

INVESTIGATION COMMITTEE
of the
SASKATCHEWAN REGISTERED NURSES' ASSOCIATION

- and -

Carolyn M. Strom
Saskatchewan R.N.# 0037024

PENALTY DECISION
of the
DISCIPLINE COMMITTEE
of the
SASKATCHEWAN REGISTERED NURSES' ASSOCIATION

Legal Counsel for the Investigation Committee:	Roger Lepage
Legal Counsel for Carolyn M. Strom:	Marcus Davies
Legal Counsel for the Discipline Committee:	Darcia Schirr, Q.C.
Chairperson for the Discipline Committee:	Christopher Etcheverry, R.N.
Date of Penalty Hearing:	February 18, 2017 Executive Royal Hotel 4025 Albert Street Regina, Saskatchewan
Date of Penalty Decision:	April 4, 2017

PHASE ONE HEARING

1. By a decision dated October 18 2016, the Discipline Committee of the Saskatchewan Registered Nurses' Association ("SRNA") found Carolyn M. Strom guilty of professional misconduct contrary to section 26(1) of *The Registered Nurses Act, 1988* (the "Act") and guilty of breaching various provisions of the *Code of Ethics and Standards & Foundation Competencies for the Practice of Registered Nurses, (2013)*. Those provisions are set out in the October 2016 decision.

PHASE TWO HEARING

2. The Discipline Committee reconvened on February 18, 2017 to hear submissions regarding penalty and disposition. The options are set out in section 31:

31(1) Where the discipline committee finds a nurse guilty of professional incompetence or professional misconduct it may:

- (a) order that the nurse be expelled from the association and that the nurse's name be struck from the register;
- (b) order that the nurse be suspended from the association for a specified period;
- (c) order that the nurse may continue to practise only under conditions specified in the order which may include, but are not restricted to, an order that the nurse;
 - (i) not do specified types of work;
 - (ii) successfully complete specified classes or courses of instruction;
 - (iii) obtain treatment, counselling or both;
- (d) reprimand the nurse; or
- (e) make any other order that to it seems just.

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

- (a) that the nurse pays to the association within a fixed period:
 - (i) a fine in a specified amount;

(ii) the costs of the inquiry and hearing into the nurse's conduct and related costs, including the expenses of the investigation committee and the discipline committee; or

(iii) both of the things mentioned in subclauses (i) and (ii); and

(b) where a nurse fails to make payment in accordance with an order pursuant to clause (a), that the nurse be suspended from the association.

3. Counsel for the Investigation Committee and Ms. Strom filed written submissions and supplemented their written material with oral argument. In addition and with the consent of the Investigation Committee, Ms. Strom filed and entered into evidence a series of emails between the SRNA and Ms. Strom's legal counsel illustrating the efforts of Ms. Strom and the Investigation Committee to enter into a Consensual Resolution Agreement ("CRA") which efforts were ultimately unsuccessful. A draft CRA was entered as D-9 and the emails as D-5 through D-8 inclusive and D-10 through D-12 inclusive.

Submissions on Behalf of the Investigation Committee

4. Counsel for the Investigation Committee submitted a written Brief and made oral submissions broadly proposing the following:
 - (a) Ms. Strom shall receive a reprimand pursuant to section 31(1)(d) of the Act.
 - (b) Ms. Strom will review the *Standards and Foundation Competencies*, the *Code of Ethics* and a Registered Nurses Association of Ontario document called "Professionalism in Nursing". Within two months of the date of the Discipline Committee decision, Ms. Strom will submit a self-reflective essay referencing each of these publications.
 - (c) Ms. Strom shall complete the Canadian Nurses Association *Code of Ethics* online learning module and do so within two months of the date of the Discipline Committee decision.

- (d) Pursuant to section 31(2)(a)(i), Ms. Strom shall pay a fine in the amount of \$5,000.00.
- (e) Pursuant to section 31(2)(a)(ii), Ms. Strom shall pay costs to a maximum of \$25,000.00.

Submissions on Behalf of Ms. Strom

- 5. Counsel for Ms. Strom argued that if a fine was imposed, it should be nominal and no more than \$1,000.00. As to costs, counsel argued that no costs should be ordered against Ms. Strom. The primary argument in support of that was the suggestion that the discipline hearing and costs could have been avoided if the SRNA had negotiated in good faith in order to conclude a CRA.
- 6. There was no opposition to the educational components proposed by the Investigation Committee.

ISSUES AND ANALYSIS

- 7. Many decisions of discipline committees and the courts have set out two primary purposes of discipline proceedings – the protection of the public and protecting the standing of the profession. On the latter purpose, the Discipline Committee endorses these passages from the Brief filed on behalf of the Investigation Committee:

[20] Although both criminal courts and professional regulatory bodies aim to protect the public, Canadian courts and disciplinary bodies have emphasized that there is an important distinction between the principles that apply to criminal sentencing and those that apply when imposing a penalty for professional misconduct. In *Merchant v Law Society of Saskatchewan*, the Saskatchewan Court of Appeal explained this distinction, which was originally established in *Law Society of Upper Canada v. Kazman*:

[74] A criminal court judge . . . is rarely concerned with the collective reputation of an accused's peer group but is free to focus instead on the individual accused to the exclusion of most other considerations. On the other hand, law society discipline panelists must always take into

**account the collective reputation of the accused
licensee's peer group – the legal profession.**

[21] Thus, where criminal sentencing is generally exclusively focused on the accused, one of the most important considerations in sentencing a member for professional misconduct is always the collective reputation of the member's peer group. For this reason, professional regulatory bodies must always consider the impact of the particular misconduct on the public's perception of the profession and what penalty may be required to maintain the public's confidence in the profession.

8. In many past decisions rendered by the Discipline Committee of the SRNA, the case of *Jaswal v Medical Board (Newfoundland)* is often cited as it sets out a list of factors discipline committees should consider in fashioning a disciplinary sanction. Those factors are as follows:
- (a) The nature and gravity of the proven allegations;
 - (b) The age and experience of the offending professional;
 - (c) The previous character of the professional and in particular the presence or absence of any prior complaints or convictions;
 - (d) The number of times the offence was proven to have occurred;
 - (e) The role of the professional in acknowledging what had occurred;
 - (f) Whether the offending professional had already suffered other serious financial or other penalties as a result of the allegations having been made;
 - (g) The presence or absence of any mitigating circumstances.
 - (h) The presence or absence of any aggravating circumstances;
 - (i) The need to promote specific and general deterrence and, thereby, to protect the public and ensure the safe and proper practice of a professional;
 - (j) The need to maintain the public's confidence in the integrity of the profession;

- (k) The range of sentence in other similar cases.
9. Before addressing the most relevant *Jaswal* factors, the Discipline Committee wishes to comment on one particular aspect of the argument made by the Investigation Committee. Both in the written material and in oral submissions, the Investigation Committee suggested that Ms. Strom showed a lack of remorse, which should be seen as an aggravating circumstance.
 10. Regulated professionals are entitled to contest discipline charges and the investigatory committee is obligated to prove those charges. If Ms. Strom genuinely believed that her conduct was not contrary to the Act, *Code of Ethics* or *Standards*, she, like any member of the SRNA, is entitled to a hearing. The fact a disciplinary hearing occurred with an adverse finding does not demonstrate a failure to acknowledge what had occurred or show a lack of remorse.
 11. At page 234 of *The Law of Professional Regulation* by Bryan Salte:
4. Lack of remorse or a denial of the conduct cannot be an aggravating factor, but admission of responsibility and remorse can be a mitigating factor (Porter).
 12. Further and at the conclusion of the submissions made by legal counsel, the Discipline Committee invited Ms. Strom to make comments if she wished. Ms. Strom took that opportunity. Ms. Strom spoke honestly and displayed an acceptance of responsibility.
 13. Carolyn Strom has been a practising nurse and a member of the SRNA for 13 years. She has never been the subject of investigation or discipline proceedings by the SRNA. There is no suggestion Ms. Strom obstructed the investigative process or unduly delayed the investigation and subsequent discipline hearing.
 14. The Investigation Committee provided the Discipline Committee with a number of cases in which social media commentary was an aspect of the misconduct being considered by either a discipline committee or an arbitrator in a grievance proceeding. In most of the discipline committee cases submitted, the conduct of the individual was more egregious than the facts here.

15. In *College of Nurses of Ontario v Margaret Kaufman*, 2012 CanLII 99767, nurse Kaufman, among other things, allowed her husband to have access to personal health information about clients. She also sought payment for a visit to a patient that she did not make. Further, she posted personal health information and negative personal opinions about a client to a publically accessible internet site. The discipline committee ordered that nurse Kaufman be reprimanded, her license be suspended for four months and that her continued practice be subject to conditions primarily focused on education.
16. In *Ontario College of Teachers v Halliday*, 2014 ONOCT 47(CanLII), the teacher held a party attended by adults and one student. The student drank alcohol at the party and stayed overnight. Further, the teacher during the course of the party posted a picture of herself on Facebook dressed in “immodest attire as Minnie Mouse, with a cigarette in her mouth and a wine glass in her hand”. In the Facebook posting, the teacher identified herself as a teacher with the particular school board. During the course of the investigation by the school board, the teacher provided incomplete and less than forthright information. A joint submission was presented which the discipline committee endorsed, ordering that the teacher should be reprimanded and that she complete an ethics course addressing boundaries and the use of social media.
17. The Investigation Committee also provided a publication from the British Columbia Commissioner for Teacher Regulation involving a teacher named Toby Crawford. The document is a “Consent Resolution Agreement”. The Agreement sets out with some detail the nature of the misconduct. In that case, the teacher made “disrespectful comments” on her Facebook page about students that had attended a trip to Ireland with her. She was suspended with pay while her employer investigated and she was specifically instructed not to communicate with students. Despite that direct instruction, she posted another message on the school’s Facebook page encouraging students and their parents to complain about the treatment she had received from the school board. As this appeared to be some form of mediation, the Commissioner (who is presumably the regulator) and the teacher agreed that her conduct amounted to professional misconduct and the parties agreed to the disposition. The teacher agreed

to a reprimand and a requirement that she take a course relevant to professional boundaries.

18. Factually, the most similar case presented to the Discipline Committee was an arbitration decision called *Ontario Secondary School Teachers' Federation and Simcoe County District School Board*, 2013 CanLII 62014. In that case, the individual was a gay teacher employed by the school board in a small community. His perception was that he was being discriminated against by his principal. It appears his concerns were investigated and his complaints were determined to be unfounded. This led the teacher to make comments on Facebook which generated an online discussion critical of the principal.

19. The teacher's Facebook posting that began the online discussion read as follows:

We've failed yet again. I'm ashamed that this happens in Ontario schools. It's difficult enough being an openly gay high school teacher in a small community. I can't imagine being an LBGQT student. I strive every day not be (sic) part of the problem. From this day forward I will be part of the solution. *To the homophobic Principal who told me that she didn't think a gay teacher should be part of the GSA [gay straight alliance] – we need real leaders, not sheep. (italics added)*

20. The school board suspended the teacher and the teacher grieved the suspension.
21. The arbitrator set aside the disciplinary suspension imposed by the employer school board and replaced it with a three-day suspension if the teacher provided a letter of apology to the principal. The arbitrator found that the school board's concern about "reputational damage" was an appropriate concern and one that was not misplaced or exaggerated.
22. At paragraph 15 of the arbitrator's decision:

AB's action was not only 'intemperate' but wrong and, if he thought he was acting in private, he was not. If AB had concerns about what he believed to be discriminatory treatment, there were appropriate avenues open to him and a Federation to advise him properly. What he did was definitely reckless and far out of line.

23. Those comments equally apply to Ms. Strom's conduct.
24. The Discipline Committee has to determine the following:
 - (a) Whether a fine is appropriate and if so, what the amount of that fine should be;
 - (b) Whether costs should be imposed against Ms. Strom and if so, in what amount.
25. The Investigation Committee submits that a fine in the amount of \$5,000.00 should be imposed, arguing that a fine is necessary to serve the principles of specific and general deterrence. In response, Ms. Strom argues that if any fine is imposed, it should only be symbolic and no more than \$1,000.00.
26. Counsel for the Investigation Committee submitted that a fine was an alternative to a suspension. Based on all of the facts and the cases presented, Ms. Strom's conduct would not attract a suspension. If the argument is a choice between two viable alternatives (suspension v. fine), that is not an appropriate comparison.
27. This said, however, the Discipline Committee agrees that a fine is appropriate. General deterrence is an important consideration in any disciplinary sanction and it is particularly so in this case. As indicated in the decision of October 2016, the Discipline Committee does not seek to "muzzle" registered nurses from using social media or for that matter, any form of public comment. However, registered nurses making public comments and criticisms (in whatever forum) must do so in accordance with the *Code of Ethics and Standards*.
28. In all of the circumstances, the Discipline Committee concludes that a fine in the amount of \$1,000.00 is reasonable, appropriate and proportionate.
29. The rationale for a costs order in discipline proceedings is succinctly set out in a case from the Alberta Court of Queen's Bench called *Hoff v Pharmaceutical Assn.* (Alberta): *Hoff v. Pharmaceutical Assn. (Alberta)*, 1994 CanLII 8950 (ABQB)

As a member of the pharmacy profession the appellant enjoys many privileges. One of them is being part of a self-governing profession. Proceedings like this must be conducted by the respondent association as part of its public mandate to assure to

the public competent and ethical pharmacists. Its costs in so doing may properly be borne by the member whose conduct is at issue and has been found wanting.

30. The Discipline Committee accepts that statement. The legislature has entrusted the SRNA to regulate the profession of registered nursing in Saskatchewan and discipline proceedings are an essential function of the SRNA. The fees paid by the membership allow the SRNA to fulfill its statutory mandate. The membership as a whole should not bear all of the costs when a registered nurse is found to have engaged in professional incompetence and/or professional misconduct.
31. The Investigation Committee proposes that Ms. Strom pay fees in the amount of \$25,000.00. The Discipline Committee was provided with a breakdown of the actual costs and the actual costs exceed almost six times the amount proposed to be paid by Ms. Strom.
32. A costs order should not be so large that it is punitive nor should the spectre of costs deter a member from raising legitimate defences in a hearing. It is also appropriate for discipline committees to consider a professional's financial circumstances if evidence is presented on those circumstances.
33. In this case, Ms. Strom has not referred to her financial circumstances as a basis for the Discipline Committee to decline to make any order as to costs. Instead, Ms. Strom in effect suggests that the costs incurred by both the SRNA and Ms. Strom could have been avoided completely with a CRA.
34. However, the simple fact is that the matter was not resolved with a CRA. The Discipline Committee will not adjudicate whether Ms. Strom's approach with the proposed wording of a CRA was the correct one or whether the approach taken by the Investigation Committee was the correct one or whether either party was negotiating in good faith. It appears the parties attempted to resolve matters but as counsel for Ms. Strom admitted in one of his emails to the SRNA (Exhibit D-7) when discussing the specific wording of the CRA "that said, I am not certain these issues could be fixed by redrafting". As it turned out, that was the case and a discipline hearing was necessary.

35. At the conclusion of the evidence and upon hearing all of the legal submissions, the Discipline Committee found that the complaint of professional misconduct was sustained. As such, Ms. Strom must bear a portion of the costs of those proceedings. The portion that the SRNA will bear far exceeds that which is sought from Ms. Strom.
36. It is appreciated that the amount proposed by the Investigation Committee is significant. However, the Discipline Committee concludes a costs order against Ms. Strom in the amount of \$25,000.00 is appropriate. The Discipline Committee further orders that the costs shall be paid on or before April 1, 2020.

PENALTY ORDER

37. The Discipline Committee therefore makes the following Order under section 31 of the Act:
 - (a) Pursuant to section 31(1)(d), Ms. Strom shall receive a reprimand.
 - (b) Pursuant to section 31(1)(c)(ii), Ms. Strom may continue to practice under the following conditions:
 - (i) Carolyn M. Strom shall review the *Standards and Competencies for the Practice of Registered Nurses* and upon completion, provide a written self-reflective essay to the Registrar referencing the relevant competencies related to the conduct identified in this case and how the *Standards* will guide her future practice. The essay will be submitted within two months of the date of this decision.
 - (ii) Carolyn M. Strom shall review the Canadian Nurses Association *Code of Ethics for Registered Nurses* and provide a written self-reflective essay to the Registrar referencing the relevant provisions related to the conduct identified in this case and how the *Code* will guide her future practice. The essay will be submitted within two months of the date of this decision.

- (iii) Within two months from the date of this decision, Carolyn M. Strom shall complete the Canadian Nurses Association *Code of Ethics* on-line learning modules and provide proof of completion to the Registrar.
- (c) Pursuant to section 31(2)(a)(i), Carolyn M. Strom shall pay a fine in the amount of \$1,000.00 to be paid on or before July 1, 2017. Failing payment, Ms. Strom's license shall be suspended until payment is made pursuant to section 31(2)(b) of the Act.
- (d) Pursuant to section 32(2)(a)(ii), Carolyn M. Strom shall pay the costs of the investigation and hearing which shall be fixed in the amount of \$25,000.00 to be paid on or before April 1, 2020. Failing payment, Ms. Strom's license shall be suspended until payment is made pursuant to section 31(2)(b) of the Act.
- (e) Pursuant to section 31(3) of the Act, a copy of this decision and the decision of the Discipline Committee dated October 18, 2016 shall be forwarded to the complainant [REDACTED]
- (f) A copy of this decision and the decision of the Discipline Committee dated October 18, 2016 shall be provided to:
 - (i) All Canadian Registrars of registered nurses;
 - (ii) Any other jurisdiction or other stakeholder as may be seen as appropriate by the Registrar.

April 4, 2017



Christopher Etcheverry, R.N., Chairperson
*On behalf of Members of the
Discipline Committee*
Michell Jesse, R.N.
Janna (Willis) Balkwill, R.N.
Patricia LeBlanc, R.N.
Daniel Kishchuk, Public Representative

NOTICE

Pursuant to section 34(1) of *The Registered Nurses Act, 1988*, a nurse who has been found guilty by the discipline committee or who has been expelled pursuant to section 33 may appeal the decision or any order of the discipline committee within 30 days of the decision or order to:

- (a) the council by serving the executive director with a copy of the notice of appeal;
or
- (b) a judge of the court by serving the executive director with a copy of the notice of appeal and filing it with a local registrar of the court.