

In the matter of *The Licensed Practical Nurses Act, 2000*, and the Bylaws of the Saskatchewan Association of Licensed Practical Nurses; and

In the matter of an appeal by Elizabeth Emeka-Okere, LPN, dated June 28, 2020, to the Council of the Association from the decision of the Discipline Committee, dated May 26, 2020, and an appeal dated October 27, 2020 from the decision and order of the Discipline Committee with respect to penalty, dated September 28, 2020

DECISION

Council, Saskatchewan Association of Licensed Practical Nurses

Council Members:

Denise Kominetsky, LPN, Chair
Linda Ewen, LPN, Vice-chair
Theo Bryson, LPN
Marlo Umahag, LPN
Mary Ellen Wellsch, Q.C., Public Appointee

Elizabeth Emeka-Okere on her own behalf and with the assistance of Emily Erhardt, Legal Counsel, on a limited scope basis

Brittnee Holliday, Legal Counsel for the Counselling & Investigation Committee

Merrilee Rasmussen Q.C., Legal Counsel for the Council

Introduction

[1] In its decision dated May 26, 2020, the Discipline Committee of the Saskatchewan Association of Licensed Practical Nurses (SALPN) found that the conduct of the Appellant, Elizabeth Emeka-Okere, in relation to several charges contained in the formal complaint served on her, to constitute professional incompetence and/or professional misconduct, as those terms are defined in *The Licensed Practical Nurses Act, 2000* (the LPN Act). A further hearing was held on July 10, 2020 to receive submissions in relation to penalty, and the Discipline Committee issued its penalty decision on September 28, 2020.

[2] The Appellant has appealed both decisions in accordance with section 35 of the LPN Act. The appeal hearing was held on November 16, 2020 at the Hotel Saskatchewan in order to have sufficient room to accommodate the social distancing requirements in place as a result of COVID-19. Mary Ellen Wellsch participated in the hearing by video conference in order to comply with the public health order.

[3] The parties agreed that the Council was properly constituted and had jurisdiction to hear and determine the matters under appeal.

Background

[4] The Appellant was first registered as a member of SALPN on May 14, 2008. She worked at Wascana Rehabilitation Centre (Wascana) as an LPN until her retirement at the end of 2018. She maintained her status as a non-practising member in 2019.

[5] SALPN received three complaints from Wascana with respect to the Appellant relating to incidents that occurred on July 26 and 27, 2017, March 9, 2018 and July 16, 2018. These complaints led to formal charges relating to the Appellant's care of three patients, SH, JC and LW.

[6] With respect to SH, the charges (summarized) were that the Appellant:

1(a) failed to appropriately monitor the patient, failed to take his vital signs and failed to perform a bladder scan;

1(b) failed to chart the administration of medications;

1(c) failed to chart that she had completed a bladder irrigation.

[7] With respect to JC, the charges (summarized) were that the Appellant:

2(a) had poured the entire contents of 60 ml bottle of Dilantin rather than the 12 ml dosage ordered and was about to administer it when the charger nurse intervened;

2(b) did not check the medication administration record (MAR).

[8] With respect to LW, the charges (summarized) were that the Appellant:

3(a) failed to properly assess and treat the patient after a fall;

3(b) failed to review the MAR for PRN medications ordered;

3(c) failed to chart concerns from family members re the patient's pain;

3(d) failed to properly assess the patient to determine whether medication administered was effective;

3(e) as an alternative to (d), failed to chart an assessment if it was conducted;

3(f) charted inaccurately re the presence of the patient's son in the hospital room;

3(g) administered hydromorphone but failed to chart any pain assessment;

3(h) failed to ensure that the administration of a narcotic was co-signed;

3(i) failed to provide ethical nursing care and failed to take responsibility for her actions.

[9] The hearing by the Discipline Committee was held over several days. These were preceded by several case-management conferences to address the Appellant's questions regarding the hearing process as she was self-represented.

[10] In its decision, the Discipline Committee referred to each of these charges individually and outlined the evidence received in relation to each of them. The Discipline Committee concluded that the charges identified in the formal complaint as 1(a) and 1(b) relating to patient SH were proven but that charge 1(c) was not. The Discipline Committee also found that charges 2(a) and 2(b) were proven and that charges 3(a) to (e), (g) and (i) were proven.

Grounds of Appeal

[11] The Appellant states in her June 28, 2020 letter of appeal that:

- the employer (Wascana) did not meet its obligations under the Collaborative Framework¹ before making its complaint to SALPN;
- the employer failed to conduct performance appraisals annually as required by its policies and the collective agreement;
- the employer did not maintain adequate staffing ratios;
- statements in the Discipline Committee's decision violate the SALPN document, *LPN Practice in Saskatchewan*, dated March 15, 2019²;
- the patients in respect of whom the Appellant was charged under the formal complaint should have been in the care of the charge nurse because they were the most unstable;
- the Appellant did initiate conversations with the charge nurses in relation to her concerns about the patients in her charge, but they failed to provide support;
- the Discipline Committee did not consider several employer policies provided by the Appellant that indicated the employer should not have been punitive with her;
- the Discipline Committee failed to subpoena records pursuant to subsection 29(10) of the LPN Act;

¹ The *Collaborative Decision-making Framework: Quality Nursing Practice* is a document jointly prepared in 2017 by the Saskatchewan Association of Licensed Practical Nurses, the Saskatchewan Registered Nurses Association and the Saskatchewan Registered Psychiatric Nurses Association. The purpose of the document is described as being to assist in understanding the scope of practice of each of the three nursing professions. It is not a document that prescribes standards of practice nor does it impose obligations on employers.

² This document was prepared by SALPN to explain in general terms the scope of LPN practice. It is not a document that sets standards for LPNs, nor was it in place when the events that gave rise to complaints concerning the Appellant occurred.

- the Discipline Committee failed to adjourn the hearing of the formal complaint to wait for the outcome of the Appellant’s grievance of her termination under the collective agreement;
- the Discipline Committee failed to consider the Appellant’s conduct in the context of the team nursing model used by the employer; and
- the Discipline Committee’s decision was not reasonable.

[12] In her October 27, 2020 letter of appeal in relation to the penalty decision, the Appellant repeats these issues. She adds references in general terms to the sanctions and costs and indicates that, in all of the circumstances, she had no option but to take early retirement.

Analysis

Standard of Review

[13] Legal Counsel for the Counselling and Investigation Committee has submitted that the standard of review to be applied to the Council’s consideration of the Discipline Committee’s decision is correctness. The submission is based on the Supreme Court’s decision in *Canada (Minister of Citizenship and Immigration) v Vavilov*.³ *Vavilov* specifically addresses the issue of standard of review in the context of an application to a court. In this case, the application for review is to another administrative tribunal. However, the same reasoning applies, based on the fact that the determination of standard of review is a search for what authority the Legislature intended the appellate body to exercise, whether that appeal body is a court or an administrative tribunal.

[14] *Vavilov* holds that reasonableness is the presumed standard of review to be applied by a reviewing court. This presumption can be rebutted in two situations: 1) where the legislature has indicated that it intends a different standard to apply; and 2) where the rule of law requires a correctness standard to apply.⁴

[15] One of the situations in which *Vavilov* recognizes that the legislature has indicated a different standard of review applies is where a statutory appeal is provided. In that situation, the appellate standard of review applies.⁵ The appellate standard of review is as described in the Supreme Court’s decision in *Hausen v Nikolaisen*.⁶ On an appeal, the standard of review with respect to questions of fact and questions of mixed fact and law is overriding and palpable error.

³ 2019 SCC 65.

⁴ *Ibid*, at para. 23.

⁵ *Ibid*, at para. 37.

⁶ 2002 SCC 33.

With respect to questions of law, including questions of statutory interpretation and those concerning the scope of a decision-maker's authority, the standard of review is correctness.⁷

[16] In this case, the Legislature has provided for a right of appeal from a decision of the Discipline Committee to the Council and in doing so has provided the Council with the authority to uphold or dismiss the appeal, direct a new hearing, vary the order, or substitute its own decision for the decision appealed from.⁸ This list is, in effect, a comprehensive list of all the things that could happen as a result of an appeal. The fact that one of the items on this list allows the Council to substitute its own decision for that appealed from does not fundamentally alter the appellate standard of review to be applied.

[17] Thus, on questions of fact and mixed fact and law, the standard of review is overriding and palpable error and on questions of law the standard of review is correctness. Overriding and palpable error has been described as being synonymous with “clearly wrong” or “unsupported by the evidence”.⁹

[18] As a result, the Council on this appeal has reviewed the factual findings of the Discipline Committee on the standard of overriding and palpable error and has reviewed the issue of whether the conduct that the Discipline Committee found to have occurred is conduct that meets the statutory definition of professional incompetence or professional misconduct, as a matter of statutory interpretation, on the standard of correctness.

Positions of the Parties

[19] The Appellant's position is that she should not have been convicted of any discipline offences. She argues that systemic and environmental factors have an impact on the LPN's ability to practice. She says the employer did not follow its own policies and procedures prior to making complaints to SALPN and set her up to fail by not managing the care environment in a manner that would ensure safe patient care. She says that the Discipline Committee failed to subpoena documents from her employer and refused to wait for the union grievance process to be concluded, and this resulted in a failure of procedural or substantive due process. She said as well that the Discipline Committee's decision was not reasonable as it did not take into account the evidence in its entirety and in particular did not take into account the systemic issues and the role of the employer.

[20] Legal Counsel for the Counselling and Investigation Committee characterized the Appellant's grounds for appeal with respect to the finding of guilt in five categories: the failure to request documents from Wascana, failing to consider certain SALPN documents, failure to consider all the evidence, failure to wait for the union grievance to be completed, and failure to

⁷ *Vavilov*, at para. 37, and see *Abrametz v Law Society of Saskatchewan*, 2020 SKCA 81.

⁸ LPN Act, ss. 35(5).

⁹ *F.H. V McDougall*, [2008] 3 S.C.R. 41, at para. 55.

meet the standard of reasonableness. In relation to each of these claims, Legal Counsel submitted as follows:

- 1) It is up to the Counselling and Investigation Committee as prosecutor and the member whose conduct is the subject of the formal complaint to present evidence to the Discipline Committee. The Discipline Committee has no obligation to search for evidence, in the same way as a judge of the court has no obligation to search for the evidence. Since there is no duty of this kind on the Discipline Committee, there cannot be a “failure”.
- 2) The SALPN documents referred to by the Appellant merely describe the various influences that can impact on LPN practice. They have nothing to do with the standards of conduct and competence that each LPN must meet.
- 3) The Discipline Committee is not obliged to refer to every single item introduced in evidence in making its decision and has no obligation to refer to evidence that is not relevant. In a similar vein, the claim that the Discipline Committee did not consider all the evidence must be rejected. There was a very large volume of evidence presented at the hearing which lasted several days. The Committee specifically stated that just because a specific item of evidence was not explicitly referred did not mean that it had not been considered. The Committee considered all the relevant evidence.
- 4) The Discipline Committee had no obligation to wait for the outcome of the grievance proceedings between Wascana and the union on the Appellant’s behalf. Professional incompetence or professional misconduct is neither proven nor disproven by those proceedings. An LPN is not relieved of her obligation to comply with the standards of the profession because of the employer’s policies.
- 5) The Counselling and Investigation Committee submitted that the standard of review to be applied to the Discipline Committee’s decision was the standard of correctness and argued that the decision was correct. Since correctness is a higher standard than reasonableness, it follows that if the decision was correct it was also reasonable.

[21] With respect to the issue of costs, the Counselling and Investigation Committee argued that the Appellant was found guilty of 85% of the charges contained in the formal complaint and the hearing was lengthy and protracted largely due to the Appellant’s conduct.

Analysis and Decision

The Professional Discipline Process

[22] It is apparent that the Appellant does not fully appreciate the nature of the investigation and discipline process. The Appellant made frequent statements in her submission to Council that the Discipline Committee was “not just the judge but also the prosecutor”. This is incorrect. These two committees are statutory committees and function independently on the basis of their statutory mandate. The Counselling and Investigation Committee acts as prosecutor as described in subsection 29(2) of the LPN Act. The function of the Discipline Committee is to hear the

evidence and to determine whether or not the formal complaint or complaints are proven as set out in subsection 29(3) of the LPN Act.

[23] Although not clear, the Appellant's argument may be that the fact that the members of both the Counselling and Investigation Committee and the Discipline Committee are appointed by the SALPN Council means that they cannot perform their functions objectively and without bias. The LPN Act sets out the investigation and discipline process and requires that the appointments to these committees are made by Council. SALPN is bound by the Act's requirements. However, once members of these committees are appointed, they exercise their statutory authority to investigate and discipline independently and without interference by SALPN's Council of staff. In addition, the duty of fairness, which guides the committees in the performance of their statutory functions, protects the rights of the member in the process. Ultimately an aggrieved member may appeal to the courts. The standards of review applied by the courts in such situations require that the committees comply with the rule of law and the objective review that may ultimately brought to bear on the deliberations of the Discipline Committee and the Council by the courts ensures that the Committees act fairly.

[24] The Appellant also argued that the Discipline Committee should have waited for the outcome of her grievances filed through the union. Grievances and their outcome have no bearing on the issue of whether or not the Appellant has met the standards of professional competence and conduct required by the LPN Act. Grievances deal with the relationship between the employer and its employees, which is a completely separate matter. It is perhaps confusing that the word "discipline" is used in both these contexts. However, the issue of discipline in a unionized workplace is engaged with the question of whether the employer has followed the requirements of the collective agreement. The issue of discipline in the context of the provision of services by a member of regulated profession is engaged with the question of whether the member of the profession has met the standards of competence and conduct required of her as a member of the profession. If the standards of the workplace conflict with the standards of the profession, the profession requires that its members comply with the profession's standards – even if that results in negative consequences to the member's relationship with the employer.

[25] The Appellant also made several comments to the effect that others did similar things and were not reported or charged and that management was targeting her by making the complaints that were made to SALPN, or that management didn't follow its own policies and procedures. None of those issues is relevant to the question of whether or not the Appellant's conduct constituted professional incompetence or professional misconduct. It is, unfortunately, the reality that SALPN can only investigate the complaints it receives. The fact that others may have committed discipline offences is not a defence for the Appellant to the discipline offences with which she was charged.

[26] The Discipline Committee's decision is thus reviewed in this context. The only question for Council to determine is whether the conduct of the Appellant constituted professional incompetence and/or professional misconduct.

The Discipline Committee's Findings of Fact

[27] The Discipline Committee made the following findings of fact:

- the Appellant failed to properly monitor patient SH in that she did not undertake a bladder scan nor did she take any vital signs or any other physical assessment;
- the Appellant did not record the administration of Tylenol to SH in the MAR;
- the Appellant admitted the “near miss” in relation to the administration of medication to patient JC and that she failed to check the MAR and provided an explanation for her failure that amounted to a further failure to recognize her inability to perform her duties and responsibilities;
- the Appellant failed to conduct or make a note of pain assessments conducted in relation to patient LW, she relied on statements made by family members about the patient’s level of comfort, and she did not assess or did not chart any assessment of the patient prior to or after administering hydromorphone;
- the Appellant failed to check the MAR prior to administering medication to LW;
- the Appellant’s failures in relation to LW resulted in her failing to provide ethical nursing care and to take responsibility for her actions.

[28] The Discipline Committee’s findings of fact are supported by the evidence. The decision outlines in detail the evidence on which the Committee relied in reaching these conclusions. There is nothing to indicate any overriding and palpable error, which is the applicable standard of review in this regard. None of these facts as found is affected by the Appellant’s arguments on appeal.

[29] There remains the question of whether these factual findings lead properly to the conclusion that the Appellant was guilty of professional incompetence or professional misconduct. The interpretation of sections 23 and 24 of the LPN Act, which define these terms, is a question of law and the Discipline Committee must be correct in its interpretation of them. The application of these legal principles to the facts as found is a question of mixed fact and law and is subject to review on the standard of overriding and palpable error.

The Statutory Definitions of Professional Incompetence and Professional Misconduct

The definitions of professional incompetence and professional misconduct in the Act are as follows:

Professional incompetence

23 Professional incompetence is a question of fact, but the display by a member of a lack of knowledge, skill or judgment or a disregard for the welfare of a member of the public served by the profession of a nature or to an extent that demonstrates that the member is unfit to:

- (a) continue in the practice of the profession; or
- (b) provide one or more services ordinarily provided as a part of the practice of the profession;

is professional incompetence within the meaning of this Act.

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;
- (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.

[30] It is not sufficient to determine what happened by finding facts, the Discipline Committee must also link its findings of fact in relation to each of the charges contained in the formal complaint to the definitions of professional incompetence and professional misconduct in the LPN Act. It is only conduct that falls within the parameters of those two terms as they are defined that constitutes a discipline offence. Conduct that falls outside of the scope of those definitions is not disciplinable.

Linking the Findings of Fact to the Definitions of Professional Incompetence and Professional Misconduct

[31] In respect of charge 1(a), the Discipline Committee found that the Appellant's failure to take vital signs or perform a physical assessment of SH when the Appellant was aware of the fact he was retaining urine demonstrated a lack of competency in the performance of her duties. Although not explicitly stated, the Discipline Committee's decision indicates that this failure to assess displayed a lack of knowledge, skill or judgment in the provision of a service ordinarily provided as a part of the practice of the profession. Indeed, assessment of the patient is a fundamental and basic aspect of the practice of a licensed practical nurse. This failure constitutes professional incompetence within the meaning of clause 23(b) of the LPN Act.

[32] In respect of charge 1(b), the Discipline Committee found that the Appellant failed to chart the administration of medication in the MAR. Failure to chart in the MAR could compromise the health and safety of the patient and in this respect her conduct was harmful to the best interests of the public and constitutes professional misconduct within the meaning of clause 24(a) of the LPN Act.

[33] The Discipline Committee found the Appellant not guilty of charge 1(c).

[34] In respect of charges 2(a) and 2(b), the Discipline Committee found, as the Appellant herself admitted, that she failed to check the MAR and was about to administer five times the prescribed dose of medication to patient JC when stopped by the charge nurse. Standard 3 of the

Standards of Practice for Licensed Practical Nurses in Canada requires that prior to administering any medication, an LPN must check the name of the person to whom the medication is to be administered, check the strength or dosage to be administered, and check the frequency with which the medication should be administered. The Appellant made none of these checks. Compliance with the standards described in the *Standards of Practice for Licensed Practical Nurses in Canada* is required by section 19 of the SALPN Regulatory Bylaws. A failure to comply with any of these standards is therefore a breach of the bylaws, which constitutes professional misconduct within the meaning of clause 24(c) of the LPN Act.

[35] Charges 3(a) to 3(i) comprise a number of particulars with respect to the Appellant's care for patient LW on May 22, 2018. The Discipline Committee concluded that the Appellant failed to conduct appropriate pain assessments or, if she did conduct them, she did not chart them. While the Discipline Committee did not specifically link this conduct to the definition of professional incompetence contained in section 23 of the LPN Act, as already noted assessment of the patient is a fundamental and basic aspect of the profession of licensed practical nursing, as is charting, and the failure to assess or to chart is professional misconduct within the meaning of clause 23(b) of the LPN Act. The Discipline Committee also found that she failed to check the MAR, contrary to Standard 3 of the *Standards of Practice for Licensed Practical Nurses in Canada*, which is professional misconduct within the meaning of clause 24(c) of the LPN Act. The Discipline Committee also described checking the MAR as a core nursing requirement and a service ordinarily provided, so that the Appellant was also guilty of professional incompetence within the meaning of clause 23(b) of the LPN Act in this regard.

[36] The Discipline Committee found the Appellant not guilty of charge 3(h).

[37] Charge 3(i) is that the Appellant failed to provide ethical care to the patient LW and to take responsibility for her actions or inactions. The *Code of Ethics for Licensed Practical Nurses in Canada* describes the ethical values and responsibilities that LPNs must uphold and promote. The Discipline Committee described how the Appellant's conduct failed to comply with the principles set out in the Code in relation to responsibilities to the public and responsibilities to the client. Compliance with the Code is required by section 20 of the SALPN Regulatory Bylaws. A failure to comply with the Code is therefore a breach of the bylaws, which constitutes professional misconduct within the meaning of clause 24(c) of the LPN Act. The Discipline Committee also found that the Appellant failed to comply with Standard 1 of the *Standards of Practice for Licensed Practical Nurses in Canada*, which requires that LPNs to be accountable for their practice. The Appellant at no point took responsibility for her conduct but focused on the perceived failures of others as an excuse for her own actions and thus was also guilty of professional misconduct in this regard.

[38] The Council concludes that in all cases the Discipline Committee has properly and correctly linked its findings of fact to the definitions of professional incompetence and professional misconduct contained in the LPN Act. The Appellant's appeal with respect to these findings is dismissed.

Appropriate Penalty

[39] However, the Council does have concerns with some aspects of the penalty decision. While the Discipline Committee has taken into account the appropriate factors as identified in *Camgoz v College of Physicians and Surgeons*¹⁰ and the direction of the Saskatchewan Court of Appeal in *Abrametz v The Law Society of Saskatchewan*¹¹ with respect to the issue of costs in professional discipline proceedings, the Council is of the view that there ought to be some flexibility built into the course requirements if equivalent courses are available and acceptable to the SALPN Registrar and also concludes that the costs should be reduced. While Council recognizes that the fact that the Appellant was self-represented led to increased costs because of protracted proceedings and her lack of understanding of the process and failure to appreciate what was relevant to the discipline charges against her and what was not, the costs ordered are a significant burden to a licensed practical nurse and could serve to drive her away from the profession forever thus becoming punitive. The Council has determined that the costs should be reduced by half.

Order

[40] For clarity, the Council orders that the Discipline Committee's decision relating to penalty dated September 28, 2020, be varied by revising paragraphs 4 and 5 to read as follows:

“4(1) Elizabeth Emeka-Okere may take courses that are in the opinion of the SALPN Registrar equivalent to the courses ordered pursuant to paragraphs 2 and 3 of this order by in advance applying to and obtaining the written permission of the SALPN Registrar.

“(2) In the event that the courses Elizabeth Emeka-Okere has been ordered to take pursuant to paragraphs 2 and 3 of this order are not offered, and there are no equivalent courses available in the opinion of the SALPN Registrar, Elizabeth Emeka-Okere may apply by letter directed to the Chairperson of the Discipline Committee to have this order varied.

“5(1) Pursuant to subclause 30(2)(a)(ii) of the Act, Elizabeth Emeka-Okere shall pay the costs of the investigation and hearing, which costs are fixed in the total amount of \$21,000, to be paid as follows:

- (a) within 6 months after being reinstated as a practicing member, the sum of \$3,500;
- (b) within 12 months after being reinstated as a practicing member, the sum of \$3,500;
- (c) within 18 months after being reinstated as a practicing member, the sum of \$3,500;

¹⁰ (1993), 114 Sask R 161 (QB).

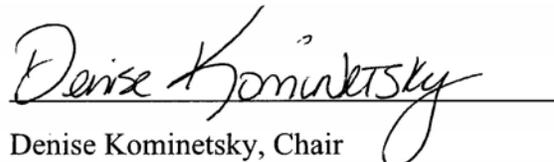
¹¹ 2018 SKCA 37.

- (d) within 24 months after being reinstated as a practicing member, the sum of \$3,500;
- (e) within 30 months after being reinstated as a practicing member, the sum of \$3,500; and
- (f) within 36 months after being reinstated as a practicing member, the sum of \$3,500.

“(2) If an installment is not made on the due date or within 7 days of the due date, Elizabeth Emeka-Okere’s licence shall be suspended pursuant to clause 30(2)(b) of the Act until payment is made”.

[41] In all other respects the decision of the Discipline Committee dated September 28, 2020 remains unchanged.

DATED at Regina, Saskatchewan this 16th day of December 2020.


Denise Kominetsky, Chair
on behalf of the SALPN Council