



**IN THE MATTER OF:**

**THE LABOUR RELATIONS CODE**

- and -

**UNITED NURSES OF ALBERTA AND  
CERTAIN OF ITS LOCALS**

Applicant

- and -

**THE GOOD SAMARITAN SOCIETY (A LUTHERAN SOCIAL SERVICE  
ORGANIZATION), SHEPHERD'S CARE FOUNDATION, DAVID THOMPSON  
REGIONAL HEALTH AUTHORITY, EAST CENTRAL HEALTH, BONNYVILLE  
HEALTH CENTRE, ALBERTA LONG TERM CARE ASSOCIATION AND THE  
ALBERTA UNION OF PROVINCIAL EMPLOYEES**

Respondents

**FILE NO.: GE-05553**

**BOARD MEMBERS**

Mark L. Asbell, Q.C. – Chair  
Ray Drisdelle – Member  
Ken Krekelwetz – Member

**APPEARANCES**

**For the Applicant:** Bruce Laughton (Counsel)

**For the Respondents:**

The Good Samaritan Society (A Lutheran social Service Organization): Craig Neuman (Counsel)

Shepherd's Care Foundation: Albert Lavergne (Counsel)

David Thompson Regional Health Authority: Unrepresented

East Central Health: Unrepresented

Covenant Health operating as Bonnyville Health Centre: Hugh J.D. McPhail, Q.C., Vicki Giles and Dan Bokenfohr (Counsel)

Alberta Long Term Care Association: Hugh J.D. McPhail, Q.C., Vicki Giles and Dan Bokenfohr (Counsel)

The Alberta Union of Provincial Employees: Simon Renouf and Shasta Desbarats (Counsel)

## **REASONS FOR DECISION**

[1] The United Nurses of Alberta and certain of its Locals (UNA) apply under section 12(4) of the Alberta *Labour Relations Code* (the “Code”) for reconsideration of the Board’s January 6, 2009 decision, found at [2010] Alta. L.R.B.R. 1, which we refer to as the “Determination Decision” rendered by the “Original Panel”. The Determination Decision summarily dismissed applications brought by UNA seeking determinations that various licensed practical nurses (LPNs) should be included in UNA’s direct nursing care bargaining units.

[2] The reconsideration application proceeded by way of oral hearing before a panel of the Board (Asbell, Drisdelle, and Krekelwetz).

[3] UNA alleges the Determination Decision contains two principal errors. First, the Original Panel erred in applying the summary dismissal test to the facts with the result the Determination Decision conflicts with earlier decisions of the Board. Second, the Original Panel denied UNA a fair hearing by failing to assume the facts as alleged in its original application to be true and by accepting facts not before the Board.

[4] The Alberta Union of Provincial Employees (“AUPE” - the current bargaining agent for the LPNs in question), various affected employers, and the Alberta Continuing Care Association (jointly the “Respondents”) oppose the application. They submit UNA’s application does not warrant overturning the Determination Decision.

### **I. Background**

[5] The LPNs in question are employed at five different facilities located throughout the province. Each location involves a separate employer. At each location the LPNs are currently included in the auxiliary nursing care bargaining unit. AUPE is the certified bargaining agent for the auxiliary nursing care bargaining unit at each of these facilities.

[6] UNA advanced five separate applications (one for each location/employer) seeking to have the LPNs removed from the auxiliary nursing care bargaining unit represented by AUPE and included in the direct nursing care bargaining unit represented by UNA.

[7] Each of the five applications was similar in form premised on the allegation the prime function of the LPNs was that of direct nursing. The Board sets this out at paragraph 49 of the Determination Decision:

49 It is no surprise that all five of the determination applications, leaving aside the identity of the employers and of the specific LPNs, are very similar in content. Each is premised on the allegation that the prime functions of LPNs is in providing direct nursing care and, therefore, they properly fall under UNA's certificates. Each application then sets out: (i) a brief reference to the operation of each employer at the particular location; (ii) the number of RNs at each location represented by UNA under a specific Board issued certificate; (iii) the number of LPNs at each location who are alleged to have expressed a desire to be represented by UNA and who are currently represented by AUPE under a specific Board issued certificate for the auxiliary nursing care bargaining unit; (iv) a typical staffing schedule at each location for RNs and LPNs and any others involved in patient care; (v) a brief outline of the work assignments on each shift; and, (vi) finally, a list of what are described as essentially the same functions performed by each of the RNs and LPNs on particular patient assignments. UNA's applications carry on, in an identical manner, to refer to the *Health Professions Act*, the LPNs Professional Regulation, the RNs Professional Regulation, Information Bulletins #10 and #22, a number of prior Board decisions and at least one Court of Queen's Bench decision, all for the purpose of persuading the Board the LPNs properly belong in UNA's direct nursing care units.

[8] The applications carry on in an identical manner to refer to the relevant legislation, regulations, Board Information Bulletins, and Board decisions all provided for the purpose of convincing the Board the LPNs in question properly belong in the direct nursing care bargaining unit. Each application is premised on UNA's contention the prime function of the LPNs in question is to provide direct nursing care and, as a result, the positions should be included in the direct nursing care bargaining unit.

[9] The Respondents opposed the applications and, at the outset, sought summary dismissal of the applications pursuant to section 16(4)(e) of the Code. The Original Panel granted the summary dismissal application. UNA seeks reconsideration of that finding.

## **II. Findings of the Original Panel**

[10] At the outset, we find it useful to provide a brief outline of the Determination Decision. At its most basic, the Determination Decision contains:

- an assessment of the scope of the application;
- a review of the relevant legal principles;
- a prime function analysis based on the scope of practice for LPNs set out in the *Health Professions Act*; and;
- several conclusions including:
  - that the dividing line between auxiliary nursing care and direct nursing care as it applies to LPNs is becoming less distinct and harder to draw;
  - the evidence of overlapping duties is not sufficient to achieve the result sought by UNA in such a close case, and;
  - a determination application is not the appropriate application to advance what amounts to an attempt to overturn long standing Board policy relating to the content of the auxiliary nursing care unit.

We expand on each of these elements of the Determination Decision.

### **Scope of the Applications**

[11] Of fundamental importance to the Determination Decision is the Original Panel's assessment of the scope of UNA's determination applications. Were the determination applications limited to the specific positions in question as argued by UNA, or were they far reaching in scope, effectively seeking to reverse the Board's longstanding policy of normally including LPNs in the auxiliary nursing care unit?

[12] In the Original Panel's opinion, the applications were broad in scope. They effectively sought to achieve the dramatic result of removing LPNs from the auxiliary nursing care unit and including them in UNA's direct nursing care unit. UNA's position that the applications were

limited in scope was inconsistent both with its position all LPNs employed by five separate employers should be included in the direct nursing care unit and, even more importantly, with its argument the legislated scope of practice for LPNs amounts to direct nursing care. The effective result, if this latter argument was accepted, would be an acknowledgment the prime function of LPNs is direct nursing care and, in turn, that they be included in that unit. Rather than a narrow application limited to the specific positions identified in the applications, it would effectively overturn the Board's long standing practice of normally including LPNs in the auxiliary nursing care unit.

### **Applicable Legal Principles**

[13] The Board also identified a number of legal principles relevant to the applications.

[14] First, the Determination Decision expressly states for the purposes of deciding whether to summarily dismiss an application, the Board assumes the facts as advanced by the applicant to be true.

[15] Second, the Determination Decision discusses the impact of the *Labour Relations (Regional Health Authorities Restructuring) Amendment Act, 2003* (commonly referred to as "Bill 27") which, among other things, established by regulation four health care bargaining units including the auxiliary nursing care bargaining unit and direct nursing care bargaining unit along with the general support services and the paramedical professional and paramedical technical bargaining units. As stated by the Original Panel at paragraph 56 of the Determination Decision, "[t]he effect of these functional bargaining units being established by regulation is to remove the Board's power to make changes to them ..." although the Board retains the power to determine whether a person is included or excluded from a unit.

[16] Third, the Board reviews the provisions of the *Health Professions Act* and, in particular, the provisions defining the scope of practice of LPNs and registered nurses (RNs). It concludes this discussion with the following statement, "... since both have scopes of practice that include applying nursing knowledge, skills and judgment, the dividing line between the direct nursing

care bargaining unit and the auxiliary nursing care unit, as it applies to LPNs, is becoming less distinct and harder to draw.”

[17] Fourth, although the Board relies heavily on job function performed by employees in making a determination as to which unit an employee is placed in, in close cases community of interest considerations may play a significant role in making this determination.

[18] Fifth, factors relevant to community of interest considerations have a role to play in determining where to draw the boundary line between units. While it is a mistake to use a community of interest analysis as a substitute for an analysis of the stated boundaries of a bargaining unit as set out in the bargaining unit description, in close cases it is acceptable and, in some close cases necessary, to look at community of interest considerations to gain insight into the intended scope of the unit.

[19] Finally, the words describing each unit and, in turn, the dividing line between them, must accommodate specialization and change to remain relevant. As stated by the Board, any definition of direct nursing care must encompass the functions and roles exclusively given to individuals with nursing training who maintain professional registration. Similarly, we would add, the definition of the auxiliary nursing unit must encompass the functions and roles given to LPNs.

### **The Board’s Prime Function Analysis**

[20] The Determination Decision contains a two part prime function analysis. First, the Board reviews the statutory scope of practice of both LPNs and RNs as set out in the *Health Professions Act* and its related schedules and regulations. Commencing at paragraph 57 of the Determination Decision, the Board reviews both the similarities and differences between the scopes of practice of LPNs and RNs, effectively analyzing the prime functions for these two groups of employees.

[21] Secondly, the Determination Decision identifies and considers the overlap in functions between the LPNs and RNs in question as identified by UNA. Again, referring to paragraph 49 of the Determination Decision, the Board expressly recognizes the applications are each premised on the allegation the prime function of LPNs is the provision of direct nursing care. The Board goes on in that same paragraph to review the list of what it describes as essentially the same functions performed by each of the LPNs and RNs on particular patient assignments.

### **Conclusions Reached by the Original Panel**

[22] Having assessed the scope of the application, identified the relevant legal principles, and considered the prime function of the LPNs in question, the Original Panel reaches a number of conclusions.

[23] First, "... since both have scopes of practice that include applying nursing knowledge, skills and judgment, the dividing line between the direct nursing care bargaining unit and the auxiliary nursing care unit, as it applies to LPNs, is becoming less distinct and harder to draw." (Paragraph 60).

[24] Second, the Original Panel specifically considers the relevance of the overlap in functions identified by UNA. At paragraph 66, the Board states: "Although each of UNA's applications do outline certain functions performed by LPNs on patient assignments that are essentially the same as those performed by the RNs, the overlap of these particular functions is insufficient, in the Board's view, to support UNA's allegation that these LPNs are engaged in direct nursing care." Thus, the Original Panel concludes this overlap is insufficient to support UNA's allegation the LPNs in question are engaged in direct nursing care. In close cases such as this, community of interest considerations favour leaving the LPNs in the auxiliary nursing care unit. (Paragraph 68).

[25] In addition, the situation described by UNA is one that existed long before 2003 when Bill 27 was proclaimed or the provisions of the *Health Professions Act* and, in particular, the provisions defining the scope of practice of LPNs and registered nurses (RNs) were proclaimed.

Nothing was alleged to have occurred at the time the applications were brought justifying a change being made by the Board to its long standing practice of normally including LPNs in the auxiliary nursing care unit.

[26] Finally, at paragraphs 69 and 70, the Original Panel concludes a determination application is not the appropriate method of seeking to overturn long standing Board policy affecting a large number of employees and employers.

### **III. The Board's Reconsideration Power**

[27] Section 12(4) provides the Board may, at any time, reconsider any decision. Information Bulletin #6 sets out, among other things, the circumstances that may prompt the Board to reconsider its own decision. In the context of this case, UNA contends the Determination Decision contains substantial errors of fact or errors of law warranting reconsideration.

[28] We note the Board generally uses its reconsideration power cautiously. As the Board states in *U.S.W.A., Local 5220 v. GenAlta Recycling Inc.* [2004] Alta. L.R.B.R. LD-004:

17 The Board's power to grant reconsideration is a discretionary one ... In a typical case, the Board exercises its reconsideration power cautiously in light of the importance of the principle of finality to labour relations matters. The standard of review is not mere disagreement with the approach followed by the original panel. There must be substantial error that justifies intervention. ...

### **IV. Reconsideration Decision**

[29] UNA contends the Original Panel made substantial errors of fact or errors of law warranting reconsideration and that it denied it a fair hearing. We disagree. We look at each in turn.

**Error of Law**

[30] UNA argues the Determination Decision errs in applying the summary dismissal test used by this Board with the result that it conflicts with earlier decisions of this Board. In particular, it argues previous Board jurisprudence addressing determination applications requires a prime function analysis be conducted. In failing to conduct this analysis to determine whether the work being done by the LPNs in question amounted to direct nursing care, the Original Panel could not assess whether the application had a reasonable prospect of success. According to UNA, this failure amounts to a reviewable error justifying reconsideration of the Determination Decision. (See: Information Bulletin #10; *Calgary General Hospital United Nurses of Alberta v. Calgary General Hospital*, [1987] Alta. L.R.B.R. 553; *UNA v. Alberta Hospital Association*, [1996] Alta. L.R.B.R. 610 at 622, and; *Alberta Union of Provincial Employees v. Health Sciences Association of Alberta and Capital Health Authority and Alberta Labour Relations Board*, [2008] Alta. L.R.B.R. 230 at paragraph 92).

[31] With respect, we do not see any reviewable error in the way the Determination Decision characterizes UNA's applications or in the conclusion it reaches that the application should be summarily dismissed. In our view, the Determination Decision correctly identifies the scope of the application and the relevant legal principles, applies these principles to the facts as alleged by UNA and concludes the application should be summarily dismissed as having no reasonable prospect of success.

[32] The Board correctly concludes the application had broader implications than potentially placing a relatively small number of LPNs in the direct nursing care bargaining unit. Rather, the application, if successful, would effectively eviscerate the auxiliary nursing care bargaining unit by removing the core group of employees that comprise that unit – LPNs. We agree with the Original Panel's assessment of the scope of the application and find no error in its assessment of this issue.

[33] The conclusion the applications had no reasonable prospect of success and, as a result, should be summarily dismissed is also, in our view, correct.

[34] First, and perhaps most importantly, granting the applications would effectively amend the auxiliary and direct nursing care units, a power the Board correctly concludes it no longer possesses since the passage of Bill 27. As discussed in the Determination Decision, this legislative scheme effectively removed the Board's power to make changes to these quasi-statutory units. Although the Board continues to have the power to decide whether an individual is included or excluded from a unit, it does not have the power to make material changes to these units such as effectively gutting the auxiliary nursing unit by removing LPNs from the unit.

[35] Second, the result sought by UNA would overturn the longstanding policy and practice of normally including LPNs in the auxiliary nursing unit. In the Original Panel's view, this result was not warranted by the simple overlap of functions between individuals whose core functions as defined by the *Health Professions Act* somewhat overlap. In cases where the dividing line between units is by definition difficult to define, simply demonstrating an overlap in functions will not be sufficient to justify moving a group of employees that are the core of the unit from one unit to another. In these close cases, community of interest considerations support continuing to include employees in their current bargaining unit unless a material change can be identified justifying movement to a different unit. As stated in the Determination Decision, no such change has been identified in this case.

[36] This is generally so even in cases where the activities and roles of the individuals in question may have evolved over time as is the case with both LPNs and RNs. As discussed in the Determination Decision at paragraph 60, the definition of units and, in turn, the dividing line between them, must accommodate specialization and change to remain relevant.

[37] We specifically reject UNA's suggestion the Original Panel failed to conduct a prime function analysis. To start, the Board expressly acknowledged the necessity of performing a prime function analysis as part of a determination application. In this case, it carefully reviewed the statutory scope of practice of both LPNs and RNs. As has been discussed, the result of this analysis was the Original Panel's conclusion the dividing line between these units was becoming

harder to determine. Simply put, the dividing line between these units in the context of the placement of LPNs is a close call that is not easily made.

[38] The Original Panel went on to consider, as part of its prime function analysis, the evidence of overlap of functions as set out in UNA's applications. Also as previously discussed, the Original Panel concludes this evidence in this "close call" case was insufficient to support the allegation these LPNs, or LPNs in general, are engaged in direct nursing. We find no error in this conclusion and, in fact, agree with it. However this analysis may be characterized, it cannot be described as a failure to consider the prime function of these employees or LPNs more generally.

[39] We would add that if evidence of overlap in functions was sufficient grounds to reverse policy positions adopted by the Board such as the language describing the content of the health care functional bargaining units, greater uncertainty will be introduced into the area of bargaining unit determinations than already exists. The determination of the boundaries of the various standard health care bargaining units has been, and will likely continue to be, a source of ongoing dispute. The guidance and certainty these policy statements provide to the health care community will be virtually eliminated if applications such as the one advanced by UNA could effectively rewrite these policies.

[40] Finally, the Original Panel concludes a party seeking to overturn long standing Board policy addressing the dividing line between functional bargaining units in health care should not do so by way of determination applications involving a small number of LPNs employed by a small number of employers. As stated at paragraph 70 of the Determination Decision, "[w]hen a party seeks to have the Board reconsider and, perhaps, overturn a practice of long standing, especially one that could have a potential impact upon numerous employers and unions, it is likely a determination application limited to only a small number of employers or groups of employees is not the route to follow." The Original Panel was of the view the preferable approach is a reference of a difference leaving the Board free to invite submissions from all affected healthcare stakeholders. We agree with these comments and see nothing in them or in the arguments presented to us on this point demonstrating an error on the part of the Original

### **Fairness of the Board's Hearing**

[41] UNA also alleges the Original Panel denied it a fair hearing by failing to assume the facts as alleged in its application to be true and by accepting facts not before it. We fail to see merit in either of these allegations.

[42] The basic factual assertions for each of UNA's original determination applications are the same. They include a brief description of the employer and its operations, the number of registered nurses and LPNs employed at the specific location, the work responsibilities for these two groups of employees, and specific examples of the overlap in their functions.

[43] At paragraph 49 of the Determination Decision, the Original Panel reviews the factual basis for the five determination applications. It continues at paragraph 51 to confirm the Board's practice that on summary dismissal applications, the facts, as alleged by the applicant, are accepted as true. Having reviewed the factual foundation for the application and the legal obligation to assume these facts as true, the Determination Decision concludes at paragraph 66, that the overlap in functions is insufficient to support UNA's allegation the LPNs are engaged in direct nursing care. With respect, we fail to see how it can be successfully argued the Original Panel fails to accept as true the facts as alleged.

[44] Nor are we of the view the Original Panel relies on facts not before it. In particular, UNA points to references in the Determination Decision to community of interest considerations suggesting the original panel unfairly relies on these as facts not before them.

[45] These references are included as part of the Original Panel's discussion at paragraph 68 that, although the Board relies heavily on the job function an employee performs, other considerations may play a role in deciding which unit an employee is included in. We find this

discussion and the resulting conclusion that “other considerations” may play a role sound. This is simply a statement of the law as developed by this Board.

[46] We also find it inoffensive in the sense there is nothing unfair about the Original Panel making this statement or discussing these “other considerations”. The “other considerations” mentioned in the Determination Decision are directly relied on by UNA or one or more of the Respondents as part of the application heard by the original panel. As a result, it cannot be argued it is unfair for the original panel to consider them.

[47] In addition, these policy considerations underlie the very health care bargaining units in question. We note while these units have acquired a statutory flavour in some contexts since the passage of Bill 27 and its related regulations, the Board is in fact the body that initially created the functional bargaining units in the health care sector. Given this fact, we find it hard to accept the Original Panel acts unfairly when it considers policy considerations raised by the parties and which the Board is intimately familiar with in its role as an expert tribunal in the labour relations area.

## **V. Conclusion**

[48] For the foregoing reasons, we dismiss UNA’s reconsideration application.

ISSUED and DATED at the City of Edmonton in the province of Alberta this 20th day of July 2010 by the Labour Relations Board and signed by its Chair.

Mark L. Asbell, Q.C., Chair