stating as follows:

As per our phone conversation, attached is a list of members who have not renewed their LPN license. Please confirm these individuals have not been working without a current valid licence. Please advise.

Mr. Henry was on this list of individuals. While the other individuals' names are blacked out on the list provided, it would appear that approximately 15 such individuals were included on the list. Apparently, the Saskatoon Health Region did not respond to Ms. Odegard to indicate that Mr. Henry was working without a license (even though Ms. ██████ affidavit indicated that Mr. Henry's hire date with the Saskatoon Health Region was in March 2005 and it appears that he has been employed with the Saskatoon Health Region since that date). However, it also appears that SALPN did not further communicate with the Saskatoon Health Region in follow up to its inquiries about Mr. Henry's licensing or work status.

There was also no further communications between SALPN and Mr. Henry in relation to his license renewal or work status for the 2014 registration year. It was not until one year later, on January 7, 2015, that the issue of Mr. Henry's licensing and work status was again addressed by SALPN. On that date, ██████ an employment consultant with the Saskatoon Health Region, sent an email message to Joel Gritzeld, an employee of SALPN who serves as a resource to the Investigation Committee. In her email message, Ms. ██████ made an inquiry about the status of Mr. Henry's licence, having noted that his name does not appear on the public registry as holding a current licence to practice. Ms. ██████ stated in her affidavit that the matter had come to her attention because Mr. Henry had applied for a position with the Saskatoon Convalescent Home (within the Saskatoon Health Region) and the hiring manager for that position had contacted her to ask for assistance in verifying Mr. Henry's registration status because she could not find his name on the SALPN website. Mr. Gritzeld referred the matter to Ms. Odegard who, after having then determined that Mr. Henry's license had expired on December 31, 2013, contacted Ms. ██████ to request that she provide her with a copy of Mr. Henry's job description with the Royal University Hospital and advise as to the number of hours Mr. Henry worked in that position over the course of the 2014 registration year. Ms. ██████ stated in her affidavit that she exchanged a number of email messages with Ms. Odegard over the

course of January 7 and 8, 2015, and ultimately advised her that Mr. Henry worked over 1300 hours at the Royal University Hospital during the 2014 calendar year and that in 2015, Mr. Henry worked 19.06 hours up to January 2, 2015. Ms. [REDACTED] also provided Ms. Odegard with a copy of the provincial job description for licensed practical nurses working within the Region (presumably the job description applicable to Mr. Henry), noting that the requirements clearly show that the LPNs working for the Saskatoon Health Region must be licenced with SALPN. Ms. [REDACTED] added that employees of the Region are expected to wear name tags that show their name and position title (presumably as an LPN).

Notably, in her affidavit, Ms. [REDACTED] suggested that the Saskatoon Health Region was not aware that Mr. Henry was practicing without a license until Ms. Odegard advised her, in January 2015, that Mr. Henry had not held a practicing license since it expired on December 31, 2013. Ms. [REDACTED] suggested that this fact did not come to light until she made an inquiry of SALPN in January 2015 when Mr. Henry applied for a position with the Saskatoon Convalescent Home. Although this information appears to be at odds with Ms. Odegard's evidence that she sent an email message to the payroll department of the Saskatoon Health Region in January 2014, Ms. [REDACTED] was not produced for questioning on her affidavit. At the same time, Ms. Odegard was unable to provide an adequate explanation for the failure to follow up her January 2014 inquiry with the payroll department.

In any event, on January 13, 2015, Ms. Odegard registered a complaint with the Investigation Committee as a result of her discovery that Mr. Henry had worked as an LPN in both 2014 and 2015 without having renewed his license to practice. Ms. Odegard's complaint resulted in the formal complaint set out in the Notice of Hearing that is the subject of these proceedings.

Ms. [REDACTED] further indicated in her affidavit that effective January 29, 2015, Mr. Henry's employment with the Saskatoon Health Region was terminated. She did not share the reasons for the termination in her affidavit.

The Discipline Committee had several questions for Ms. Odegard and Ms. Brewster about the process for renewal and the failure to follow up when Mr. Henry failed to register for the 2014 registration year. While these questions revealed obvious imperfections with the renewal system, including a lack of appropriate follow-up or some type of public notification concerning former members whose status has changed as a result of the failure to renew a practicing license, these were not issues for the Discipline Committee to determine in this case, and as such, the evidence on those issues need not be summarized here.

Counsel for the Investigation Committee also submitted a statement she prepared of the "*Actual and Anticipated Costs*" of these discipline proceedings. The Discipline Committee accepted this document (marked as Exhibit P-5) on the basis that it represented a list of the estimated costs likely to be incurred in these proceedings. More will be said about this evidence later.

As noted earlier, Mr. Henry joined the hearing near its conclusion. The Discipline Committee questioned Mr. Henry (via teleconferencing) about the allegations contained in the formal complaint. The four charges were read to Mr. Henry and he agreed that the facts underlying the charges were correct and that he is guilty of professional misconduct under the *Act*. Ms. Schirr, counsel for the Investigation Committee, proceeded to review and discuss each of the penalties in its written proposal with Mr. Henry (a copy of which had previously been delivered to Mr. Henry on at least two occasions). Mr. Henry indicated his general agreement with the Investigation Committee's proposed penalties, although he expressed concern about his ability to pay the \$7,400 in fines and costs by the proposed deadline of August 1, 2016.

Given Mr. Henry's concern about the financial impact of the proposed penalties and his ability to pay, the Chairperson of the Discipline Committee asked Mr. Henry a number of questions directed to this issue. Mr. Henry testified that he has been practicing as an LPN for about nine years and he enjoys it. Mr. Henry stated that he had been experiencing a number of personal difficulties, including the break-up of his common law relationship. He is now a single father with three children, two of whom reside with him at his residence in Saskatoon. Since the termination of his employment with the Saskatoon Health Region, he has worked as a dockworker and more recently as a personal trainer, earning less than half of what he earned as a practicing LPN. Mr. Henry conveyed his concerns about his financial situation, noting that his financial obligations to his family are significant. However, Mr. Henry also indicated his belief that he could pay a fine and costs totally \$7,400, but would need a year or so following the reinstatement of his LPN license to do so. While Mr. Henry did not adequately explain the reasons for his having worked without a license, he recognized that his conduct was improper and he apologized for having worked without a license.

SUBMISSIONS OF PARTIES:

Counsel for the Investigation Committee submitted that the Discipline Committee should find, on the basis of the evidence and the Member's acknowledgement of guilt, that the Member's conduct amounts to professional misconduct, as defined by s. 24 of the *Act*. Counsel pointed out that section 9 of the Regulatory Bylaws prescribes SALPN's licensing requirements.

Specifically, section 9(1) indicates that every license to practice expires on December 31 of the year in which it is issued. Section 9(2) indicates that every LPN must obtain a license in each year in order to practice and must do so by submitting the prescribed application form and fee(s) on or before December 1 in each year. The consequences for a failure to obtain or renew one's license are set out in section 9(3): the LPN ceases to be licensed and is not entitled to practice or work as an LPN as of January 1 of the year for which the license is required. Counsel also referenced section 22 of the *Act* which states that no person shall practice as an LPN unless that person is a "practising member," a concept defined in s. 2(j) of the *Act* as meaning "a member to whom a current license to practice has been issue pursuant to section 19 of the *Act*." Section 19

of the *Act* contains the requirements for registration as a member of SALPN and the issuance of licenses to practice.

Counsel submitted that the facts clearly demonstrate that Mr. Henry failed to renew his license for the 2014 and 2015 registration years and worked as an LPN without a license, in contravention of the Regulatory Bylaws and the *Act*. Counsel submitted that this demonstrates that Mr. Henry has committed acts of professional misconduct within the meaning of s. 24 of the *Act*. Counsel noted that while Mr. Henry's former employer may have had a role in what occurred in this case by permitting him to practice as an LPN without having a current license, it is ultimately the member's responsibility to ensure he or she is properly licensed and only works as an LPN when licensed to do so. Counsel also submitted that the efforts SALPN made to contact Mr. Henry and other members who failed to renew by January 1 went "above and beyond" what SALPN is required to do.

Counsel noted that the conduct was serious given that it occurred over two registration years and the Member worked a significant number of hours without a license in 2014. Counsel provided the Discipline Committee with a set of proposed penalties for the professional misconduct which legal counsel acknowledged are significant but in keeping with the serious nature of the conduct. Counsel also cited a number of discipline decisions of other professional associations in other jurisdictions in support of the penalties sought in this case. The penalties proposed in this case included: a suspension of the Member's license for a period of 60 days; attendance at a meeting with the Registrar to discuss the consequences of his conduct and the importance of registration; a requirement to complete an on-line Code of Ethics course; and the payment of a fine of \$400 and costs of \$7,000 by August 1, 2016, failing which the Member's license would be suspended until payment is made. Legal counsel also asked that the Discipline Committee to make a direction that the Saskatoon Health Region be advised of the Discipline Committee's Order and a direction that SALPN publish this decision on its website and in its newsletter with the Member identified by name.

In terms of the proposed penalties, the Counsel submitted that they meet the purposes of orders made by a discipline committee in the context of professional discipline, including specific deterrence and general deterrence. Counsel also indicated that significant penalties are required in this case to prevent the erosion of SALPN's authority to regulate its members. With respect to the proposed 60-day suspension, Counsel indicated that a suspension of this length was in line with decisions of other discipline committees involving situations where the member was working without a license for an extensive period of time. Counsel also submitted that it was appropriate to require Mr. Henry to meet with the Registrar to discuss the consequences of his conduct and the importance of registration for a self-regulating profession. A further proposed penalty includes a requirement that Mr. Henry complete a Code of Ethics course offered on-line by the Canadian Council of Practical Nurse Regulators. Counsel submitted that the course is intended to further Mr. Henry's knowledge of ethical matters and the importance of compliance

with his obligations. It was counsel's understanding that there was no cost associated with taking this course and that it is available to be taken at any time.

Counsel also submitted that the Discipline Committee should make orders requiring the Member to pay a fine in the amount of \$400 and pay part of the costs of the investigation and hearing in a fixed amount of \$7,000, by August 1, 2016, and that failing payment, Mr. Henry's license would be suspended until payment is made. Counsel submitted that fines are appropriate in cases where the member has benefitted from her or his misconduct (as Mr. Henry did in this case because he continued to work as an LPN without having paid for his license). The amount of \$400 was chosen because it is equivalent to the cost of the annual registration fee. Counsel submitted that an order for the payment of costs of \$7000 is appropriate as it reflects about half of the amount of actual costs expected to be incurred in this case. Legal counsel submitted that the total costs in this case are expected to be higher than usual given the difficulties communicating with Mr. Henry and due to Mr. Henry's late request to adjourn the initial hearing date in May 2015. According to the statement of the "Actual and Anticipated Costs" prepared and submitted by counsel for the Investigation Committee, the estimated costs of the proceedings before the Discipline Committee amount to over \$13,000. These costs include: the costs of the hotel hearing room facilities (approximately \$650); the court reporter fees (approximately \$700) and per diems for the Discipline Committee (approximately \$1,800) for both the May 27 and June 29, 2015 hearing dates; the process server's fees (approximately \$500); as well as the legal fees, disbursements and taxes for legal counsel for the Investigation Committee (estimated at nearly \$10,000). We find that the statement that was presented is a fair estimate of the costs that will be incurred in these proceedings and note that the total estimate does not include an estimate of the legal fees and taxes of legal counsel for the Discipline Committee. Legal counsel submitted that the rationale supporting an order requiring Mr. Henry's payment of some of the costs of these proceedings is that the membership should not be expected to exclusively bear the costs of discipline proceedings.

Lastly, Counsel requested that orders be made that the Saskatoon Health Region be advised of the Discipline Committee's Order and that SALPN publish the full text of this decision on its website and in its newsletter, with the Member's name identified.

As indicated earlier, near the conclusion of the hearing, the Discipline Committee had the opportunity to hear from Mr. Henry via teleconferencing. Upon questioning by the Discipline Committee, Mr. Henry acknowledged that the allegations set out in the formal complaint amount to professional misconduct. In addition, Mr. Henry indicated his agreement with the Investigation Committee's proposed penalties, as put forth by Ms. Schirr, with some modification as to the time for payment of the proposed costs and fine. Although Mr. Henry gave evidence about his financial difficulties, he indicated his full agreement to the penalties, including those with a financial impact, but he asked that the Order require that he make monthly payments and that these payments be spread out over a longer period of time than the August 1,

2016 deadline date proposed by the Investigation Committee. When the Discipline Committee explained to Mr. Henry that it would likely incorporate a clause into the Order that any missed monthly payment would result in the immediate suspension of his license to practice without further action by SALPN or an order of the Discipline Committee, until that failure is remedied, Mr. Henry found that acceptable. He indicated that he understood the risk but felt that monthly payments would allow him to better “stay on track” with the obligation and that he would benefit by having additional time to make the monthly payments.

In reply, the Investigation Committee indicated that it was agreeable to the proposal Mr. Henry made regarding the terms of payment of the fine and costs. The Investigation Committee agreed that monthly payments were acceptable and that the deadline to make the final payment could be extended from August 1, 2016 to December 2016, provided that the Order includes a clause to the effect that Mr. Henry’s license to practice would be immediately suspended if any monthly payment was missed.

DECISION:

There is no dispute about the facts of this case. Clearly, the evidence shows that Mr. Henry practised as a Licensed Practical Nurse during all of 2014 (in excess of 1300 hours) and the early part of 2015 (approximately 19 hours) without having renewed his license for the 2014 and 2015 registration years. He also used the title “Licensed Practical Nurse” or “LPN” in 2014 and 2015 when he was not a “practising member.” To be clear, we also find that he had received adequate notification of the need to renew his license in each year, not only by reason of SALPN’s general notifications to the membership to that effect, but also by reason of direct communications with him in January 2014. In addition, Mr. Henry has followed the renewal process for many years. He was also aware of the impact of failing to renew by December 1st in each year, given that he was required to pay reinstatement/late fees in three of the last five years in which he renewed his license.

The primary issue before the Discipline Committee is whether Mr. Henry’s conduct is “professional misconduct,” as defined in s. 24 of the *Act*. If it is, the Discipline Committee must decide on appropriate penalties for the misconduct under s. 30 of the *Act*.

Even though Mr. Henry acknowledged at the hearing that he engaged in the conduct alleged and agreed that this conduct was professional misconduct under the *Act*, in order to make a finding that Mr. Henry is guilty of professional misconduct warranting the imposition of discipline under the *Act*, his conduct must fall within one or more of the definitions of “professional misconduct” in s. 24 of the *Act*. Section 24 reads as follows:

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;*
- (c) *it is a breach of this Act or the bylaws; or*
- (d) *it is a failure to comply with an order of the counselling and investigation committee, the discipline committee or the council.*

We accept the submissions of legal counsel for the Investigation Committee and find that Mr. Henry is guilty of professional misconduct within the meaning of s. 24(c) of the *Act*, in that his conduct amounts to a breach of the *Act* and the Regulatory Bylaws. Specifically, Mr. Henry breached section 9 of the Regulatory Bylaws by failing to obtain a license for the 2014 and 2015 registration years by December 1 of each prior year, and he worked as an LPN after January 1, 2014 and January 1, 2015 without having a license to practice. In addition, we find that Mr. Henry breached section 22(1) of the *Act* by practicing as an LPN when he was not a “practicing member,” as defined by the *Act*. Mr. Henry also breached section 21 of the *Act* which prohibits anyone other than a “member” (defined in section 2(g) as a member of the association who is in good standing) from using the title “Licensed Practical Nurse,” “LPN” or other similar words, to imply that the person is a member.

Although it is not necessary for us to making a finding of professional misconduct on the basis of the other definitions of that term in s. 24 of the *Act*, the significance of this issue to the Association and the seriousness of Mr. Henry’s conduct compels us to comment briefly on these additional provisions of the *Act*.²

The failure to renew one’s annual practice license on a timely basis is a serious matter. As a self-regulating profession, SALPN is charged with the responsibility of administering the *Act*, much of which is concerned with ensuring that LPN’s maintain certain standards in terms of their education, competencies and conduct. SALPN’s ability to do this effectively depends on the co-operation of its members and their willingness to follow the rules set out in the legislation. An important part of self-regulation is maintaining and enforcing high standards within the profession. That a person must first qualify to become a member of SALPN and then meet certain annual requirements in order to continue to be licensed to practice as an LPN, protects the standing of the profession and its members, as well as ensures public safety. Becoming and remaining licensed to practice as an LPN in this province is not like joining a club and paying a voluntary membership fee. Membership and licensure with SALPN are not optional if you wish

² Although the Notice of Hearing also cited various provisions of the *Code of Ethics and Standards of Practice* as being relevant to the complaint, they were not the subject of specific submissions. While the cited provisions are important, we find it unnecessary to address them, having made the finding of professional misconduct on the basis of the *Act* and Regulatory Bylaws alone.

to practice as an LPN in the province. A licensed practical nurse must comply with all membership and licensing requirements in order to legally practice as a licensed practical nurse.

With these considerations in mind, it is our view that Mr. Henry's conduct in working as an LPN without a license is harmful to the best interests of the public ("professional misconduct" defined in s. 24(a)) because the public must be confident of SALPN's ability to ensure that its members are following the licensing requirements and that patient safety is not put at risk. We also find that Mr. Henry's conduct tends to harm the standing of the profession ("professional misconduct" within the meaning of s. 24(b)) in that if members do not take seriously their obligations of registration and licensure with SALPN, the status of all members of the profession declines, as does public confidence in SALPN to properly regulate the profession. This is particularly so in a licensing scheme such as this one, where SALPN may only become aware that an LPN has practiced without a license after it occurs.

Therefore, the Discipline Committee finds, on the basis of the evidence presented to it at the hearing, the submissions of legal counsel for the Investigation Committee, and the member's acknowledgment of professional misconduct, that Mr. Henry's conduct is professional misconduct within the meaning of section 24 of *The Licensed Practical Nurses Act*.

We turn to the second primary issue in this case, which is a determination of the appropriate penalties for Mr. Henry's professional misconduct. Section 30 of the *Act* sets out the Discipline Committee's powers to determine and make orders concerning penalties. It states as follows:

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.*

During the course of Ms. Schirr's submissions about the proposed penalties, the Discipline Committee raised a concern that no mention had been made of the Discipline Committee's own decisions that have dealt with the issue of a member's failure to renew her or his license and practicing without a license.³ Legal counsel responded that the facts of the present case are different than those underlying the past decisions of this Discipline Committee. Counsel noted that Mr. Henry practiced for a significantly long period of time without a license and as such, the decisions that counsel cited in her submissions more appropriately addressed this fact. While the Discipline Committee generally accepts that distinction, the Discipline Committee's prior decisions are instructive concerning the range of penalties appropriate for this type of misconduct and the rationale for the penalties imposed in those cases. Most notably, the past decisions of this Discipline Committee did not include an order suspending the members. While orders were made requiring the payment of both costs and fines, significantly, the amounts of each were essentially the opposite of what was proposed in this case (i.e. the fine was higher and the costs were lower in the Discipline Committee's earlier decisions) and the rationale for those conclusions was clearly explained. In those decisions, we reasoned that a fine, which is more in the nature of punishment and acts as a deterrent to similar conduct in the future, was appropriate

³ These include the Discipline Committee's decisions concerning LPNs: LaSwisse, Taylor, Tedford and Bastian. All of these decisions were rendered by the Discipline Committee on March 14, 2011.

on the basis of the principle that one should not “profit” from their illegal/improper behaviour. A fine was imposed in three of the four decisions⁴ and the amount of the fine was calculated by reference to the number of shifts the LPN worked without a license (based on the amount of \$200 per shift) in order to provide a rational connection between the purpose of a fine and the particular misconduct in which the member had engaged. On the other hand, the Discipline Committee determined that the purpose of an order to pay costs is to compensate SALPN for some of the reasonable expenses associated with the discipline proceedings in circumstances where the LPN is found guilty of professional misconduct or incompetence and, in some cases, where such costs could have been avoided through the appropriate actions of the member, yet recognizing that the Association also bears part of the costs of discipline proceedings given the responsibility and benefit of being and remaining a self-regulating profession.

While the Discipline Committee is not bound by its prior decisions, consistency in decision-making is important, in part because it benefits the public and the membership by clearly informing them of the standards of expected conduct and the consequences for failing to meet those standards. However, in this case, given the Member’s agreement to the proposed penalties, along with the particular facts of this case, the most significant of which are the facts that Mr. Henry practiced for more than a year without a license and he failed to renew his license for two consecutive years, the Committee’s past decisions are factually different.

In this case, it is also important to clearly indicate our finding that Mr. Henry’s agreement to the proposed penalties was genuine and informed. It was apparent that he had had a number of communications with SALPN’s investigator and legal counsel for the Investigation Committee, such that he was well informed of the charges, the process and the proposed penalties, prior to the hearing. As previously indicated, extensive efforts were made to accommodate Mr. Henry’s desire to make representations to the Discipline Committee. Through his participation at the hearing (via teleconferencing), he admitted to the facts underlying the charges and agreed he had engaged in acts of professional misconduct. He was also aware that discipline would result from the finding of professional misconduct. While he was unhappy about the public nature of the proceedings and he was concerned about the financial impact of the proposed penalties (given that he has not been working as an LPN for several months and was now also faced with an order of suspension), he had the opportunity to offer evidence concerning his ability to pay and he had input into the proposed penalties. Through his participation at the hearing, an agreement was reached with the Investigation Committee that differed in some respects from the Investigation Committee’s initial proposal for penalties: it extended the terms of payment of the fine and costs

⁴ The Discipline Committee did not impose a fine in the Taylor decision because the Investigation Committee and the Member made a joint submission concerning the proposed penalties and a fine was not included in their agreement.

by a period of six months, while allowing him to practice as an LPN following his 60-day suspension, provided he did not miss any monthly payments.

Ultimately, the Discipline Committee is guided in this case by the decision of the Saskatchewan Court of Appeal in *Rault v. Law Society of Saskatchewan*, 2009 SKCA 81 (CanLII) in terms of the responsibilities of a disciplinary panel where the parties, under circumstances similar to those involved in this matter, make a joint submission or present an agreement as to the disposition of the complaint. Having found Mr. Henry guilty of the charges set out in the formal complaint, conduct which amounts to professional misconduct as defined by the *Act*, we also accept that the proposed, agreed-upon penalties are appropriate, reasonable and fitting in view of the range of sanctions imposed in similar circumstances, and that the agreement is not contrary to the public interest. While the Discipline Committee may have imposed different penalties had an agreement not been reached between the Investigation Committee and Mr. Henry (such as a higher fine and lower costs), we note that the overall financial impact of the proposed penalties in this case is similar to that of the Discipline Committee's prior decisions, using the Discipline Committee's rationale for calculating an appropriate fine. But again, the Courts have clearly indicated that agreements such as that put before us should not be rejected by the disciplinary panel unless the agreement is inappropriate, outside a reasonable range of appropriate sentences, unfit or unreasonable, or is contrary to public interest. To depart from an agreement, the Discipline Committee would need to provide "good and cogent reasons" as to why that is necessary. Having found no good and cogent reasons to depart from the agreement before us, we accepted the parties' agreement and made our Order accordingly, with two exceptions.

There were two parts of the agreed-upon proposed penalties that the Discipline Committee declined to include in its July 6, 2015 Order. These included a direction that the Saskatoon Health Region be advised of the Discipline Committee's Order (pursuant to section 30(5) of the *Act*) and an order that SALPN publish the full text of this decision on its website and in its newsletter and include Mr. Henry's name in such publications.

We have declined to make a specific order directing that Mr. Henry's former employer, the Saskatoon Health Region, be advised of the Discipline Committee's Order. Section 30(5) of the *Act* permits the Discipline Committee to inform a member's employer of its order against the member when the member has been found guilty of professional misconduct or incompetence. This provision is not enumerated in the list of possible orders the Discipline Committee may make under sections 30(1) and (2) upon a finding of professional misconduct or professional incompetence. This does not mean that the Discipline Committee is opposed to notifying the Saskatoon Health Region of its order; only that this direction does not properly form part of the Discipline Committee's order.

The Discipline Committee has also declined to make an order requiring SALPN to publish this decision on its website and in its newsletter with the Member identified by name. It is

inappropriate for the Discipline Committee to make an order directing SALPN to take or not take any particular action. It is SALPN's decision whether and how it chooses to publish decisions of the Discipline Committee. While the Discipline Committee may make certain suggestions about publication, the Discipline Committee cannot make an order imposing obligations on the Association. We are therefore limited to indicating that we do not find this an appropriate case in which to mask the identity of the Member should SALPN choose to publish this decision. It is also for these reasons that we have not masked the identity of the Member in this decision.

ORDERS:

Upon consideration of the evidence and the agreement of the parties as to appropriate penalties, the Discipline Committee issued an Order on July 6, 2015. In that Order, the Discipline Committee indicated its finding that Mr. Henry's conduct, as alleged in the formal complaint accompanying the Notice of Hearing, amounts to professional misconduct under the *Act*, and that the penalties the parties had agreed to were within the range of reasonable consequences for Mr. Henry's professional misconduct. The Order, dated July 6, 2015, set out the penalties imposed on Mr. Henry, while noting that our written reasons for decision would follow. Therefore, in accordance with s. 30 of the *Act*, the Discipline Committee confirms the Order it made on July 6, 2015, as follows:

1. That Kevin Henry's license be suspended for a period of sixty (60) days from the date of this Order, pursuant to s. 30(1)(b) of *The Licensed Practical Nurses Act, 2000* (the "*Act*").
2. That Kevin Henry shall meet with the Registrar or Associate Registrar before the expiry of the 60 day suspension to discuss the potential consequences on his conduct to clients, colleagues, the profession and himself and the importance of maintaining current registration in a self-regulated profession, pursuant to s. 30(1)(f) of the *Act*.
3. That Kevin Henry shall complete the Canadian Council for Practical Nurse Regulators LPN Code of Ethics course online and provide verification of completion to the Registrar before the expiry of the 60 day suspension, pursuant to s. 30(1)(f) of the *Act*.
4. That Kevin Henry shall pay a fine in the amount of \$400.00, pursuant to s. 30(2)(a)(i) of the *Act*.
5. That Kevin Henry shall pay a portion of the costs of the investigation and hearing, which costs shall be fixed in the amount of \$7,000.00, pursuant to s. 30(2)(a)(ii) of the *Act*.
6. The fine and costs referred to in paragraphs 4 and 5 of this Order, in the total amount of \$7,400.00, shall be paid by Mr. Henry in monthly installments as follows: \$413.00 due on July 31, 2015, and thereafter in equal monthly installments of \$411.00 commencing

on August 31, 2015 and continuing on the last day of every month following, such that payment in full will be made on December 31, 2016. If Mr. Henry fails to make any monthly payment of the costs and fine as ordered, his license shall be immediately suspended pursuant to section 30(2)(b) of the *Act*, until such payment is made.

As indicated earlier, the Discipline Committee makes no orders concerning the publication of this decision by SALPN, the Association being free to publish this decision in any manner it chooses. We state only that SALPN is not prevented from identifying Mr. Henry by name in any publication it chooses to make. Further, while not forming part of this Order, the Discipline Committee intends to notify the Saskatoon Health Region of the Order it has made. Utilizing the assistance of the Executive Director of SALPN, the Discipline Committee will provide a copy of this decision to the appropriate personnel with the Saskatoon Health Region.

In closing, the Discipline Committee thanks both parties for their cooperation at the hearing and reaching an agreement on the proposed penalties.

DATED at Regina, Saskatchewan, this 11th day of January, 2016.

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



Angela Zborosky, Chairperson

Brenda Ballagh LPN, Member

Terry Hallett, LPN, Member

Don Robinson, Public Representative, Member