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RE: An application for determination under Section 12(3) of the *Labour Relations Code* brought by the United Nurses of Alberta affecting East Central Health and Health Sciences Association of Alberta – Board File No. GE-04403

RE: An application under Section 12(3) of the Labour Relations Code brought by Health Sciences Association of Alberta affecting East Central Health and United Nurses of Alberta, Locals 35, 38,42, 45, 55, 69, 78, 151, 190, 192, 195, 216, 217 and 218 - Board File GE-04545

Applications

[1] The United Nurses of Alberta, Locals 29, 35, 38, 42, 45, 55, 69, 78, 151, 190, 192, 195, 216, 217, 218, 225 ("UNA") seek a finding from this Board that Michelle Duncan and Kevyn Noble, two registered nurses working as Clinical Supervisors out of the Mental Health Clinic in Camrose, should be placed in UNA's direct nursing care bargaining unit in East Central Health Authority (the "Employer"). The Employer had previously placed these two individuals in the Health Sciences Association of Alberta ("HSAA") paramedical professional or technical services bargaining unit as part of the restructuring brought about by the *Labour Relations (Regional Health Authorities Restructuring) Amendment Act, 2003* and its related regulations (collectively "Bill 27"). Both the HSAA and the Employer oppose this application.

[2] During the processing of UNA's application, HSAA filed its own application seeking a determination that 16 mental health therapists ("MHT") with professional designations as either registered nurses or registered psychiatric nurses, and who had been placed by the Employer in UNA's direct nursing care bargaining unit as a result of Bill 27 restructuring, should properly be placed in HSAA's paramedical professional or technical services bargaining unit. The Employer supports HSAA's application. UNA opposes the application.

[3] Prior to the Bill 27 restructuring, all of the individuals who are the subject of these applications were employed by the Alberta Mental Health Board and were represented by the Alberta Union of Provincial Employees.

[4] The remaining MHTs who have professional designations as social workers or psychologists and the clinical supervisor who is a professional social worker are in HSAA's bargaining unit. These applications do not affect the positions held by these individuals.

[5] The parties have agreed the two applications should be joined and heard together.

Hearings

[6] A panel of the Board (Lucas, Basken, Flannery) conducted five days of hearings extending over several months. Prior to the Board releasing a decision with respect to these two applications, the Board issued its decision in *UNA v. Chinook Regional Health Authority and Health Sciences Association of Alberta* [2005] Alta.L.R.B.R. LD-042. In *Chinook* the Board held all MHTs employed by the Chinook Regional Health Authority, including those with professional designation as RNs or RPNs, properly belonged in HSAA's paramedical professional or technical services bargaining unit. The parties provided written submissions on the effect of that decision on the matter before this panel.

[7] During the course of our hearings we were presented with the testimony of 11 witnesses and received 40 exhibits, most of these exhibits being filed by agreement of the parties.

Facts

[8] The Employer operates outpatient community mental health clinics in east central Alberta. Clinics are located in Camrose, Hardisty, Killam, Provost, Tofield, Vegreville, Vermillion and Wainwright. In addition, the Employer operates traveling clinics for patients in various other rural communities.

[9] The clinics are staffed by approximately 30 Mental Health Therapists as well as 3 Clinical Supervisors. As a general rule, both MHTs and supervisors must hold qualifications as either registered nurses, registered psychiatric nurses, psychologists or social workers. They are required to maintain their registration with their respective professional governing bodies.

[10] The mental health services provided by the Employer are delivered through three programs: the Adult Program; the Children's Program and the Geriatric Program. The current distribution of professions within these programs is roughly as follows:

> Adult Program – 17 MHTs consisting of 10 nurses, 2 psychologists, 3 social workers and 2 psychiatric assistants.
>
> Geriatric Program – 5 MHTs all of whom are nurses.
>
> Children's Program – 7 MHTs consisting of 1 psychiatric nurse, 4 social workers, 1 psychologist and 1 psychiatric assistant.

[11] In addition to the MHTs discussed above, a Clinical Supervisor is responsible for each of the three program areas. Currently, the Clinical Supervisors for the Geriatric and Children's Programs are a registered psychiatric nurse and registered nurse respectively. The Adult Program is supervised by a social worker.

[12] The Employer maintains a uniform job title of Mental Health Therapist for all MHTs irrespective of the incumbent's professional background. While the Position Descriptions are virtually identical for all MHTs, they do differ in several ways based on the professional

qualifications in issue. For example, the Position Description for a MHT with a nursing background is “Mental Health Therapist (Staff Nurse)”. Similarly, the Position Description for a MHT with a social work background is “Mental Health Therapist (Social Worker)”. In addition, they contain a section entitled “Discipline Specific Functions and Responsibilities” which outlines the functions that are unique to the specific discipline in question. Other than the title and this one section identifying discipline specific functions, the Position Descriptions are identical irrespective of the specific background of the MHT.

[13] The situation is identical for Clinical Supervisors. The Position Title and one section setting out discipline specific responsibilities and functions identify the specific discipline in question. Otherwise, the Position Descriptions are identical for all Clinical Supervisors.

[14] The evidence of the Employer was that hiring for MHT and supervisor positions is done without a limitation to, or preference for, any particular professional designation. While generally this may be true, evidence led by UNA surrounding the hiring of Bonny Erickson suggests that on at least one occasion, the Employer hired into the position of psychogeriatric outreach nurse based on the requirement that applicants possess professional nursing qualifications. While a professional nursing background was a requirement at the hiring stage, the evidence demonstrated that in practice this individual performs the same basic function as all MHTs employed by the Employer.

[15] UNA also challenged the Employer’s position that it hired into the MHT position without preference for any particular professional training by pointing out that at the time of the hearing all five of the MHTs in the Geriatric Program had a professional background in nursing. According to UNA, this concentration of nurses in the Geriatric Program was a result of the preference the current Clinical Supervisor has for staffing the Geriatric Program with nurses. UNA argues this preference was practically, if not formally, accepted by the Employer. According to the Employer, the reason for the concentration of nurses in this area was due to a combination of low staff turnover and the fact nurses have tended to apply for these positions when openings occur. According to the Employer, there is no preferential hiring of any specific professional background when MHT positions are posted and the mix in the Geriatric Program could well change as future positions are filled.

[16] The mental health services provided by the Employer are delivered using a multi-disciplinary approach. In Camrose, multi-disciplinary team meetings are conducted weekly while in the other clinics such meetings occur monthly. The purpose of these meetings is to allow cases being handled by individual MHTs to be reviewed by others thereby allowing different perspectives to be brought to the task of ensuring the most appropriate services and treatment are provided. This model includes allowing MHTs with different professional backgrounds to bring their own unique professional perspective to cases discussed at these multi-disciplinary conferences.

[17] The core functions of a MHT are the same irrespective of an incumbent’s individual professional training. While they may approach the job from the specific perspective of their professional training, the core responsibilities are the same. They include responsibility for the intake, assessment, diagnosis and treatment of patient mental health issues. Specific tasks include completing First Information Forms as part of the intake process; the Enrolment Form including gathering information for completing a patient assessment; the Mental Health Clinic Assessment which includes a history, risk assessment, diagnosis and treatment plan and Medication Information Sheets where applicable.

[18] Similarly, the core functions of the Clinical Supervisors are the same irrespective of their individual professional backgrounds. They spend approximately half of their time doing the same work as MHTs. The other half of their time is divided between administrative duties and advising MHTs with respect to their cases.

[19] The assignment of patient files supports the fact that MHT are not distinguished based on their professional backgrounds. Patients are not assigned based on the professional background of the MHT. Rather, they are assigned based on the Employer's intake policy. This policy states that the MHT assigned to intake duty will accept all patients accepted through the intake process so long as they are patients within the specific program in which they work. That is, a MHT assigned to intake duty who works in the Adult Program will accept all adult program patients but will assign, for example, a child to a MHT working in the Children's Program. Nor are files reassigned when the specific services of one of the MHTs is needed. For example, if a MHT with a social work background has a patient that needs medication that must be dispensed by a nurse, a MHT with a nursing background administers the medication to the patient but the file continues to be the responsibility of the original MHT. Similarly, if a MHT with a nursing background needs a psychological test administered, a MHT with psychological training administers the test but the file remains with the original therapist.

[20] A significant amount of time was spent addressing evidence explaining the role MHTs with nursing backgrounds play in the administration of medication. From UNA's perspective, this evidence was important as it established a clear area of nursing practice - one that is exclusive to nurses in the context of the mental health services provided by the Employer.

[21] At the larger clinics, a nurse is assigned on a rotating basis to administer medication. The amount of time spent on this task is relatively small when compared with the overall work load of a MHT. At most, administering medication amounts to 10% of their overall work time. This low number is because very few patients actually have medication administered by a MHT with a nursing background. For example, in the Camrose clinic only 4 patients out of approximately 250 have medication administered by a MHT. This is explained at least in part by the fact the vast majority of patients either take no medication, take it themselves, have it given to them by a caregiver, or have it administered by a doctor or some other service outside the clinic setting operated by the Employer.

[22] We note that MHTs with professional backgrounds as either psychologist or social workers also spend approximately 10% of their time on discipline specific tasks with the remaining 90% being core MHT tasks as discussed above.

Law

[23] In our view, this case is governed by the principles set out in Information Bulletin #10 – Bargaining Units for Hospitals and Nursing Homes, Information Bulletin #22 – Determinations, as well as numerous Board decisions addressing principles applicable to determination applications generally as well as in the health care industry. These cases include *UNA, Loc. 151 et al. v. Alberta Hospital Association et al.* [1986] Alta. L.R.B.R. 610 – the leading case in this area; *Braun Construction Ltd. v. Construction and General Workers', Local Union No. 92* [1992] Alta. L.R.B.R. 10; *Graphic Communications International Union, Local 33-M* v. *The Calgary Herald, A Division of the Southam Inc.*[1993] Alta. L.R.B.R. 222; *City of Edmonton Bargaining Units* [1993] Alta. L.R.B.R. 362; *Canadian Health Care Guild* v. *Canadian Union of Public Employees, Local 927* [1993] Alta. L.R.B.R. 38; *Re Calgary Regional Health Authority* [1999] Alta. L.R.B.R. 458; *Health Sciences Association of Alberta* v. *Calgary Regional Health*

Authority [1999] Alta. L.R.B.R. LD-058; *United Nurses of Alberta* v*. Calgary Regional Health Authority et al.* [2003] Alta. L.R.B.R. 238; *HSAA* v. *AMHB, AUPE, CUPE, CHA and David Thompson Health Authority* [2004] Alta. L.R.B.R. 437; and *United Nurses of Alberta, Locals 23, 66, 82, 89, 102, 120, 140, 152, 160 and 164* v. *Chinook Regional Health Authority et al.* [2005] Alta. L.R.B.R. LD-042.

[24] A review of these decisions reveals the following principles we feel are sufficient for the purposes of making the determinations before us. First, the Board does not accept the principle that the boundaries of the direct nursing care bargaining unit are determined by the professional qualifications of the incumbents of any position. (See: *UNA, Loc. 151 et al.* v. *Alberta Hospital Association et al.* [1986] Alta. L.R.B.R. 610) Simply because the person doing the job is a nurse does not mean it is nursing. Rather, the Board has consistently chosen to base its bargaining units using the prime function test as discussed in Information Bulletin #22. This test includes consideration of the unit description(s), the nature and organization of the employer's business, the prime function of each employee and job qualifications to the extent they assist the Board to decide what a person is doing. (See: *Braun Construction Ltd.* v*. Construction and General Workers', Local Union No. 92* [1992] Alta. L.R.B.R. 10 at 15) In determining the prime function, the Board focuses on the work the person routinely and primarily performs as opposed to ancillary or incidental tasks. It is the person's core function; the purpose of having them do the job. (See: *Graphic Communications International Union, Local 33-M* v*. The Calgary Herald, A Division of the Southam Inc.*[1993] Alta. L.R.B.R. 222 and *City of Edmonton Bargaining Units* [1993] Alta. L.R.B.R. 362)

[25] Second, the Board recognizes the community of interest can be a relevant factor in a determination application, in particular, where the prime function test leaves some uncertainty as to the correct result. Community of interest includes who the individual interacts with, which employees share common skills, what the working conditions are, whether the employee works with others and whether there is a close functional relationship with other employees. (See: *Canadian Health Care Guild v. Canadian Union of Public Employees, Local 927* [1993] Alta. L.R.B.R. 38 at 44) Where present, the Board recognizes the existence of professional qualifications combined with membership in professional associations as supporting a community of interest among individuals with the same professional affiliations. (See: *UNA, Loc. 151 et al. v. Alberta Hospital Association et al.* [1986] Alta. L.R.B.R. 610 at 622) Community of interest may also be relevant when addressing cases involving interdisciplinary teams. (*United Nurses of Alberta, Locals 23, 66, 82, 89, 102, 120, 140, 152, 160 and 164 v. Chinook Regional Health Authority et al.* [2005] Alta. L.R.B.R. LD-042).

[26] Third, nursing is a profession that is not static. It has evolved and will continue to evolve beyond traditional bed-side care and dispensing of medication. This reality must be accommodated within one or more of the functional bargaining units. (See: *UNA, Loc. 151 et al. v. Alberta Hospital Association et al.* [1986] Alta. L.R.B.R. 610 at 622 and *City of Edmonton Bargaining Units* [1993] Alta. L.R.B.R. 362 at 396)

[27] Fourth, a position will fall within the direct nursing care bargaining unit where it requires a nursing background and accreditation or in practice functions in a way that makes it clear a nursing background is necessary. Where the position requires a health discipline background, of which nursing is simply one of the eligible disciplines, the community of interest falls within either the paramedical unit or the general support unit. (See: *UNA, Loc. 151 et al. v. Alberta Hospital Association et al.* [1986] Alta. L.R.B.R. 610 at 623)

[28] In determining whether the position in question is one that requires a nursing background and accreditation or functions in such a way that makes it clear such a background is necessary, the Board will consider factors such as whether the posting for the position requires a nursing background; whether the position description supports the conclusion a nursing background is required; whether other disciplines are recruited for the job and in fact do the job; the specific tasks of the job including the prime function as well as other ancillary tasks; and whether the individual works as part of a multi-disciplinary team or is a unique position. (See: *Re Calgary Regional Health Authority* [1999] Alta. L.R.B.R. 458 and *Health Sciences Association of Alberta v. Calgary Regional Health Authority* [1999] Alta. L.R.B.R. LD-058)

Decision

[29] We note the facts of this case are similar to those found in *UNA v. Chinook Regional Health Authority and Health Sciences Association of Alberta* [2005] Alta.L.R.B.R. LD-042. We endorse the approach used in that case. Applying the principles from this case and others set out above, we conclude both the MHT and Clinical Supervisor positions in questions fall within HSAA's paramedical professional or technical bargaining unit. The following are our reasons for coming to this conclusion.

[30] We first address the 16 MHT positions that are the subject of HSAA's determination application. Applying the prime function test set out in Information Bulletin #22 and discussed in the cases presented to us, we conclude the prime function of a MHT is the assessment, diagnosis and treatment of mental health conditions in their patients. With the exceptions of approximately 10% of an individual therapist's time spent on discipline specific functions, there is no discipline specific specialization within the work of MHTs. Rather, the core functions of assessment, diagnosis and treatment are the same among all MHTs irrespective of their individual professional backgrounds. We view the discipline specific functions as ancillary to these core or primary functions such that they are not part of the primary functions which are common to all MHTs.

[31] Having identified the prime function of a MHT, the question that must be answered is whether the assessment, diagnosis and treatment of mental health patients is direct nursing or paramedical professional work? In our opinion, the answer to this question is not readily apparent by simply considering the positions' prime function. Rather, we must go on to consider whether the position is one that requires a nursing background and related community of interest considerations.

[32] Applying the governing principles set out in *UNA, Loc. 151 et al. v. Alberta Hospital Association et al.* [1986] Alta. L.R.B.R. 610 at 623, where the position requires a professional nursing background - whether by job posting or by practice - the community of interest lies with the direct nursing care bargaining unit. On the other hand, where the position simply requires one of several different professional health backgrounds of which nursing may be one type, then the community of interest will lie with the paramedical professional or technical bargaining unit where the skills in question are primarily put to a paramedical purpose.

[33] In this case, the position of MHT simply requires one of several different professional backgrounds of which nursing is one. It does not require that applicants be nurses. As a result, the community of interest lies with the HSAA bargaining unit. This rule recognizes the common interests that exist among MHTs arising not only from being members of multi-disciplinary teams as discussed above but because of the shared core job functions that exist for all MHTs. To split these individuals into two separate bargaining units – with separate collective

agreements including potentially different terms and conditions of employment such as seniority, promotions and wages – would unnecessarily divide individuals that function within the same team setting and who do the same job. In our view, this is a result to be avoided if possible.

[34] In reaching this conclusion, we acknowledge that the nursing professionals in question have common qualifications and professional associations. While these are factors which support a community of interest among the MHTs with nursing training, they are not sufficient to warrant overriding the common interests that are found among MHTs.

[35] We have also reached this conclusion despite the fact we have not fully accepted the Employer's position that it hires into the MHT position without preference for any specific discipline. In particular, the evidence regarding the hiring of Bonny Erickson into the position of psychogeriatric nurse is not consistent with this position. Having said that, based on the evidence we received we consider this hiring to be an anomaly. It is the only example of discipline specific hiring presented to us and, as such, does not seriously undermine the Employer's general position that individuals are hired into the MHT position without preference for particular professional training.

[36] In terms of Ms. Erickson's position specifically, we have chosen to include it in the paramedical professional and technical bargaining unit despite the fact the Employer required a nursing background for the position as evidenced by the recruitment requirement that applicants have professional nursing backgrounds. While this requirement would normally indicate including the position in the direct nursing bargaining unit, in this case we find that requirement alone to be insufficient to place her in the direct nursing care bargaining unit. We have reached this conclusion for two reasons.

[37] First, the primary functions of Ms. Erickson's position are very similar if not the same as those of MHTs discussed above. As a result, Ms. Erickson shares a strong community of interest with other MHTs working for the East Central Health Authority.

[38] Second and perhaps more importantly, we are not convinced a professional nursing background is in practice – as opposed to according to the job posting – a requirement of the job. As confirmed in *Re Calgary Regional Health Authority* [1999] *Alta. L.R.B.R. 458,* the Board will look beyond the employer's job posting to determine whether the position in question actually requires a nursing background. In this case, we conclude Ms. Erickson's position does not in fact require professional nursing training. Despite the nursing requirements set out in the job posting, in practice the position is comprised of fundamentally the same duties as the MHT positions described above. As a result, we find it could in fact be done by someone with any one of the health care backgrounds accepted by the Employer for the MHT position. Given the position does not in practice require nursing training and given the community of interest considerations discussed above, including the fact she would be the sole person performing MHT's duties who would be included in the direct nursing bargaining unit, we conclude on the specific facts of this case that Ms. Erickson's position should be included in the HSAA's bargaining unit.

[39] UNA also argues the fact the MHTs employed in the Geriatric Program at the time of the hearing all had nursing training demonstrates the MHT positions within this program require such training and should therefore be included in the direct nursing care bargaining unit.

[40] We are not persuaded by this argument. First, the Employer's evidence is that it has not had nor does it currently have a preference for hiring nurses into these positions. If anything,

the evidence led on behalf of the Employer suggested it is concerned the concentration of MHTs with nursing backgrounds in this particular program could impact negatively on the multidisciplinary team approach utilized by the Employer. While the current Clinical Supervisor of this program may have a personal preference for hiring nurses into these positions, the Employer does not share this preference. Given the Employer's wish to continue to be able to consider applicants for these positions with any of the accepted professional backgrounds, we are not willing to place these individuals in the direct nursing bargaining unit when their primary function and community of interests suggests placement in a bargaining unit with the remaining MHTs.

[41] Having addressed the 16 MHTs in question, we next turn to the reasons for our decision to include the two Clinical Supervisors within the paramedical professional or technical bargaining unit. As set out above, approximately 50% of their time is spent doing the work of a mental health therapist – the assessment, diagnosis and treatment of mental health conditions of patients they are responsible for. The remaining 50% of their time is spent undertaking various administrative duties including advising and assisting MHTs with their case loads.

[42] As with the MHTs, we conclude there exists no requirement – formally or in practice - that Clinical Supervisors possess a nursing background. As with the MHTs, there is no preference for a particular professional background when the supervisory positions are filled. That is, there is no requirement that any of these positions be filled by nurses. Rather, the Employer will consider any applicant possessing one or more of the accepted professional specializations. Applying the principles set out in *UNA, Loc. 151 et al. v. Alberta Hospital Association et al.* [1986] Alta. L.R.B.R. 610, these positions fall within HSAA's paramedical professional or technical unit.

[43] While a supervisor may use his or her specialized knowledge within a particular discipline to assist him or her in the performance of their job, the core functions of the job can be and in fact are done by individuals with varied professional backgrounds. As with the MHTs, we find the amount of discipline specific work to be insufficient to allow us to conclude these positions should be included in the direct nursing care bargaining unit.

Conclusion

[44] In the result, we conclude the 16 positions that are the focus of HSAA's determination application are included in the paramedical professional or technical bargaining unit. We further conclude the two Clinical Supervisory positions that are the subject of UNA's determination application shall remain in this same unit.

Gerald A. Lucas, Q.C., Vice-Chair