

**IN THE MATTER OF A HEARING UNDER THE *HEALTH PROFESSIONS ACT* REGARDING THE  
CONDUCT OF JAY GARCIA, LPN #39067, WHILE A MEMBER OF THE COLLEGE OF LICENSED  
PRACTICAL NURSES OF ALBERTA**

**DECISION OF THE HEARING TRIBUNAL**

**(1) Hearing**

The Hearing was conducted at the Aloft University Calgary Hotel, Calgary, Alberta on July 14 and 15, 2020 with the following individuals present:

**Hearing Tribunal:**

Patricia Standage, LPN (“Licensed Practical Nurse”), Chairperson  
Alan Naranin, LPN, Panel Member  
Jan Schaller, LPN, Panel Member  
Margaret Hayne, Public Member

**Independent Legal Counsel for the Hearing Tribunal:**

Julie Gagnon

**Staff:**

Katrina Haymond, Legal Counsel for the Complaints Director  
Sandy Davis, Complaints Director, College of Licensed Practical Nurses of Alberta (“CLPNA”)

**Investigated Member:**

Jay Ar Garcia, LPN  
Carol Drennan, AUPE Representative for the Investigated Member  
David Lardner, AUPE Representative for the Investigated Member

**(2) Preliminary Matters**

The hearing was open to the public pursuant to section 78 of the *Health Professions Act*, RSA 2000, c. H-7 (the “HPA”).

There were no objections to the members of the Hearing Tribunal hearing the matter, and no Hearing Tribunal member identified a conflict of interest. There were no objections to the jurisdiction of the Hearing Tribunal.

### **(3) Background**

Jay Garcia was an LPN within the meaning of the *HPA* at all material times, and more particularly, was registered with CLPNA as an LPN at the time of the complaint. Jay Garcia was initially licensed as an LPN in Alberta on September 8, 2014.

The CLPNA received a complaint form dated August 30, 2019 from Amanda Pearce, Director of Human Resources, with Rocky Ridge Retirement Community in Calgary, Alberta informing CLPNA of a complaint against Jay AR Garcia. Included in the complaint was a copy of a letter dated August 16, 2019 from Jim Held, Executive Director, Rocky Ridge Retirement Community to Jay AR Garcia advising of the termination of his employment with Rocky Ridge Retirement Community.

The complaint was received pursuant to s.57 of the *Health Professions Act (Alberta)* (the “Act”).

In accordance with s. 55(2)(d) of the Act, Ms Sandy Davis, Complaints Director for CLPNA (the “Complaints Director”) appointed Phillip Northrup, Investigator for CLPNA (the “Investigator”) to investigate the complaint. The Complaints Director also advised Mr Garcia a recommendation was sent to Ms Teresa Batemen, Senior Director for CLPNA, requesting a suspension of his practice permit due to the alleged conduct. Jay Garcia received notice of the complaint, the recommendation and the investigation by letter dated August 30, 2019.

Mr Garcia was advised by letter dated September 11, 2019 from Ms Bateman that she would not be proceeding with a suspension of Mr Garcia’s practice permit.

On October 8, 2019, the investigator concluded the investigation and submitted the investigation report to the Complaints Director.

After reviewing the Investigation Report, the Complaints Director determined there was sufficient evidence the matter should be referred to the Hearings Director in accordance with s. 66(3)(a) of the Act.

Mr Garcia received notice the matter was referred to a hearing, as well as a copy of the Investigation Report and Statement of Allegations under cover of letter dated November 13, 2019.

A Notice of Hearing, Notice to Attend and Notice to Produce respecting the Complaint were served upon Jay Garcia under cover of letter dated June 12, 2020.

#### **(4) Allegations**

The Allegations in the Statement of Allegations are:

“It is alleged that **JAY GARCIA, LPN**, while practising as a Licensed Practical Nurse engaged in unprofessional conduct by:

1. On or about February 10, 2019, Jay Garcia made unwelcome advances or engaged in unwelcome contact with a co-worker, C.T. the particulars of which include one or more of the following:
  - a. kissing or attempting to kiss C.T. without C.T.’s consent;
  - b. placing his hands, or rubbing his genitals, or both against C.T. without C.T.’s consent;
  - c. making comments of a sexual nature to C.T. such as “you’re going to smell like me now.”

#### **(5) Exhibits**

The following exhibits were entered at the hearing:

- Exhibit #1: Statement of Allegations  
Exhibit #2: Agreed Book of Exhibits
- Tab 1 – Complaint form re complaint against Jay Garcia, dated August 30, 2019
  - Tab 2 – Letter from Jim Held to Jay Garcia, dated August 16, 2019
  - Tab 3 – Letter from Sandy Davis to Jay Garcia, dated August 30, 2019
  - Tab 4 – Letter from Sandy Davis to Amanda Pearce, dated August 30, 2019
  - Tab 5 – Letter from Sandy Davis to Teresa Bateman, dated August 30, 2019
  - Tab 6 – Letter from Jeanne Weis to Jay Garcia, dated September 11, 2019
  - Tab 7 – Email from Jackie Faber to Amanda Peace, enclosing email from C.T., dated July 26, 2019, providing details of the incident
  - Tab 8 – Letter from Amanda Pearce to C.T., dated August 29, 2019
  - Tab 9 – Investigation Summary Report prepared by Amanda Pearce
  - Tab 10 – Notes from “Attendance Meeting” with C.T., dated July 18-19
  - Tab 11 – Photographs of Unit/Facility, taken by J. Faber on July 9, 2020
  - Tab 12 – Letter re Attendance Management, dated July 18, 2019
  - Tab 13 – Employee Absence Schedule for C. T.
  - Tab 14 – Code of Ethics for Licensed Practical Nurses in Canada (“Code of Ethics”)
  - Tab 15 – Standards of Practice for Licensed Practical Nurses in Canada (“Standards of Practice”)
  - Tab 16 - Section 1(1)(pp) of the HPA, Part 4 of the HPA
- Exhibit #3: Screen shots of text messages from Lisette Stenger’s cell phone  
Exhibit #4: Screen shots of text messages

**(6) Witnesses**

The following individuals were called as witnesses in the hearing:

Jackie Faber  
Lisette Stenger  
C.T.  
Jay Ar Garcia

The Hearing Tribunal recognizes some of the evidence it may be asked to accept and consider in this matter may be hearsay evidence. The Hearing Tribunal concludes that hearsay evidence can be admissible when it is determined the central issues have been established or where there is additional evidence to support the Allegations. All issues of guilt or innocence are considered on a balance of probabilities. The onus is on the Complaints Director to establish on a balance of probabilities the facts as alleged in the Statement of Allegations occurred and that the conduct rises to the level of unprofessional conduct as defined in the HPA.

The following is a summary of the evidence given by each witness:

Jackie Faber

Ms. Faber has been the Resident Care Manager at Rocky Ridge Retirement Home (the “Facility”) since January 2, 2019. She has been a registered nurse since 1996. As Resident Care Manager, she oversees all of the care for the residents in the Facility and manages the staff providing the care. The Facility has a 29 bed locked dementia unit on the first floor, referred to as the “DAL” unit, and a unit with 30 independent residents, referred to as the “PAL” unit, which is on the first, second and third floors of the building. During the day shift, there is one LPN with a shift from 7:00 am to 3:00 pm, one LPN with a shift from 8:00 am to 2:00 pm and Health Care Aids as part of the team. Each LPN is assigned to either DAL or PAL. The LPNs can assist each other, if necessary, during the day. They can help out if there are patient behaviors, a patient fall, or an increased workload.

Ms. Faber testified that Mr. Garcia’s position was terminated following an investigation into an allegation that Mr. Garcia violated the workplace harassment and violence policy. The incident involved Mr. Garcia making unwanted advances towards a co-worker, C.T. Mr. Garcia kissed the co-worker’s neck without permission to do so, pushed himself up against her and was rubbing his private areas on her.

C.T. is an LPN and works a mixture of the 8:00 am to 2:00 pm and the 7:00 am to 3:00 pm shifts. She works every other weekend from 7:00 am to 3:00 pm. C.T. is a very thorough LPN and takes

direction easily. She is a good team lead with the Health Care Aids and personable with staff and residents.

Ms. Faber testified that Mr. Garcia worked every other weekend which coincided with the weekend shifts for C.T. Mr. Garcia worked an 8:00 am to 2:00 pm shift. Ms. Faber described Mr. Garcia as very thorough in his nursing, very personable with staff and residents, and also took direction well.

In the summer of 2019, attendance meetings were conducted with a number of employees following a pattern and high volume of sick calls among staff. The attendance meetings were coaching meetings with staff regarding attendance and to see if there was anything the Facility could do to assist them. An AUPE representative was present for the meetings.

An attendance meeting was held with C.T. on July 18, 2019. Ms. Faber reviewed the Employee Absence Schedule (Exhibit #2, Tab 13). The document shows C.T. had called in sick in February, April and July on days she normally would have worked. C.T., Ms. Faber, the AUPE representative Angela, and a business manager, Leanne, were present for the meeting. Leanne's role was to take notes of the meeting. During the meeting, Ms. Faber reviewed C.T.'s absences. C.T. stated she had something to tell them. She disclosed she had received unwanted advances by Mr. Garcia who she worked with on weekends. He had cornered her in the medication room and had made unwanted advances. During the incident, a resident and their spouse had approached the nursing desk, which had caused Mr. Garcia to stop. C.T. felt very uncomfortable working with him which had caused her to call in sick.

Leanne took notes of the meeting which are at Exhibit #2, Tab 10. Ms. Faber added notes to the ones taken by Leanne, which are in a lighter grey in Exhibit #2, Tab 10. Ms. Faber's additions to the notes were made within 48 hours after the meeting.

Prior to the July 18, 2019 meeting, C.T. had not disclosed the incident to Ms. Faber or anyone else in management. C.T. stated she was fairly new to the organization and did not know if anybody would believe her as Mr. Garcia was a married man and had worked there longer.

The Facility did an internal investigation following the disclosure by C.T. The human resources representative, Amanda Pearce, advised Ms. Faber to request detailed documentation from C.T. C.T. provided an email on July 26, 2019 (Exhibit #2, Tab 7) detailing the incident which C.T. stated occurred on February 10, 2019. Management proceeded to speak with other co-workers, Health Care Aids, other LPNs and with Mr. Garcia. Mr. Garcia was interviewed on August 12, 2019. He stated he had asked C.T. to go on a break and to walk him down out of the unit. It was the end of his shift. They walked together out of the unit. Once outside they had held hands. He opened the door in the stairwell. She followed him. There was no resistance. They continued into the stairwell and they hugged. He had kissed her and he kept stating there was no resistance, no force. He denied he had rubbed up against C.T.

An Investigation Report was prepared (Exhibit #2, Tab 9) and it was concluded Mr. Garcia made unwanted advances towards C.T. which violated the Workplace Harassment Policy and occupational health and safety requirements. The decision was made to terminate Mr. Garcia's employment. The termination letter is at Exhibit #2, Tab 2. Mr. Garcia was notified of the decision in a meeting on August 16, 2019.

Ms. Faber noted during the investigation, it was determined the incident occurred just outside the dementia unit, in an alcove with a bench at the end of a stairwell. C.T. and Mr. Garcia agreed there had been a kiss.

Ms. Faber identified pictures of the Facility found at Exhibit #2, Tab 11. There are video cameras that record certain parts of the Facility but the alcove where the bench is located does not appear on video recordings. Ms. Faber confirmed the video camera images are shown on monitors at the concierge desk. There is someone at the concierge desk most of the time although they do leave the desk occasionally. The video recordings from the cameras are only kept for three days.

Ms. Faber confirmed C.T. had not been shown the notes taken during the interview (Exhibit #2, Tab 10) to confirm they were accurate.

In reviewing C.T.'s Employee Absence Schedule (Exhibit #2, Tab 13), Ms. Faber confirmed that while C.T. did call in sick for some shifts on the weekend, there were shifts she would have worked with Mr. Garcia after the date the incident was said to have occurred. There was one sick day on the weekend of February 23 that aligned with a previously scheduled day off. There were no sick days taken in March. There was a sick day on April 7, but no sick days in May or June. Mr. Garcia and C.T. would have worked shifts together during those months.

#### Lisette Stenger

Ms. Stenger has been registered as an LPN since 2016. She was initially registered in Ontario and moved to Alberta in 2018. She has worked as an LPN at the Facility since October 2018. She works with both C.T. and Mr. Garcia. She described C.T. as positive and knowledgeable and stated they occasionally socialize outside work but are mostly work friends. She has worked once with Mr. Garcia. She indicated he knows the residents very well and was knowledgeable. He had a good reputation in the Facility as an LPN in terms of his nursing skills.

C.T. disclosed to Ms. Stenger that an incident had occurred involving Mr. Garcia. C.T. told her she was frustrated and Mr. Garcia told her to come with him and brought her to the stairwell. There is an alcove in the back of the stairwell and he kind of cornered her by the bench and was kissing her neck. He was rubbing his genitals on her leg through his scrubs. This occurred sometime after C.T.'s birthday but before March 9, 2019. Ms. Stenger identified that time period because she reviewed her text messages and C.T. texted her on March 9 when she was working with Mr. Garcia. Ms. Stenger indicated C.T. was stressed and felt awkward and worried about working with Mr. Garcia. Ms. Stenger told her she needed to tell Ms. Faber right away but C.T.

said she was not ready to do so. C.T. told Ms. Stenger about one other incident in which Mr. Garcia had asked to walk C.T. to her car and she said no.

The text messages of March 9, 2019 between C.T. and Ms. Stenger were entered as Exhibit #3. Ms. Stenger acknowledged there is some laughing and joking going on with respect to the text messages. She indicated it was making light of a very awkward situation and that is how her and C.T. would talk to each other usually. C.T. was uncomfortable because she was working with Mr. Garcia that day. Ms. Stenger indicated there were no other text messages about the incident.

### C.T.

C.T. is an LPN who has been registered with CLPNA since 2014. She has worked at the Facility since July 2018. She indicated Jackie Faber started as the Resident Care Manager in approximately January 2019. She works Monday to Thursday day shift and alternating weekends. On the weekends her shift is 7:00 am to 3:00 pm. The environment when she started at the Facility was friendly and welcoming. She worked with Mr. Garcia on some of her weekend shifts. She described Mr. Garcia as a really good nurse, very professional, and a really good employee. She described that her and Mr. Garcia got along very well before the incident. He taught her a lot because she was a new nurse at the Facility. C.T. described them as friendly colleagues. They did not socialize outside of work but texted a few times.

On February 10, 2019, she was working the 7:00 am to 3:00 pm shift and Mr. Garcia was working the 8:00 am to 2:00 pm shift. She was doing a Sudoku puzzle at one of the tables in the dining area and was getting frustrated. The nursing station overlooks the dining area. She had been sitting with a resident at one point, but he had gotten up and left. Mr. Garcia came up to her and stated she looked frustrated or something along those lines and asked her to go for a walk with him, which she did. It was 2 p.m. They walked down the hallway of the unit because he was leaving. To the left of the doors of the unit, there is a stairway that has a window with a bench. He grabbed her hand at some point, and they ended up in the alcove. She thought maybe they were going to look at something outside or he was going to show her something. She was not concerned because she had no reason to be.

Mr. Garcia put his hands around her and she was in the corner by the bench. He was on the other side of her and trying to kiss her, so she turned her head so he could not kiss her. She was telling him "you are married" and "I have a boyfriend" and he was being very persistent. She heard a resident and her family outside the doors and then Mr. Garcia kind of moved. She then walked with him to the doors by his car.

C.T. testified she believes she was working on the DAL unit that day but was not certain. When the LPN working the shift that ends at 2:00 pm is done, they do a report and touch base with the LPN who is there until 3:00 pm.

C.T. stated as they were walking down the hallway, she thinks they engaged in some small talk but does not recall what they were talking about. While they were walking down the hallway, they were beside each other and then at one point he was walking in front of her.

She indicated she did not know exactly how she got cornered in the alcove, but he grabbed her at some point and the next thing she knew she was in the corner and could not really move out of it. She was standing closest to the bench facing towards the window. He was positioned right in front of her and his back was to the window. He was rubbing up against her saying you are going to smell like me. She could feel his body pressed against hers. He kissed her neck because she had her head turned. She was saying "No I have a boyfriend, you are married". She does not believe she said "No" but she said "No I have a boyfriend" or something like that. She is not sure how many times he kissed her but believes it was at least three times. She believes the entire incident lasted approximately 3-5 minutes, but she is not certain of that timeframe.

C.T. described she did not know what to make of the incident at first. She was disturbed and scared. She did not want to leave the building at first because she did not know if he would be out there waiting. She did not really know what to expect. She texted her best friend before she left the building. Her best friend does not work at the Facility.

C.T. indicated she tried to obtain the text messages with her best friend before the hearing but because her phone was dropped in a lake, they were all gone. C.T. also indicated she spoke to Ms. Stenger about the incident, perhaps one or two weeks later. She did not disclose the incident to management because the Resident Care Manager was new and C.T. did not have a good sense whether she would be believed. She was nervous they would not believe her, and she would still have to work with Mr. Garcia or find a new job.

At the time of the incident, Mr. Garcia was married. C.T. believes Mr. Garcia was aware she had a boyfriend because she talked about him a lot and sometimes her boyfriend would bring her coffee at work. She indicated she had never signaled to Mr. Garcia that she was interested in him sexually. C.T. indicated that prior to February 10, 2019, she and Mr. Garcia had hugged each other a few times but nothing along the nature of what had occurred during the incident. It was not sexual; it was a friendly hug.

C.T. worked with Mr. Garcia on shifts after the incident. The next time she was scheduled to work with him after the February 10, 2019 incident was the weekend of February 23 and 24, but she called in sick on February 23 and had taken the day off on February 24. The next weekend she was scheduled to work with him was the weekend of March 9 and 10, 2019. She was stressed and nervous and tried to stay away from him during the shift. There was no discussion with Mr. Garcia about what had happened. He did phone her at some point and asked if she was avoiding him, but she said she was just busy.

With respect to the attendance meeting on July 18, 2019, C.T. met with her union representative in advance of the attendance meeting. She disclosed the incident to the union representative who told her she should tell management.

C.T. confirmed she did not review the notes taken during the meeting on July 18, 2019 until the time of the hearing. She does not recall indicating the incident was in the medication room. Following the attendance meeting, C.T. prepared an email for management dated July 26, 2019 (Exhibit #2, Tab 7).

In cross-examination, C.T. acknowledged she vaguely remembers what she said to Mr. Garcia, but it was something to the effect of being uncomfortable because she was in a relationship and he was married. She indicated she turned away and so he kissed her on the neck, because of the height difference between them. C.T. acknowledged she was not resisting him physically, but she was verbally making comments. C.T. does not recall initiating a hug with Mr. Garcia at the time of the incident. She acknowledged she did not push the button on her tracker during or after the incident. She did confirm giving him a hug before he left, and it was very awkward.

With respect to the text messages sent to Ms. Stenger, C.T. acknowledged that is how she texts. It is her personality to use laughing faces even if it is something very serious. C.T. confirmed calling in sick on a few occasions and indicated she tried to switch some of her shifts from days to evenings when she could. C.T. also indicated there was one occasion where Mr. Garcia texted her asking if she was avoiding him, but she did not respond to him.

In response to questions from the Hearing Tribunal, C.T. indicated Mr. Garcia initiated the hug at the end, right before he left, on February 10, 2019.

#### Jay Ar Garcia

Mr. Garcia has been registered as an LPN since 2015. He started work at the Facility in March 2015. He currently works at the Peter Lougheed Centre.

Mr. Garcia worked on February 10, 2019. His shift ended at 2:00 pm. On his way out, he stopped at the nurses' station where C.T. was sitting. She was at the nursing desk in front of the computer, playing a Sudoku puzzle. He asked her if she was going for a break and she said she already had her break but could use another. She stood up and they both walked out of the exit of the DAL unit. Upon exiting the DAL unit, he held her hand briefly to signal to her that he was going on the left side. He was going to the stairwell because he needed to pick up some documents on the second floor. When he opened the door, he noticed C.T. was following him and so he walked to the vestibule and turned around. She was there. She initiated a hug by raising both hands and so he hugged her as well.

Mr. Garcia testified he does not know what was going through his mind, but he got carried away and he asked if he could kiss her. She did not respond at the time but remained hugging him.

She did not do anything, she did not push him, she did not show any protest but continued to hug him. Since they have a height difference, she is taller than him, he ended up kissing her on the side of her neck. He gave her a kiss, which he described as a peck, two or three times. After that he stopped and then they both walked out the exit door. They continued walking down the hallway side by side. She stopped by the staff room and had a conversation with one of the staff and he waited for her in the hallway. They walked further to the lockers and she asked where his coat was, and he said he did not have a coat at that time. They proceeded and went to the exit door going to the parking lot. Once in front of the exit doors, she initiated a hug again. She raised both her hands and he hugged her and left the building.

Mr. Garcia denied asking C.T. to accompany him when she was sitting at the nursing desk. He was surprised she followed him because he had not asked her to follow him. When he turned to go up the stairs, he noticed she was following him, so he walked a little bit further into the vestibule and when he turned around, they were facing each other. She initiated the hug. He described that they were standing closer to the front of the exit door rather than in the corner by the bench. When he kissed her, she did not push him or protest. She continued hugging him. He asked if he could kiss her and that is the only dialogue they had. Mr. Garcia denied rubbing his genitals against C.T. or saying she would smell like him now.

Mr. Garcia indicated C.T. had hugged him in the past. One day during a shift, he was not talking very much. She noticed it and said she was going to give him a hug. She did not give him a hug at the time but during the lunch break, he asked her where his hug was. She finished her lunch, stood up and went around where he was seated. She put her hands across him and leaned in and hugged him. There was another occasion where again he was not talking very much, and she placed both her hands on his face without him asking for it.

After the incident, there was an occasion where he texted C.T. to ask if she was avoiding him. He did it jokingly. He also recalled a time where she had texted him to swap shifts.

During the workplace investigation on August 12, 2019, he insisted on getting the camera footage, but the recording was no longer available.

On cross-examination, Mr. Garcia confirmed he has been married for 14 years. He had a good working relationship with C.T. She was not a close personal friend; she was a work colleague. They had never phoned each other outside of work. During work they would have some conversations about their personal life. However, Mr. Garcia indicated he was not aware on February 10, 2019 that she had a boyfriend. He found out after February 10, 2019 that she had a boyfriend.

At the time of the workplace investigation, he acknowledged he had kissed C.T. but that it was consensual. He denied pushing himself up against her or saying she was going to smell like him. That continues to be his position. Mr. Garcia indicated it was when C.T. initiated the hug that he thought that he would give her a peck. He got carried away. He asked if he could kiss her and

she did not respond but remained hugging him. He then gave her a kiss. When C.T. had hugged him previously, he assumed she had some sexual interest in him. This was based on the fact she had hugged him and put her hands on his face.

Mr. Garcia explained that when they were walking down the hallway before the incident, he touched her hand to indicate he was going left. He was on his way upstairs to pick up his paystub. He opened the door going up the stairs and she came in the doorway after him. Instead of going up the stairs, he continued to the end of the hall and turned around. Mr. Garcia agreed the nook by the bench would be a much more private area to have a kiss and would be out of view of the cameras but maintained that the kiss happened right in front of the exit door. Mr. Garcia indicated he was deeply embarrassed about it and deeply regrets it. He should not have done that. He was tested and it was not his best judgment at the time.

Mr. Garcia acknowledged he and C.T. had never discussed kissing in the past. It was important for him to ask her whether he could kiss her. He waited momentarily and she remained hugging him and then he kissed her. He concluded based on the fact she was hugging him that she consented to the kiss. Mr. Garcia insists C.T. did not say anything when he kissed her. He denies she said she had a boyfriend or that he was married.

Mr. Garcia was also asked about a text he sent to C.T. in February on her birthday which stated "Happy Birthday to the most gorgeous and best partner! stay sweet always..." (Exhibit #4) This was after he had kissed her. Mr. Garcia indicated he usually sends greetings to his co-workers for Christmas and special holidays. It was clarified that Exhibit #4 was a screen shot from C.T.'s phone that she had sent to the AUPE representative before her phone was destroyed in the water.

In response to questions from the Hearing Tribunal, Mr. Garcia confirmed he and C.T. worked together in April, May and June of 2019. They did not take their breaks together either before or after the incident. Mr. Garcia indicated he was not thinking about the position of the cameras while he was walking down the hallway with C.T. Mr. Garcia did not remember if C.T. responded to his birthday text.

## **(7) Summary of Closing Submissions by the Parties**

### **Closing Submissions on Behalf of the Complaints Director**

Ms. Haymond noted the evidence that is most germane in the hearing is that given by C.T. and Mr. Garcia. They were the only two witnesses who were present when the incident occurred. In some respects the evidence is consistent and, in some respects, it diverges.

Both C.T. and Mr. Garcia agreed on the following facts. They worked together every second weekend, they had a good working relationship, and they worked together on February 10, 2019. Around the end of Mr. Garcia's shift at 2:00 pm, C.T. was doing a Sudoku puzzle and Mr. Garcia

approached C.T. C.T. was either in the dining area or the nursing station. Mr. Garcia spoke to C.T. They walked down the hallway on the DAL unit and exited the locked doors. They turned left and C.T. followed Mr. Garcia through the door and Mr. Garcia then kissed C.T. on the neck more than once. C.T. did not say anything before Mr. Garcia kissed her to indicate she was providing consent. She did not push Mr. Garcia away. She did not scream or press her tracker. They left the stairwell and walked together through the Facility towards the parking lot. They hugged at the exit before Mr. Garcia exited the building. Prior to the incident, they did not have any discussions about kissing each other and no other discussion about potential sexual or physical intimacy. They had hugged on a few prior occasions but had never been physically intimate.

However, Mr. Garcia and C.T.'s evidence diverges in a number of respects. C.T. says she does not think she hugged Mr. Garcia in the stairwell. She said it was possible but did not believe it had occurred. Mr. Garcia says C.T. hugged him first which led to the kiss. Their evidence also diverges because C.T.'s recollection was very clear that Mr. Garcia asked her to walk with him. Mr. Garcia says this did not happen but that C.T. just got up and followed him to the stairwell. C.T. said she did not think Mr. Garcia asked if he could kiss her before he did, but Mr. Garcia says he did so. C.T. says during the encounter she said, "No I have a boyfriend and you are married" but despite these protests, Mr. Garcia continued to kiss her on the neck. Mr. Garcia says C.T. never said anything like that during the encounter. C.T. says Mr. Garcia was pressing his body against hers and said, "Now you will smell like me". Mr. Garcia denies pressing against her or saying anything like that.

Ms. Haymond made submissions with respect to credibility. She noted C.T. appeared to try to be honest and straight forward. She did not exaggerate her responses and was candid in acknowledging if she did not remember something. There was nothing to impede C.T.'s ability to perceive what was happening at the time. Although there were some gaps in C.T.'s memory, on the key points, C.T. had a very good recollection of what happened. Both C.T. and Mr. Garcia testified they had a good working relationship. There would be no motivation for C.T. to try and get Mr. Garcia into trouble. She had nothing to gain by making the complaint and everything to lose. While the Hearing Tribunal may believe there was motivation for C.T. to lie based on her being summoned to an attendance meeting, that conclusion would not be supported by the evidence of Ms. Faber. The attendance meetings were not disciplinary in nature, they were coaching meetings. C.T. disclosed the incident to her AUPE representative who she trusted, who then encouraged her to disclose it to management.

Ms. Haymond submitted the Hearing Tribunal should compare and contrast the two versions of events and find C.T.'s version was more probable and plausible. C.T. and Mr. Garcia had walked together on previous occasions. She thought he wanted to show her something. She had no sexual interest in Mr. Garcia. It is not probable or plausible that C.T. initiated a hug or the touching that led to the kiss. In addition, C.T. was largely consistent on the key points of her evidence. Her testimony was also consistent with her email to her employer of July 26, 2019. There is one potential inconsistency in that the incident is described in the notes of July 18, 2019 as taking

place in the medication room. However, C.T. had no opportunity to review those notes. There are no independent witnesses here to what occurred. However, C.T.'s evidence was consistent with the evidence provided by Ms. Stenger, including the text messages.

Ms. Haymond also provided submissions with respect to how victims of sexual assault disclose an incident. There is no one way that a victim discloses an assault. Some disclose right away, others do not disclose the abuse, and some may delay in disclosing. In this case, C.T. provided reasons for her delay in reporting. Ms. Haymond submitted the delay in reporting was understandable in the context of this case and should not negatively impact C.T.'s credibility. Ms. Haymond also submitted the fact that C.T. did not push Mr. Garcia away or cry out or press her tracker should not diminish her credibility. There are myths and stereotypes about how victims should react, and the courts have cautioned against drawing inferences based on these.

Ms. Haymond also made submissions with respect to Mr. Garcia's credibility. The main issue in his testimony was the probability or plausibility in many points of his testimony. It is not probable or plausible that C.T. simply followed him down the hall on her own accord. The testimony that he touched her hand as an indication he was turning left is also not probable or plausible. It is also not probable or plausible that if his intent was to go upstairs, he would have redirected himself and gone down the hallway. Ms. Haymond also questioned the probability or plausibility of two people who have never engaged in flirtatious behavior or had any discussion of any kind kissing in the workplace. The whole version of events does not make sense from a common-sense perspective.

Ms. Haymond then turned to the allegations. She noted that in criminal cases dealing with consent, the trier of fact has to decide whether the victim actually did provide consent. There is no implied consent as in the health care setting. Consent to touching someone cannot be implied, it has to be actual consent. It does not have to be verbal, but it has to be actual. Ms. Haymond noted that even if the Hearing Tribunal accepted Mr. Garcia's evidence, the fact that she had hugged him previously was not an open invitation to escalate the behaviour and start kissing her. Mr. Garcia says he asked if he could kiss C.T. but he did not wait for her to respond before he went ahead. Even if the Hearing Tribunal finds that C.T. was hugging him first, this does not establish consent for kissing.

Ms. Haymond noted that if the Hearing Tribunal accepted the conduct occurred, then it was clear the conduct was unprofessional conduct. The conduct harms the integrity of the profession. It is also a breach of the Code of Ethics and Standards of Practice. Ms. Haymond noted Principle 3 of the Code of Ethics, indicator 3.1 and 3.4, Principle 4 of the Code of Ethics. Ms. Haymond also pointed to the Standards of Practice, Standard 3, indicator 3.3.

## Closing Submissions on Behalf of Mr. Garcia

Ms. Drennan noted there are only two witnesses with firsthand knowledge of what occurred. Ms. Faber and Ms. Stenger testified to events that occurred as part of the investigation or what they had been told about the incident, but they were not individuals with firsthand knowledge. Mr. Garcia admits and acknowledges he kissed C.T. It was him who kissed her, and he wanted to kiss her at the moment. However, he does not admit to rubbing his genitals against C.T. or saying she would smell like him.

Ms. Drennan asked why someone would admit to one but not the other allegations and she said it was because Mr. Garcia was admitting to the truth. The elements that are denied are because they are not true. The incident has been characterized as harassment, but rather, it was clumsy. C.T. followed Mr. Garcia. C.T. did not press her tracker or cry out or demonstrate any objection. Ms. Drennan asked how Mr. Garcia was to know she was objecting. C.T. did not demonstrate any cues of someone who was offended. When they were walking down the hall, C.T. could have departed. But rather, she walked him down the hallway to the staff exit. She talked to someone but did not disclose what had happened. She continued to walk with Mr. Garcia to the exit and gave him a hug.

Much later, C.T. told Ms. Stenger about the incident. She indicated she was feeling awkward working with Mr. Garcia. However, the text messages between Ms. Stenger and C.T. were mocking and joking. The incident was not disclosed to the employer until four months later when C.T. was having a meeting with respect to her absences. At this point, C.T. felt the incident was significant. In addition, the notes taken at the time the incident was disclosed (Exhibit #2, Tab 10) indicate the incident was in the medication room and then it was changed to the vestibule by the stairwell.

Ms. Drennan noted Mr. Garcia is not a predator. He has learned from the incident and continues to work at the Peter Lougheed Centre with no further complaints, convictions, or discipline.

The standard of proof is on the balance of probabilities but, in all cases, evidence must be scrutinized with care by the trier of fact. The evidence must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test.

With respect to assessments of credibility, it is not dependent on who appears more sincere in the witness box. Opportunities for knowledge, powers of observation, judgment and memory, ability to describe clearly what has been seen or heard also affect credibility.

Mr. Garcia was consistent throughout his testimony and during the workplace investigation process. His capacity to recall or perceive was good and he was able to clearly communicate this without hesitation. Mr. Garcia was honest during the adversarial parts of the testimony. Ms. Drennan reviewed some cases in the labour context. She indicated that in the present case, C.T. did not prove to Mr. Garcia the conduct was unwelcome at the time of the incident. After the

fact, both agreed it was awkward and C.T. indicated she was avoiding working with him. Ms. Drennan noted the Hearing Tribunal should look to the complainant's reaction at the time the incident occurred and assess whether she expressly, or by her behavior, demonstrated the conduct was unwelcome. The complainant must establish by her body language she has signaled to the harasser that his conduct was unwelcome. Ms. Drennan took the position that a reasonable person would not find C.T. indicated the conduct was unwelcome. The lack of response indicates consent. There are multiple things that imply consent, including her offering him a hug.

Ms. Drennan noted the laughing and joking in the text messages between Ms. Stenger and C.T. indicate the lack of significance of the event.

#### Reply Submissions on behalf of the Complaints Director

In reply, Ms. Haymond noted the Hearing Tribunal should approach the cases cited by Ms. Drennan with caution as the cases are old or speak to the law of sexual harassment. Cases in a labour arbitration context are not analogous to professional discipline cases. In addition, the law around sexual harassment, and particularly around consent, has changed. Recent criminal law cases are more directly analogous.

With respect to whether the advances were unwelcome, the evidence shows the advances were unwelcome. Even if the Hearing Tribunal finds that C.T. hugged Mr. Garcia in 2019, it is not acceptable to think a hug provides consent to kiss someone. It is also not incumbent on the victim, who is receiving the kiss, to fight back or to push the person away. It is incumbent on the person who is making the physical contact to make sure they have the consent and not imply the consent.

#### **(8) Decision of the Hearing Tribunal**

The onus is on the Complaints Director to establish the facts as alleged in the Statement of Allegations occurred. The standard of proof in civil cases is the balance of probabilities.

The Hearing Tribunal has a two-part task in considering whether a regulated member is guilty of unprofessional conduct. First, the Hearing Tribunal must make factual findings as to whether the alleged conduct occurred. If the alleged conduct occurred, it must then proceed to determine whether the conduct rises to the threshold of unprofessional conduct in the circumstances.

The Hearing Tribunal has carefully considered the testimony of the witnesses and the exhibits. The Hearing Tribunal finds the particulars in Allegation 1(a) are proven and the conduct constitutes unprofessional conduct. The Hearing Tribunal finds the particulars in Allegation 1(b) and (c) have not been proven on a balance of probabilities. The Hearing Tribunal's reasons are set out below.

**(9) Hearing Tribunal Findings and Reasons**

The Hearing Tribunal considered the evidence of all the witnesses. The Hearing Tribunal found Ms. Faber and Ms. Stenger to be credible and reliable witnesses. However, neither Ms. Faber nor Ms. Stenger were present during the incident on February 10, 2019 and as such, did not have first-hand knowledge of what had occurred. The Hearing Tribunal placed limited weight on their evidence.

The Hearing Tribunal considered the evidence of C.T. C.T. appeared to give her evidence in a candid and truthful manner. She acknowledged during the hearing if she could not remember something. Her evidence was consistent throughout the hearing and with the email she provided as part of the workplace investigation (Exhibit #2, Tab 7).

The Hearing Tribunal also considered the evidence of Mr. Garcia. Mr. Garcia also appeared to give his evidence in a candid and truthful manner. He was consistent in his evidence. He acknowledged he kissed C.T. on her neck. He also acknowledged that, although he asked permission to kiss C.T., he did not wait for her to respond before he kissed her.

In weighing the evidence of C.T. and Mr. Garcia, the Hearing Tribunal found both C.T. and Mr. Garcia to be credible. There was agreement between C.T. and Mr. Garcia on certain details of what occurred. However, their evidence diverged on certain key points. In considering the diverging evidence, the Hearing Tribunal could not determine whose evidence it preferred where the evidence diverged.

**Allegation 1(a) – On or about February 10, 2019, made unwelcome advances or engaged in unwelcome contact with a co-worker, C.T., the particulars of which include: kissing or attempting to kiss C.T. without C.T.’s consent**

The Hearing Tribunal finds Mr. Garcia approached C.T. on February 10, 2019 at the end of his shift. They spoke briefly in the DAL unit. They exited the DAL unit together, walked in the hallway and turned left toward the stairwell. Somewhere in the alcove or near the alcove past the stairwell, Mr. Garcia kissed C.T. two or three times on her neck. C.T. did not verbally consent to the kiss. They had never discussed having an intimate or physical relationship, although they had hugged previously.

The Hearing Tribunal finds the conduct of Mr. Garcia was unwelcome by C.T. Even if Mr. Garcia asked if he could kiss C.T., he did not wait for a response. C.T. indicated she did not hear Mr. Garcia ask if he could kiss her. The Hearing Tribunal finds C.T. did not consent to being kissed.

C.T. and Mr. Garcia had had physical contact before the incident on February 10, 2019. However, even given the prior hugging, and whether or not C.T. initiated a hug on February 10, 2019, the Hearing Tribunal finds this is not sufficient to constitute evidence of consent by C.T. for Mr. Garcia to kiss her.

The Hearing Tribunal did not find that the failure by C.T. to disclose the incident immediately to management or that her texts with Ms. Stenger that used laughing faces and joking language undermined C.T.'s credibility. The Hearing Tribunal accepts that individuals will react differently to these types of incidents. The Hearing Tribunal accepted C.T.'s explanation of why she did not disclose the incident to management immediately and accepted her evidence about the tone she generally uses in text messages, even when the matter is serious.

The Hearing Tribunal considered the context of the kiss. C.T. and Mr. Garcia were work colleagues. They had never discussed having an intimate or physical relationship. Mr. Garcia's evidence is that he assumed he had C.T.'s consent. However, Mr. Garcia should not have made this assumption. In particular, in the context of a working relationship between colleagues and during a shift at the Facility where they both worked, it could not be assumed that C.T. was consenting to being kissed. As noted above, the Hearing Tribunal finds Mr. Garcia did not have C.T.'s consent, regardless of whether or not C.T. initiated a hug.

The Hearing Tribunal finds the conduct in Allegation 1(a) amounts to unprofessional conduct as defined in s. 1(1)(pp) of the HPA, in particular, the Hearing Tribunal considered the following definitions of unprofessional conduct:

- (ii) Contravention of this Act, a code of ethics or standards of practice;
- (xii) Conduct that harms the integrity of the regulated profession;

The Hearing Tribunal finds the conduct harms the integrity of the regulated profession and constitutes unprofessional conduct under HPA section 1(1)(pp)(xii). Given that there was no prior relationship between Mr. Garcia and C.T., they had never discussed having an intimate or physical relationship, Mr. Garcia did not obtain C.T.'s consent and kissed her in their place of employment during her shift, the kiss was clearly outside of the scope of what is acceptable conduct toward a colleague. The conduct reflects negatively on the profession of Licensed Practical Nursing and harms the integrity of the profession.

The Hearing Tribunal also finds the conduct breached the Code of Ethics and Standards of Practice and constitutes unprofessional conduct under HPA section 1(1)(pp)(ii). The Hearing Tribunal considered the CLPNA Code of Ethics and Standards of Practice, as follows:

CLPNA Code of Ethics:

Principle 3: Responsibility to the Profession – Licensed Practical Nurses have a commitment to their profession and foster the respect and trust of their clients, health care colleagues and the public.

- 3.1 Maintain the standards of the profession and conduct themselves in a manner that upholds the integrity of the profession.

3.4 Promote workplace practices and policies that facilitate professional practice in accordance with the principles, standards, laws and regulations under which they are accountable.

Principle 4: Responsibility to Colleagues – Licensed Practical Nurses develop and maintain positive, collaborative relationships with nursing colleagues and other health professionals.

CLPNA Standards of Practice:

Standard 3: Service to the Public and Self-Regulation – Licensed Practical Nurses practice nursing in collaboration with clients and other members of the health care team to provide and improve health care services in the best interests of the public.

3.3 Support and contribute to an environment that promotes and supports safe, effective and ethical practice.

The Hearing Tribunal finds Mr. Garcia’s conduct did not uphold the standards in the profession or promote workplace practices that fostered respect and trust with his colleagues. Mr. Garcia’s conduct did not promote safe, effective and ethical practice in his conduct. His conduct undermined the trust C.T. had in him and negatively impacts the workplace environment, thus affecting safe and effective practice. His conduct breaches the above noted provisions of the Code of Ethics and Standards of Practice.

Allegation 1(b) and (c) - On or about February 10, 2019, made unwelcome advances or engaged in unwelcome contact with a co-worker, C.T., the particulars of which include: placing his hands, or rubbing his genitals, or both against C.T. without C.T.’s consent and making comments of a sexual nature to C.T. such as “your’re going to smell like me now.”

As noted above, where the evidence of C.T. and Mr. Garcia diverged, the Hearing Tribunal could not determine whose evidence it preferred. The Hearing Tribunal found Mr. Garcia to be equally credible to C.T. Mr. Garcia’s evidence was that C.T. initiated the hug in the alcove or near the exit sign on February 10, 2019. He denied rubbing his genitals against her or making comments of a sexual nature. C.T.’s evidence was that Mr. Garcia cornered her by the bench in the alcove, rubbed his genitals against her and said, “You are going to smell like me now.”

Given that there was no independent witness or independent evidence in favour of either C.T. or Mr. Garcia and given that the Hearing Tribunal found Mr. Garcia’s evidence to be credible, the Hearing Tribunal finds there is insufficient evidence to determine the conduct in the particulars of Allegation 1(b) or 1(c) occurred. The Complaints Director has not proven the particulars in Allegation 1(b) and (c) on a balance of probabilities and these particulars are dismissed.

**(10) Conclusion of the Hearing Tribunal**

Allegation 1(a) is proven on a balance of probabilities. The Hearing Tribunal finds the conduct in Allegation 1(a) constitutes unprofessional conduct, for the reasons noted above. The Hearing Tribunal finds the conduct in Allegation 1(b) and (c) has not been proven on a balance of probabilities.

The Hearing Tribunal will receive submissions from the parties on sanction with respect to Allegation 1(a). The Hearing Tribunal requests that the parties discuss the timing and method of providing submissions on penalty to the Hearing Tribunal. If the parties are unable to agree on a proposed procedure and timing, the Hearing Tribunal will make further directions as required.

DATED THE 22nd DAY OF AUGUST 2020.

**THE COLLEGE OF LICENSED PRACTICAL NURSES OF ALBERTA**



Patricia Standage, LPN  
Chair, Hearing Tribunal