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RE: An application for determination brought by the United Nurses of Alberta affecting Alberta Health Services and The Alberta Union of Provincial Employees – Board File No. – GE-05633

[1] United Nurses of Alberta (“UNA”) brings this application pursuant to section 12(3)(o) of the *Alberta Labour Relations Code* (the “Code”) for a determination that the Operating Room Technicians/Licensed Practical Nurses (“ORT/LPNs”) working at the Royal Alexandra Hospital in the surgical program in the Women’s Operating Room (WCOR), the Ear, Eye, Nose and Throat Operating Room (ATCOR) and the Diagnostic Treatment Centre Operating Room (DTCOR) fall within the “direct nursing care or nursing instruction” bargaining unit (the “Direct Nursing Care Bargaining Unit”).

[2] The ORT/LPNs at the Royal Alexandra Hospital are currently represented by the Alberta Union of Provincial Employees (“AUPE”) under the certificate for employees when employed in auxiliary nursing care (the “Auxiliary Nursing Care Bargaining Unit”). AUPE opposes UNA’s application and maintains the ORT/LPNs are properly included in the Auxiliary Nursing Care Bargaining Unit represented by AUPE.

[3] Alberta Health Services (“AHS”) is the employer of the ORT/LPNs. It also opposes UNA’s application and maintains the ORT/LPNs are properly included in the Auxiliary Nursing Care Bargaining Unit represented by AUPE.

[4] AUPE and AHS submit that UNA’s application has no prospect of success and should be summarily dismissed pursuant to section 16(4) of the *Code*. Their applications for summary dismissal were heard before a Board panel (Asbell, Fraleigh, and Williams with Board Member Moffatt participating for training purposes only – he did not participate in the actual decision) and after carefully considering the helpful submissions of the parties, the Board has decided to grant the applications of AUPE and AHS and summarily dismiss UNA’s application. Our reasons follow.

Background

[5] Between 2007 and 2009 UNA filed 11 determination applications seeking to have LPNs moved out of AUPE’s Auxiliary Nursing Care Bargaining Units and into UNA’s Direct Nursing Care Bargaining Units on the basis that those LPNs were performing “direct nursing care” and should therefore be included in the Direct Nursing Care Bargaining Unit.

[6] After a hearing, the Board summarily dismissed five of UNA's determination applications on January 6, 2009 (*UNA (Various Locals) v. Good Samaritan Society and AUPE et al.* [2009] Alta. L.R.B.R. 1 ("*Good Samaritan*"), reconsideration dismissed July 20, 2010 at [2010] Alta. L.R.B.R. 185 ("*Good Samaritan Reconsideration*"). UNA did not seek judicial review of the reconsideration and subsequently withdrew all of its remaining determination applications except this application for the ORT/LPNs at the Royal Alexandra Hospital.

[7] In *Good Samaritan*, the Board notes the similarity of the five determination applications before it:

[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] This application filed May 5, 2009 follows a similar format as those described above. The application was supplemented with further particulars on November 19, 2010 and April 7, 2011. At the hearing of the summary dismissal applications, the Board accepted as exhibits two letters from physicians "in support" of UNA's application. After the conclusion of the hearing, UNA filed a certificate for Age Care Investments (Beverly) Ltd. in support of its position it holds a certificate that includes LPNs in its Direct Nursing Care Bargaining Unit. All parties responded to this submission. The factual allegations contained in these particulars and documents filed by UNA represent all of the facts considered by the Board for the purposes of the summary dismissal application.

[9] In the application, UNA pleads the following facts:

- Approximately 32 ORT/LPNs work in WCOR, ATCOR and DTCOR, compared to approximately 115 RNs;
- in WCOR, surgical procedures are typically performed using two circulating nurses and one scrub nurse. Usually two RNs and one ORT/LPN fill these positions on a rotating basis, with each nurse taking turns in the three positions;

- in ATCOR, surgical procedures are performed using one scrub nurse and one to two circulating nurses. These positions are filled by one ORT/LPN and one RN and an "RN float." The positions filled by these nurses generally rotate every third or fourth procedure;
- in DTCOR, surgical procedures are performed using two RNs and one ORT/LPN. These nurses rotate between first and second circulating nurses, and scrub nurse;
- the nursing duties associated with circulating nurses and scrub nurses are not assigned to RNs and ORT/LPNs on the basis of their professional designation or the difficulty of the procedure. Rather, nursing duties are assigned on a rotating basis, and on the basis of experience or familiarity with the surgical procedure being performed; and
- the duties completed by ORT/LPNs and RNs as scrub nurses and circulating nurses are essentially the same.

[10] In addition to the similarities in nursing duties in WCOR, ATCOR and DTCOR, UNA notes the ORT/LPNs and RNs are also similar in the following ways:

- both are governed by professional regulatory bodies in accordance with the *Health Professions Act*, R.S.A. 2000, c. H-7 (the "HPA"), the *Registered Nurses Profession Regulation*, Alta Reg 232/2005, and the *Licensed Practical Nurses Profession Regulation*, Alta Reg 81/2003 ; and
- both apply nursing knowledge, skill, and judgment.

[11] However, UNA also note the roles of ORT/LPNs and RNs are not completely identical, as an RN must be present when an ORT/LPN checks a patient's medication or does a final count following a surgical procedure.

[12] Overall, UNA concludes that RNs and the ORT/LPNs in these operating theatres perform essentially the same duties, and the prime function of ORT/LPNs is to work collaboratively and interchangeably with RNs during surgical procedures. On this basis, UNA submits the ORT/LPNs provide direct nursing care and should be included in the Direct Nursing Care Bargaining Unit.

[13] Via letter dated November 19, 2010, UNA provided further particulars regarding the ORT/LPN determination application. UNA confirms the duties of RNs and the ORT/LPNs are essentially the same with three exceptions - only RNs can be assigned the team leader position, at least one RN must be involved when counting medications and instruments following a surgical procedure, and the ORT/LPNs cannot hang blood, whereas RNs can hang blood.

[14] Via letter dated April 7, 2011, UNA provided further particulars. UNA confirms that scrub and circulating nurse positions are assigned on the basis of experience in relation to the particular surgical procedure being performed. UNA notes further similarities between the ORT/LPNs and RNs including:

- the same Basic Practice Guideline Manuals describing the roles of scrub and circulating nurses apply to them;
- they receive the same orientation for working in WCOR, ATCOR and

DTCOR, with the exception of separate instructions that are given in regard to professional standards;

- both use a senior ORT/LPN who works in DTCOR as a resource person ;
- both have the same manager; and
- both attend the same orientation.

[15] Via a letter filed after the conclusion of the hearing dated June 10, 2011, UNA provided the Board with a certificate covering a unit of employees of Age Care Investments (Beverly) Ltd. described as “all employees when employed in direct nursing care or nursing instruction at Beverly Centre Lake Midnapore”. It notes this bargaining unit includes LPNs as noted in the Board’s decision rendered for that matter (*Age Care Investments (Beverly) Ltd.* [2005] Alta. L.R.B.R. LD-072).

[16] UNA submits there is a strong community of interest between the ORT/LPNs and RNs - they work side by side, interchangeably; they attend the same orientation; they report to the same managers; they share the same locker room and lounge; and they socialize together in the work environment.

Legal Framework

[17] Paragraph Section 16(4)(e) of the *Labour Relations Code* provides:

16(4) When a complaint is made under subsection (1), a reference is made under subsection (3) or any other application to the Board is made under this Act, the Board may do one or more of the following:

...

(e) where the Board is of the opinion that the matter is without merit, or is frivolous, trivial or vexatious, reject the matter summarily.

[18] In deciding whether to summarily dismiss a matter pursuant to Section 16(4)(e), the Board asks: “Is there a reasonable prospect of success?” For the purposes of a summary dismissal application, the Board assumes the applicant’s allegations of fact are true. (*United Brotherhood of Carpenters and Joiners of America, Local Union No. 2103 v. Garry Halicki* [2007] Alta. L.R.B.R. LD-062 at paragraph 5). In *Good Samaritan*, at paragraph 51, the Board distinguished between assertions of fact and assertions of law:

Although the Board, in deciding whether to summarily dismiss an application, assumes the applicant’s facts to be true, it should be made clear that what is being assumed is true are the factual assertions contained in the application. This does not extend to accepting as true those assertions made at a hearing by the applicant or its counsel which purport to represent what is contained in the application or, of course, assertions of factual matters not contained in the application. Nor does the assumption of truth extend to those matters, even

though contained in the application, that amount to nothing more than the applicant's interpretation of legislation, Board documents or decisions, or court decisions.

[19] The Board has authority to dismiss applications in cases where the Board finds the applicant is abusing the process (*United Steelworkers of America, Local Union 7226 v. Handleman Company of Canada and Certain Employees of Handleman Company of Canada Ltd.* [1988] Alta. L.R.B.R. 431). In *Teamsters Local No. 987 and Brandt Tractor Ltd. and Pardee Equipment Employees Association* [2010] Alta. L.R.B.R. 56 the Board said at paragraph 21:

[21] The Board always maintains the authority to protect its process from abuse. If the circumstances surrounding the filing of a duplicitous application reveal an abuse of the Board's process, the Board may refuse the application as an exercise of that authority.

The Good Samaritan Decisions

[20] In *Good Samaritan Reconsideration*, the reconsideration panel summarized the conclusions reached by the original panel as follows:

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.

[21] Given the importance of *Good Samaritan* to our conclusions, we repeat here the final 3 paragraphs of that decision:

[68] Of course it is true the Board heavily relies upon the job function an employee performs in making a determination as to which unit the employee is placed, and tends not to rely upon job titles or the qualifications the employee may possess. However, other considerations do play a role in deciding on the bargaining unit into which an employee is included. As mentioned in a number of the other decisions of the Board, community of interest considerations can come into play and, relevant to this case, these can include matters such as qualifications required by statute, governance by a statutorily mandated College, a history of successful collective bargaining, an ability or lack thereof for promotion to higher classifications within the unit, and statutory or constitutional impediments to being included in a particular bargaining unit.

[69] What all of this means is the determination applications submitted by UNA raise significant matters of concern to others than just AUPE and the five respondent employers. Since these applications, as presently framed, have a potential impact upon the auxiliary nursing care and direct nursing care units, in light of the applicable statutes and regulations, they ought not to be decided in the context of the present proceedings. Also, UNA's suggestion that the scope of practice of the LPNs outlined in Schedule 10 of the HPA is tantamount to "direct nursing care" is merely a suggestion but, in asserting that to be the case, UNA is effectively stating that all LPNs, not just those possessed of specialized practice education or training, are engaging in "direct nursing care". If UNA's suggestion had merit it would describe a situation that has prevailed long before 2003, when Schedule 10 was proclaimed, but presumably without giving rise to any concern on the part of UNA until 2008. Nothing is alleged to have occurred in 2008 that would serve to justify a change being made by the Board at this time to its long established practice of normally including the LPNs in the auxiliary nursing care unit. In the result, these applications are, in the opinion of the Board, without merit. Accordingly, the request for summary dismissal of the applications is allowed and those determination applications are dismissed.

[70] When 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 employees or groups of employees is not the route to follow. Instead, the reference of a difference would appear to be a

preferable method of seeking to have the Board embark upon such an inquiry, leaving the Board free to determine if submissions should be invited from all affected health care stakeholders who may appear to have an interest in the proper bargaining unit placement of the affected employee or groups of employees. The potential movement of some or all of the LPNs from the auxiliary nursing care unit into the direct nursing care unit is an example of the sort of issue that affects a long standing Board practice with a potential impact upon numerous other parties that is simply not capable of resolution through UNA's dismissed determination applications.

Decision

[22] The thrust of the Respondents' submissions in support of their summary dismissal applications is that the issues raised by UNA in this application are the same issues it raised in the five determination applications in *Good Samaritan*. In *Good Samaritan* the Board summarily dismissed the applications and directed UNA, if it wanted to raise these issues in the future, it should do so by way of a reference of a difference. Yet, UNA persists in bringing this determination application. The Respondents argue UNA's insistence on bringing another determination application, identical for all intents and purposes as the five applications in *Good Samaritan* is an abuse of process and warrants the application being summarily dismissed with costs.

[23] In reply to the submissions of the Respondents, UNA submits this determination application is distinguishable from the determination applications dismissed in *Good Samaritan* on the following basis:

- a) The ORT/LPN determination application will apply to different LPNs than the applications in *Good Samaritan*;
- b) The ORT/LPN determination application is limited to one specialty of LPNs being those who work as ORTs in WCOR, ATCOR and DTCOR at the Royal Alexandra Hospital, and would not affect the entire LPN classification;
- c) The overall functions performed by ORT LPN's as compared to their RN co-workers are more similar than the functions performed by the LPN's affected by *Good Samaritan*;
- d) The community of interest of ORT/LPNs is distinct from the community of interest for LPNs generally that the Board considered in the *Good Samaritan* decision.

[24] The Board rejects UNA's submissions in this regard and finds there are no material or relevant distinctions between this application and the determination applications before the Board in the *Good Samaritan*. The Board is confident that if this ORT/LPN determination application had been one of the five applications before the Board in *Good Samaritan*, the Board would have come to the same conclusion. Of course, this application affects different LPNs than those affected by the five applications in *Good Samaritan*. Similarly, each of the five applications before the Board in *Good Samaritan* affected different LPNs. Nonetheless, the Board was able to deal with all five together and made no distinction in its decision among them. The concerns raised and principles articulated by the Board in *Good Samaritan* applied generally to each of the five applications and we conclude apply equally to this application.

[25] We specifically reject UNA's submission that this application is distinguishable because the overall functions performed by ORT/LPN's as compared to their RN co-workers are "more similar than the functions performed by the LPN's affected by *Good Samaritan*." In each of the

five applications before the Board in *Good Samaritan*, UNA plead that the LPNs and RNs were performing “essentially the same functions.” In each application, UNA plead that “their assignments can be interchangeable.” By way of illustration, in Board file GE-05471, UNA’s application read in part:

7. On any particular assignment the LPNs and the RNs perform essentially the same functions on the patient assignments. That is they each:

- Are responsible for providing all nursing care to their patients;
- Administer medication, including RPN medications, medications prescribed on an “as needed” basis. LPNs exercise their own nursing judgment in deciding whether to give such medication;
- Take vital signs;
- Provide wound care;
- Conduct assessments;
- Complete charting;
- Implement care plans;
- Deal with families;
- Take Doctor’s orders;
- Make Doctor rounds.

8. As well one LPN, Becky Gutch, works Home Care out of the Mannville Health Centre. Ms. Gutch’s position is operated as a satellite position with the home office being located in Vermilion. Ms. Gutch works a fulltime position and one other LPN, Patricia Smart, works casual shifts for home care out of the Mannville Health Care Centre. UNA takes the position that the LPNs in home care are conducting direct care nursing. In home care the LPNs see the same clients that the RNs see and perform the same direct nursing care including:

- Wound care;
- foot care;
- injections;
- wellness checks;
- palliative care;
- Hypodermacylis;
- case coordination;
- charting
- trachea care;
- completion of admissions and application for placement;
- central venous catheters.

[26] For the purposes of the summary dismissal application before it, the Board in *Good Samaritan* assumed that the LPNs and RNs were performing essentially the same functions. Similarly, in this application, UNA plead:

The role of scrub nurse and circulating nurse are essentially the same regardless of who is assigned during the procedure. That is ORT/LPN and RNs will perform essentially the same duties as their counterpart would be working in the same role during another procedure.

[27] Later, in its further particulars of November 19, 2010, UNA plead:

The duties are essentially the same for RNs and LPNs as set out in paragraph 9 of the UNA application with the following 3 exceptions:

- An RN would be a team leader (in charge) for a particular theatre; an LPN would not.
- The counting of medications and instruments are done by both an RN and an LPN, however there is a requirement that there be at least one RN involved in the count (i.e. 2 LPNs could not do the count).
- An LPN cannot hang blood (he or she can check it, but not hang it).

[28] Similarly, in each of the five applications before the Board in *Good Samaritan* UNA argued that community of interest of the LPNs was with others in the Direct Nursing Care Bargaining Unit because the “LPNs work side by side as professional colleagues with the RNs in providing direct nursing care for patients and families. Their assignments can be interchangeable. Their Employer addresses their professional roles under one policy.” (GE-05468). While more details to support these factual assertions have been provided in this application, the Board in *Good Samaritan* accepted these general factual assertions for the purpose of the summary dismissal applications before it.

[29] We agree with the Respondents that the issues and arguments raised in this application are not materially different than those addressed in *Good Samaritan*. The Board is aware from the determination applications filed by UNA and other applications that have been filed with it from others involved in the health care sector that there are many circumstances across the province in which RNs and LPNs work together on integrated teams providing nursing duties that often overlap, all within the scope of their professional practices. Given the overlap in the scope of their practices defined under the *Health Professions Act*, considerable overlap in their duties is inevitable. With the exception of *Age Care*, the Board has consistently ruled that in those circumstances, LPNs will be placed in the auxiliary nursing care bargaining unit and RNs in the direct nursing care bargaining unit. The only exception to this general rule involved a scenario where the only objection dealt with by the Board was whether the unit managers should be excluded from the bargaining unit. There was no objection to the inclusion of LPNs in the Direct Nursing Care Bargaining Unit; no involvement of other interested parties such as AUPE; it was a certification application as opposed to a reconsideration application, and; there was no analysis of whether the LPNs should be included in the Direct Nursing Care Bargaining Unit. We also note the employer was not subject to Bill 27 as a Regional Health Authority. Thus, the case carries no weight as a precedent for the Board. The preferred view and the perspective consistently applied after analysis by the Board is that enunciated in *Shepherd's Care Foundation (Re)* [2008] Alta L.B.R. LD-042 at paragraph 10, where the Board commented on the value to the health care sector of the stability and predictability of the standard bargaining units. For those reasons and others, the Board indicated in *Good Samaritan* that this long-standing practice will not be altered in the absence of proceedings that seek and permit input from all affected stakeholders. This continues to be the Board's view.

[30] Accordingly, for the reasons outlined in *Good Samaritan* and confirmed in *Good Samaritan Reconsideration*, this application has no prospect of success. The application is summarily dismissed pursuant to section 16(4) of the *Code*.

[31] We understand the frustration expressed by the Respondents with being faced with another determination application similar to those summarily dismissed in *Good Samaritan*. Following the issuance of the *Good Samaritan Reconsideration* decision, UNA withdrew five other similar determination applications and chose to proceed only with this ORT/LPN application. UNA has argued that this application was different and hence it chose to proceed with it. Although we have rejected that argument, we are satisfied it was made in good faith and accordingly we are not prepared to grant the request made by the Respondents that costs be awarded against UNA.

Mark L. Asbell, Q.C., Chair