

**IN THE MATTER OF A HEARING UNDER THE *HEALTH PROFESSIONS ACT* REGARDING THE
CONDUCT OF GEORGE ALUMA, LPN #36510, WHILE A MEMBER OF THE COLLEGE OF LICENSED
PRACTICAL NURSES OF ALBERTA**

DECISION OF THE HEARING TRIBUNAL

(1) Hearing

The Hearing was conducted at St. Albert Inn & Suites in St. Albert, Alberta on May 28 to 30, 2019 with the following individuals present:

Hearing Tribunal:

Kunal Sharma, LPN, Chairperson
Donna-Lee Wowk, LPN
James Lees, Public Member
Marg Hayne, Public Member

Independent Legal Counsel for the Hearing Tribunal:

Julie Gagnon
Mitchell Hayward, summer student, attending as an observer

Staff:

Ayla Akgungor, Legal Counsel for the Complaints Director
Evie Thorne, Legal Counsel for the Complaints Director
Sandy Davis, Complaints Director, College of Licensed Practical Nurses of Alberta (“CLPNA”)
Kevin Oudith, Complaints Consultant, CLPNA

Investigated Member:

George Aluma, LPN
Kathie Milne, 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

George Aluma (“Mr. Aluma”) was a Licensed Practical Nurse (“LPN”) within the meaning of the HPA at all material times, and more particularly, was registered with the CLPNA at the time of the complaint. Mr. Aluma has been registered as an LPN in Alberta since May 15, 2013.

On July 5, 2018, Sandy Davis, Complaints Director for the CLPNA received a complaint from Amanda Uhl, Unit Manager of Unit 51 at the Royal Alexandra Hospital. The complaint was received pursuant to s. 57 of the HPA. In the complaint Ms. Uhl stated that Mr. Aluma was found to be inappropriately touching another staff member on Unit 51. Mr. Aluma also called the staff member at home on her personal phone. Mr. Aluma was issued a one day suspension on June 25, 2018.

Mr. Aluma received notice of the complaint and the investigation by letter dated July 6, 2018. Ms. Davis also made a recommendation to Teresa Bateman, Senior Director of the CLPNA for an immediate suspension of Mr. Aluma’s practice permit. Ms. Davis advised Mr. Aluma he had an opportunity to make written submissions to Ms. Bateman until July 10, 2018. On July 9, 2018, Mr. Aluma made written submissions to Ms. Bateman. After reviewing all the documents Ms. Bateman decided not to proceed with an immediate suspension of Mr. Aluma’s practice permit.

In accordance with s. 55(2)(d) of the HPA, Ms. Davis appointed Judith Palyga, Investigator for the CLPNA (the “Investigator”) to investigate the complaint. The Investigator prepared and submitted an Investigation Report to the Complaints Director.

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

(4) Allegations

The Allegations in the Statement of Allegations are:

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

1. On or about May 11, 2018, engaged in inappropriate behavior when he touched co-worker CR’s breast with his hand, without her consent.
2. On or about May 25, 2018, engaged in inappropriate behavior when he touched co-worker CR’s breast with his hand, without her consent.

3. On or about May 28, 2018, attempted to contact co-worker CR by phone after being informed by his employer that an investigation was being conducted into CR's allegations, contrary to instructions not to speak to anyone."

(5) Exhibits

The following exhibits were entered at the hearing:

- Exhibit #1: Statement of Allegations
- Exhibit #2: Book of Agreed Exhibits
- Exhibit #3: Photographs (Taken by Amanda Uhl)
- Exhibit #4: Tab 1 of Documents of the Complaints Director (Typed notes from RAH's internal investigation by A. Uhl, dated May 28, 2018)
- Exhibit #5: Tab 2 of Documents of the Complaints Director (Investigation interview notes with Bryan Hamm dated May 28, 2018)
- Exhibit #6: Tab 3 of Documents of the Complaints Director (Investigation interview notes with Candace Racich dated May 29, 2018)
- Exhibit #7: Tab 4 of Documents of the Complaints Director (Investigation interview notes with George Aluma dated May 30, 2018)
- Exhibit #8: Tab 5 of Documents of the Complaints Director (Investigation interview notes with Sheila Deppner dated May 31, 2018)
- Exhibit #9: Tab 6 of Documents of the Complaints Director (Investigation interview notes with Candace Racich dated June 6, 2018)
- Exhibit #10: Tab 8 of Documents of the Complaints Director (Safety Incident Report filed by Candace Racich (Bettencourt))
- Exhibit #11: Tab 7 of Documents of the Complaints Director (Investigation interview notes with George Aluma dated June 12, 2018)
- Exhibit #12: Tab 10 of Documents of the Complaints Director (Photograph taken by Candace Racich of her green Grey's Anatomy scrubs)
- Exhibit #13: Tab 9 of Documents of the Complaints Director (Text messages from Candace Racich to Janice Howe dated May 28, 2018)
- Exhibit #14: Letter written by George Aluma to Ms. Bateman

(6) Witnesses

The following individuals were called as witnesses in the hearing:

Amanda Uhl, Unit Manager
Candace (Racich) Bettencourt ("Ms. Racich")
Bryan Hamm
Slavica Bozic
Sheila Deppner
Aldona Szulc

George Aluma

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:

Amanda Uhl

Amanda Uhl (“Ms. Uhl”) has been a Registered Nurse for approximately nine years. She has been the Unit Manager at the Royal Alexandra Hospital on Unit 51 for approximately one year and one month. Unit 51 is a medical inpatient unit with 32 staff. Ms. Uhl was supervisor to both Mr. Aluma and Candace (Racich) Bettencourt (“Ms. Racich”). Ms. Uhl provided evidence about the information collected during the employer’s investigation.

On May 28, 2018, Ms. Uhl reported to work at 0630 hours when Ms. Racich requested to speak with her privately. They went into the dictation room. Ms. Racich informed Ms. Uhl that since Unit 52 moved over to Unit 51, incidents started happening. Ms. Racich would be walking down the hallway and Mr. Aluma would go to nudge her and accidentally miss and nudge her breast instead. Ms. Racich told Ms. Uhl she thought nothing of it until approximately two weeks prior. Ms. Racich stated approximately two weeks before she was sitting at the nursing desk when Mr. Aluma approached her, sat in a chair, and then slid the chair up to her, placing his two legs around each side of her. He then proceeded to reach over and grab her breast. Ms. Racich turned around and said, “What are you doing?” and kind of covered herself. Mr. Aluma then walked away. Ms. Racich continued her work after because she did not know how to respond. When Ms. Racich was informing Ms. Uhl of the incident, Ms. Racich did not know the date, just that it happened “two weeks ago”. They later investigated and found a hard date.

Ms. Racich then proceeded to tell Ms. Uhl about an incident on May 25, 2018. Ms. Racich was standing at the “labels on the unit” when Mr. Aluma came up to her and grabbed her breast again. Ms. Racich slapped him on the chest, pushed him away and said, “What are you doing?” Ms. Racich said Mr. Aluma then smiled and walked off the Unit. Ms. Uhl noted Ms. Racich’s demeanour throughout her disclosure was calm.

In testimony, Ms. Uhl also mentioned Ms. Racich stated she did not come forward earlier because she had past issues with Human Resources and she feared she may get into further trouble.

Ms. Uhl stated she notified Mr. Aluma on May 28, 2018 at 1300 hours that the employer was going to be commencing an investigation regarding an incident on the Unit. Ms. Uhl further relayed to Mr. Aluma that the matters of this investigation must remain confidential. Mr. Aluma asked Ms. Uhl who the complaint came from and she notified him it came from Ms. Racich.

Approximately 20 minutes after speaking with Mr. Aluma, Ms. Racich phoned Ms. Uhl and informed her Mr. Aluma had just tried to phone her. At 1330 hours, Ms. Uhl approached Mr. Aluma in the lunch room and notified him again that under no circumstances he should call Ms. Racich. Mr. Aluma agreed not to call Ms. Racich and to keep the matter confidential. As Ms. Uhl was leaving the lunchroom Mr. Aluma stated, "I should know people better before I play with them."

On May 28, 2018, Ms. Uhl interviewed Bryan Hamm, Registered Nurse in the presence of Tim Tsounis, Patient Care Manager and Michael Stoddard, Human Resources Advisor. Mr. Hamm confirmed to Ms. Uhl he heard a slap on May 25; however, he had thought Mr. Aluma and Ms. Racich were joking. He indicated his back was facing them so he could not see anything. Ms. Uhl's investigation notes stated that at 2100 hours on May 25, Candace told Bryan about the situation.

On May 29, 2018, Ms. Uhl interviewed Ms. Racich in the presence of Mr. Tsounis and Mr. Stoddard. Ms. Uhl stated Ms. Racich relayed the same information as the May 28 disclosure; however, she was upset speaking about the events.

On May 30, 2018, Ms. Uhl interviewed Mr. Aluma in the presence of Mr. Tsounis, Mr. Stoddard and Bree Ann Barr, AUPE representative for Mr. Aluma. In this interview, Mr. Aluma indicated to Ms. Uhl that on May 11 he was sitting at the computers and Ms. Racich approached him. He stated he found a package of cigarettes and he put them into Ms. Racich's scrub side pocket. Mr. Aluma further indicated Sheila Deppner was present and he identified her by her tattoos.

During the interview, Mr. Aluma stated on May 25, he was leaving Unit 53 and came to Unit 51. Ms. Racich had requested to see photos of his kids, so he went to the back room to get his phone. He approached Ms. Racich but she was on her phone so he poked her side near the breast with two pens to get her attention. Ms. Racich then pushed or slapped him, he indicated Bryan Hamm laughed and Mr. Aluma then screamed as a reaction and did not hear what she said. Ms. Uhl stated Mr. Aluma mentioned it was early in the morning so he said good morning to some people. Ms. Uhl was confused by this, because the incident happened at night. Ms. Uhl indicated they told Mr. Aluma this had occurred in the evening and he stated, "I get mixed up with the times."

On May 31, 2018, Ms. Uhl interviewed Sheila Deppner, LPN in the presence of Mr. Stoddard. Ms. Deppner informed Ms. Uhl she did not recall any conversation with Mr. Aluma regarding cigarettes on May 11.

On June 6, 2018, Ms. Racich was interviewed again in the presence of Mr. Stoddard and Mr. Tsounis. On June 12, 2018, at 0906 hours, Mr. Aluma was interviewed again in the presence of Ms. Uhl, Mr. Stoddard, Mr. Tsounis and Jerry Woods. In his second interview, Mr. Aluma retracted his statement about Ms. Deppner being present when Ms. Uhl informed him Ms. Deppner told her she was not present that day. Mr. Aluma then stated he can get people mixed up and “maybe it wasn’t Sheila”. The remainder of Mr. Aluma’s story remained consistent.

Ms. Uhl’s evidence was, prior to this, Ms. Racich had not come forward with any complaints against Mr. Aluma. In answering questions about the MySafetyNet document (Exhibit 10), Ms. Uhl stated there was some uncertainty in filling it out. Ms. Racich filled out the first section and Ms. Uhl filled out the rest. The document asks for the “root cause” and they break it down to look for the root cause of what has happened. In Ms. Uhl’s MySafetyNet Report, she recorded that the cause of the incident could have been poor personal boundaries which may have been caused by too much casual interaction in the workplace.

Ms. Uhl stated after all the interviews were conducted, it was determined, based on a balance of probabilities there was some type of incident involving sexual misconduct between Mr. Aluma and Ms. Racich. Despite discrepancies in the time frame, there was confirmation from both parties that an interaction took place on both dates. Ms. Uhl and other Human Resources personnel came to the conclusion that a one day suspension would be appropriate because there have been no other incidents reported between Mr. Aluma and Ms. Racich.

Candace Racich

Ms. Racich has been an LPN for eight years. She initially worked on Unit 52 on a temporary basis, starting in 2014. Unit 52 became Unit 51 and she became full-time permanent in 2015. She met Mr. Aluma on Unit 52 where she stated they developed a friendly relationship. Ms. Racich described how she would joke around, poke and kick Mr. Aluma and he would walk around with his arm around her. Mr. Aluma was very friendly with her. They would goof around on the Unit and the relationship was not 100% professional all the time, although it was strictly a work relationship. Ms. Racich said, before this, she had no previous disagreements or concerns with Mr. Aluma.

On May 11, 2018, Ms. Racich worked the A shift from 0700 to 1915 hours with four additional hours of overtime until 2315 hours. In reference to Exhibit 3, Ms. Racich stated she was sitting on the left chair on the station in front of the computer. It was roughly about 2100 to 2130 hours. At the time the lights on the Unit were turned off. She noticed Mr. Aluma was looking at the wall where the assignment sheets are kept. Mr. Aluma then sat down on the chair next to

Ms. Racich and put both his legs around her legs. Mr. Aluma then reached out with an open hand and grabbed Ms. Racich's right breast. She stated he squeezed her breast. Ms. Racich said she was shocked and put her arms around her chest. Ms. Racich said to Mr. Aluma, "What are you doing?" Mr. Aluma smiled and left the Unit. This interaction took only minutes and there was no one around at the time. Ms. Racich finished charting and went home. She determined the time based on when the lights are usually shut off to get the patients settled.

Ms. Racich noted she was wearing her "Grey's Anatomy" green scrubs (Exhibit 12). Ms. Racich confirmed she was a smoker at the time of the incident. She often had her cigarettes in her pocket or in her bag. She indicated she did not recall having any discussions about her cigarettes on May 11, 2018.

Ms. Racich did not initially report the incident to management. She had just gotten a new manager and had issues with the previous manager. She was scared. However, on May 12 at approximately 2000 hours, Ms. Racich told her co-worker and friend, Aldona Szulc, about the incident. Ms. Szulc told Ms. Racich she should "smash him, that this isn't right, and that something needs to be done about it."

On May 25, 2018, Ms. Racich said she was standing in the nursing station by the grey filing cabinet. She was getting labels, as she had just received a patient admission. Bryan Hamm and Adrianna were sitting on the chairs with their backs to Ms. Racich. Slavica Bozic was standing on the opposite side of the desk. Someone else was standing in front of Bryan, but she cannot remember who it was. The Unit lights were turned off. Ms. Racich said she made a quarter to a half turn when she saw Mr. Aluma and she was a little shocked to see him on the Unit. Mr. Aluma then walked over to Ms. Racich, stood at an angle, and grabbed her right breast with his left hand. His hand was open handed and he squeezed. Ms. Racich put her left arm over her breasts, slapped Mr. Aluma's chest, pushing him away and said sternly, "What are you doing?" Mr. Aluma smiled and walked away. She had not had any interactions with Mr. Aluma between May 11 and May 25. Mr. Aluma was in scrubs. Ms. Racich recalls the incident occurred sometime around 2100 to 2200 hours. She ascertained the time because the lights were off.

Later during the shift, Ms. Racich told Mr. Hamm, Ms. Bozic, and a person named "Bev" about the incident while they were in the medication room. Mr. Hamm informed Ms. Racich he had heard her say, "What are you doing?" but did not know what it was in reference to. Ms. Bozic told Ms. Racich she should grab Mr. Aluma by the scruff of his shirt and tell him that it is not appropriate behaviour. Over the next few days, Ms. Racich spoke with, and confided in, her co-workers about the incident.

The incident occurred on a Friday night. Ms. Uhl did not work again until Monday morning. On May 28, 2018 (the Monday), Ms. Racich notified Ms. Uhl of the issues pertaining to Mr. Aluma. She told Ms. Uhl there had been two incidents. Ms. Uhl informed Ms. Racich she had never

dealt with a situation like this before, she was unsure how to go forward, and would update her accordingly.

Ms. Racich received a call from an unknown phone number and did not answer the phone. Ms. Racich texted with Janice, the Unit Clerk, who confirmed the call came from Mr. Aluma (Exhibit 13). Ms. Racich immediately notified Ms. Uhl regarding the same.

In cross-examination, Ms. Racich confirmed there had been a six month period where Mr. Aluma would graze or nudge her breasts. At the time these incidents occurred, Ms. Racich presumed them to be an accident and did not think of it as anything sexual, until the incidents happened.

Ms. Racich indicated it was not possible she left her cigarettes on the computer desk on May 11, 2018. Ms. Racich was asked about Ms. Uhl's interview notes regarding her (Exhibit 9). In response to the question, "Did George place the cigarettes in your pockets?", Ms. Uhl recorded the response as: "Wouldn't be surprised if he put a pack of cigarettes. I wouldn't recall. I wouldn't be surprised." Ms. Racich indicated she was referring to a different time, not May 11.

Ms. Racich noted she confided in Aldona because she is her best friend. Aldona did not advise her to report it to her employer at the time. She did not tell anyone else because she hoped it would go away.

When cross-examined about the May 25 allegation, Ms. Racich confirmed the incident happened between 2100 and 2130 hours, based on the fact the lights were off. She stated Mr. Aluma did not poke her with a pen. She was not on her phone at the time of the incident as she was dealing with a patient admission. She talked to her colleagues shortly after the incident. Bryan Hamm offered to talk to Mr. Aluma as a mediator. She did not think it was Mr. Hamm's role. At the end of the weekend, when her manager came in on Monday, Ms. Racich disclosed the events to her.

Ms. Racich was cross-examined about why she did not immediately say something in front of Mr. Aluma and her co-workers. She stated she was in shock. She was questioned about why she did not prepare a MySafetyNet report at the time and said it did not occur to her until later after she spoke to her manager.

Ms. Racich confirmed she and Mr. Aluma often spoke about his kids but could not recall a conversation in April 2018 where she told him she would like to look at pictures of his kids.

Bryan Hamm

Mr. Hamm has been a Registered Nurse since 2014 and has worked on Unit 51 for 4.5 years. Ms. Racich and Mr. Hamm were colleagues.

On May 25, 2018, Mr. Hamm worked a B shift from 1900 to 0715 hours with Ms. Racich. Mr. Hamm was checking charts in the nursing station. Slavica Bozic and Aldona Szulc were both there. Mr. Hamm indicated they were positioned in front of a wall and does not believe they could see into the nursing station area. A Unit Clerk (Adrianna or Megan) was sitting next to him. Ms. Racich was standing behind Mr. Hamm. Mr. Hamm said he saw Mr. Aluma in scrubs on the Unit. Mr. Hamm could not pin point the exact time line, but said it was between 1900 and 2300 hours. Mr. Hamm said he heard a loud slap and turned his head to the left and asked himself, "What was that about?" Mr. Hamm said he saw Mr. Aluma flinching back. Mr. Hamm said he did not hear Mr. Aluma scream. Ms. Racich had a grimace on her face and said to Mr. Aluma, "What are you doing?" Mr. Hamm did not observe what took place between Mr. Aluma and Ms. Racich. He acknowledged during cross-examination it is a possibility Ms. Racich slapped Mr. Aluma in response to being poked with a pen. However, he stated he did not believe this was probable.

Ms. Racich then told Mr. Hamm in the presence of Ms. Bozic and Ms. Szulc that Mr. Aluma had pinched her breast area. Ms. Racich further informed him Mr. Aluma had grabbed her breast on one earlier occasion and it had all started with subtle nudging. Ms. Racich also said she wanted this behavior to stop. Mr. Hamm offered two options to Ms. Racich: he could act as a mediator between Mr. Aluma and Ms. Racich or Ms. Racich could report the incident to Ms. Uhl. Ultimately, Ms. Racich chose the latter.

Mr. Hamm did not hear Mr. Aluma offer to show pictures of his children to Ms. Racich or anyone else on Unit 51 on May 25.

Mr. Hamm said Ms. Racich would joke with him and other people in a sexual manner, although he noted it depended on who she was joking around with. Mr. Hamm said he finds Ms. Racich friendly with a good sense of humor. Mr. Hamm also described Ms. Racich as having a volatile personality and that her emotional mood is unstable. Mr. Hamm said he was unaware of any previous animosity between Mr. Aluma and Ms. Racich.

Mr. Hamm could not recall if the Unit lights were off at the time of the incident. He described Ms. Racich's demeanour as slightly disturbed but calm during the disclosure on May 25.

Slavica Bozic

Ms. Bozic has been an LPN since 2003. She has worked on Unit 51 at the Royal Alexandra Hospital since 2010. Ms. Bozic did not directly witness either of the incidents in question. However, she was a part of a conversation that took place in the medication room on Unit 51 during which Ms. Racich disclosed to her the allegations at hand.

Ms. Bozic said she is not aware of any animosity between Ms. Racich and Mr. Aluma. Ms. Bozic also stated both Mr. Aluma and Ms. Racich have been respectful towards her. According to Ms. Bozic, staff would joke around on the Unit and “maybe the joking went too far.”

In the medication room on May 25, Ms. Bozic said Ms. Racich informed her of the actions of Mr. Aluma. Ms. Racich told her at first Mr. Aluma would subtly nudge her breasts while they were joking together. Then Ms. Racich informed her of the May 11 and May 25 incidents where Mr. Aluma grabbed Ms. Racich’s breast. Ms. Bozic described Ms. Racich’s demeanour as calm. Ms. Bozic also said when she heard of these incidents she was surprised as she would not suspect something like this from Mr. Aluma.

Sheila Deppner

Ms. Deppner has been a LPN for 14 years at the Royal Alexandra Hospital. Ms. Deppner has known both Mr. Aluma and Ms. Racich for approximately three years. Ms. Deppner is unaware of any animosity between them. Ms. Deppner acknowledged she has tattoos on her arms and stated she previously smoked cigarettes.

On May 11, 2018, Ms. Deppner worked the A shift from 0700 to 1915 hours and had spent time at the desk where the allegation took place. Ms. Deppner did not recall anything unusual. Ms. Deppner said she did not recall any interaction with either Mr. Aluma or Ms. Racich that day. Ms. Deppner does not recall being asked by Mr. Aluma any questions or comments regarding cigarettes on May 11, 2018.

Ms. Deppner testified there is a lot of joking around on the Unit and friendly physical interactions between staff, which are coping mechanisms due to the stressful nature of their work. She said nurses are “touchy feely” people: if someone is having a bad day we hug them, rub their back, put an arm around their shoulder. It is always done in good fun and she has never seen it get out of hand. Ms. Deppner said she has not experienced any inappropriate sexual conduct from Mr. Aluma.

Aldona Szulc

Ms. Szulc has been an LPN since 2009. She has been employed at the Royal Alexandra Hospital on Unit 51 since 2010. She did not directly witness the events, but she testified the incidents were disclosed to her by Ms. Racich.

Ms. Szulc said she is close friends with Ms. Racich and she had coached her with nursing skills when she started working on the Unit. Ms. Szulc considers herself as Ms. Racich’s “work mom”.

On May 11, 2018, Ms. Szulc was on vacation. On either May 12 or May 13, Ms. Racich confided in her that Mr. Aluma had grabbed her breast on May 11. Ms. Racich further told Ms. Szulc that

in the months prior, Mr. Aluma would graze or nudge her breasts while they were joking together. This disclosure took place over the course of a smoke break at approximately 2000-2100 hours. Ms. Szulc said she was surprised to hear this and asked Ms. Racich if it was done on purpose. Ms. Racich was upset and serious and said Mr. Aluma had done it purposely. Ms. Szulc told Ms. Racich if she was in her position she would wait it out. If it happened again, she would report it, but if it could resolve on its own, then she would just leave it.

Ms. Szulc believes she was away on a personal day on May 25, 2018. On May 26, Ms. Racich told Ms. Szulc about the situation with Mr. Aluma. She described Ms. Racich's demeanour as nervous and anxious. They talked about it with Mr. Hamm. In cross-examination Ms. Szulc stated it would not make sense to report the incident to security because the matter was not urgent. She indicated if the incident was more severe than just touching her breast, then it might be appropriate to call security.

George Aluma

Mr. Aluma moved to Canada in 2003. Mr. Aluma has been an LPN for six years. Mr. Aluma finished his nursing diploma from Norquest College in 2013. Prior to this, he was working as a Health Care Aide in Toronto. Mr. Aluma is married and has four children. In June 2013, Mr. Aluma started working at the Royal Alexandra Hospital on Unit 51. Mr. Aluma indicated Unit 51 is his "home Unit," however, he works on all medical units in the hospital. Mr. Aluma says he has never had any previous complaints against him, nor has he ever been disciplined at work. Mr. Aluma has known Ms. Racich since he started working at the Royal Alexandra Hospital as co-workers and friends.

On May 11, 2018, Mr. Aluma worked. He was booked for two shifts and moved from Unit to Unit. Mr. Aluma indicated he would keep his shoes and food on Unit 51 because it was his home unit. During his dinner break, Mr. Aluma returned to Unit 51 to eat. Around 2000 hours, he went to the staff room and had his dinner. He washed his hands in the medication room, then he sat on the right chair at the desk (indicated on the first photograph in Exhibit 3). Mr. Aluma stated he sat here to review the "hour book" which has the employee schedules. He remembers people were in the general vicinity, but he cannot recall specifically who was around. He then saw a pack of cigarettes on the desk and asked randomly out loud (not directed towards anyone in specific), "Whose cigarettes are these?" Mr. Aluma indicated another employee walked by and stated that the cigarette pack was Ms. Racich's. Mr. Aluma noted he initially thought the person who responded to him was Sheila, but he may be wrong. It could also be a woman named Shelley. But ultimately, he remained unsure of who responded to him.

Mr. Aluma stated Ms. Racich then approached him at the desk. Mr. Aluma then began to joke with Ms. Racich, asking her how she would educate her patients on health when she in fact smokes. Ms. Racich then sat down next to Mr. Aluma. Mr. Aluma then reached over and began

to put the package of cigarettes into her pocket. Before he could fully do so, Ms. Racich took the package of cigarettes and left. Mr. Aluma then put the binder back and left the Unit to return to work. Mr. Aluma could not recall whether the hallway lights were on, but he did note the lights above the computer were on. Mr. Aluma believed the entire interaction took approximately two minutes. Ms. Racich did not show any signs of being upset.

On May 25, 2018, Mr. Aluma worked on Unit 53 from 0845 hours to 1915 hours. Prior to his shift beginning on Unit 53, he dropped his backpack and shoes off at Unit 51 in the staff room. He did not return until the end of his shift. Mr. Aluma left Unit 53 around 1920 hours and arrived on Unit 51 at approximately 1925 hours. Mr. Aluma then walked by the Nursing Station where he saw Ms. Racich beside the assignment sheet on the whiteboard. Mr. Aluma stated he had previously promised to show Ms. Racich photographs of his kids on their birthday which is on May 28.

Mr. Aluma stated Ms. Racich's name in order to get her attention. At the time, Ms. Racich was on her phone and did not respond. Mr. Aluma was holding two pens in his left hand and he used the pens to poke near the lower ribcage area of Ms. Racich in order to get her attention. Mr. Aluma testified the nursing station is an open area and it would be difficult for him to angle his body in a position such that no one else could see their interaction.

After being poked, Ms. Racich reacted by slapping Mr. Aluma's chest. Mr. Aluma exclaimed "ouch" and stumbled backward. Mr. Aluma acknowledged Mr. Hamm was there, sitting in a chair, and there were other unidentified staff members. Mr. Aluma heard Mr. Hamm kind of laugh. Mr. Aluma did not respond after being hit. He then walked to the staff room to pick up his backpack and leave the Unit. He left the Unit at approximately 1930 hours. After she slapped him on the chest, he thought she was probably not in a good mood.

On May 28, 2018, Mr. Aluma was notified by his manager, Ms. Uhl, that Ms. Racich had made an allegation against him. Mr. Aluma was notified to keep this matter confidential and not to speak to anyone regarding this issue. Mr. Aluma interpreted this to mean to not to speak to anyone who was not involved in the issue. He did not realize Ms. Uhl had meant he should not contact Ms. Racich, since Ms. Racich knew about the incident. He decided he should call Ms. Racich to apologize for poking her.

During cross-examination, Mr. Aluma was questioned about the May 11 incident. He indicated he made the comment about "Whose cigarettes are these?" while facing the computer and did not look around behind him. He was asked about his prior comment that the person said, "Cigarettes are expensive." Although he initially thought it was Sheila who responded to him and who said, "Cigarettes are expensive"; he stated it could have been Shelly or someone else and he is not good with names. He acknowledged he never took steps to confirm who the person was who responded to him. He did not recall who the person was that responded. Mr.

Aluma also acknowledged it was not common for staff to leave cigarettes on the desk. It is usually patient items left on the desk. He was not caring for any patients on Unit 51 that day.

Mr. Aluma was questioned about his statement of poking Ms. Racich. Mr. Aluma stated he poked Ms. Racich softly. Mr. Aluma testified Ms. Racich was holding the phone in her hands, with her arms down covering her sides. Mr. Aluma poked Ms. Racich on the ribs. However, it was pointed out that the area he described poking would have been covered if she were texting with her arms by her sides in the manner Mr. Aluma had indicated in his testimony. Mr. Aluma then attempted to clarify that he reached under Ms. Racich's arms. He poked her under her arms, below her elbows. He stated it may have been the ribs or may not have been the ribs.

With respect to his comment that his boys' birthday was on May 28, Mr. Aluma noted Ms. Racich had asked to see photographs and he had told her he didn't have current pictures but their birthday was coming up. He had taken different photographs of his children prior to their birthday and wanted to show these to Ms. Racich on May 25.

Mr. Aluma acknowledged he rarely sees Ms. Racich at work since the Unit changed over from Unit 52 to Unit 51. He states he has never had any issues with Ms. Racich in the past.

(7) Summary of Closing Submissions by the Parties

Closing Submissions on Behalf of the Complaints Director

Ms. Akgungor noted the Hearing Tribunal is faced with a challenging task of assessing witness credibility, given the diametrically opposed version of events. Ms. Akgungor reviewed several factors to consider when assessing credibility: demeanor of the witness, memory, plausibility, internal consistency, external consistency, motivation, and ability to perceive.

With respect to the incidents of May 11, 2018, it is common ground that both Ms. Racich and Mr. Aluma worked that day. Both acknowledge an incident occurred. Ms. Racich believes the incident occurred around 2100 to 2130 hours. Mr. Aluma's evidence indicates the incident was at approximately 2030 hours. Ms. Akgungor reviewed the different versions of events between Ms. Racich and Mr. Aluma.

Ms. Akgungor noted Mr. Aluma initially identified Sheila Deppner as the person who was present on May 11. He identified her as the nurse with the tattoos. He made specific reference to something identifiable about the individual. When Mr. Aluma was informed that Ms. Deppner denied being present at the time, he indicated that he must have mistaken Ms. Deppner for another person. During his evidence, Mr. Aluma then indicated it may have been Shelly, because her name is close to Sheila. Ms. Akgungor submitted this did not add up. After working with individuals for three years, Mr. Aluma would not be expected to be confused about their identity. Ms. Akgungor noted Mr. Aluma took no steps to verify the identity of the

individual. Although he was instructed during the investigation not to talk to anyone, he could have taken other steps such as reviewing a staff list and identifying the name to management or seeking his union's assistance.

Ms. Akgungor also submitted it was odd Mr. Aluma would ask a question while facing the computer and not turn to identify somebody or see if someone was there. In addition, in his evidence he indicated the person walked by and indicated the cigarettes belonged to Ms. Racich, but in his original version of events he indicated Ms. Deppner was part of a conversation and said, "Cigarettes are expensive".

With respect to May 25, 2018, both Ms. Racich and Mr. Aluma agree an incident took place at the nursing station on Unit 51 near the whiteboard by the grey filing cabinet. Mr. Hamm was at the nursing station at the time of the incident. Each of these witnesses confirmed there was a slap. Ms. Racich stated, "What are you doing?" and Mr. Hamm overheard this statement. Mr. Aluma did not hear the statement but said "ouch" or screamed when he was slapped.

Ms. Akgungor acknowledged the discrepancy in the timeline. Ms. Racich believes the incident occurred between 2100 and 2130 hours; however, Mr. Aluma's shift ended at 1915 hours. However, she submitted it was not really a conflict that needed resolve for the purpose of determining what occurred. Whether an incident took place at 1930 or 2100 hours, it was established an incident occurred.

Ms. Akgungor reviewed the evidence of Ms. Racich and Mr. Aluma. Ms. Akgungor noted the Complaints Director's concerns regarding Mr. Aluma's evidence. His evidence was he poked Ms. Racich softly and the response he got was a hard slap on the chest which led him to step backwards and say ouch. Ms. Racich gave evidence that her response was stern. Ms. Akgungor noted the Hearing Tribunal should ask itself if the response is proportional to being softly poked. Ms. Akgungor also submitted the evidence showed Ms. Racich and Mr. Aluma had a relationship where they poked each other and joked around. She submitted Ms. Racich would know the difference between a soft poke and someone grabbing her breast. In addition, Mr. Hamm testified he heard the slap and then turned. He described Ms. Racich as having a grimace on her face. In addition, Mr. Aluma's evidence about where he poked Ms. Racich was not consistent and his statement that he poked her ribs could not be correct because her arms would have been covering her ribs.

Ms. Akgungor reviewed case law regarding myths and stereotypes in cases of allegations of sexual misconduct. She cautioned the Hearing Tribunal to not give weight to arguments about how a victim would be expected to respond.

Ms. Akgungor submitted the allegations were proven and constituted unprofessional conduct. She noted the conduct breaches the Standards of Practice and Code of Ethics and is conduct that harms the integrity of the regulated profession. For Allegations 1 and 2, Ms. Akgungor

pointed to Standards of Practice 1.9, 3.3 and 4.6 and section 4.2 of the Code of Ethics, as well as conduct that harms the integrity of the regulated profession. For Allegation 3, she submitted the conduct fell under the definition of conduct that harms the integrity of the regulated profession.

Closing Submissions on Behalf of Mr. Aluma

Ms. Milne urged the Hearing Tribunal to thoroughly review the evidence and testimony presented. She stated an assessment of credibility would be required and the standard of proof is commensurate with the allegations levied against Mr. Aluma. No one except Ms. Racich and Mr. Aluma witnessed the events. All the witnesses testified they were not aware of any animosity between Ms. Racich and Mr. Aluma. They were friends and co-workers and would joke around and talk about Mr. Aluma's family and children.

Ms. Milne noted Mr. Aluma advised he was forthright and honest in his answers and he would take responsibility for his actions. This is supported by his admission to Allegation 3. His response to the CLPNA (Exhibit 14) has no significant differences from his testimony. Ms. Milne also submitted the employer's investigation was less than adequate.

With respect to the issue of whether the lights were on or off on May 11 or May 25, Ms. Milne stated great emphasis was placed on this; however, there is no proof one way or another. There is no specific time the lights are turned off, they do not turn off automatically and no one staff is assigned to turn them off.

Ms. Milne reviewed Ms. Racich's evidence regarding the cigarettes and her response when asked about the reference in Ms. Uhl's notes. She also stated Ms. Racich noted a number of reasons for not reporting the incidents right away and submitted these were confusing and somewhat questionable responses. She noted Mr. Hamm's references to Ms. Racich's volatile personality and emotional moods. He testified Ms. Racich had joked with him in a sexually suggestive manner and she states what is on her mind and if she doesn't approve, she will be vocal.

With respect to the incident of May 25, Ms. Milne questioned whether Ms. Racich's version was plausible given the likely chance of being seen by co-workers in the area at the time. Why would Mr. Aluma risk his job, his reputation and what could amount to a potentially huge impact on his family.

Ms. Milne submitted given the seriousness of the allegations, the standard of proof required in support of a finding of guilt is higher than in other circumstances of a less serious nature. Ms. Milne provided cases for the Hearing Tribunal's review, which she reviewed in her submissions.

Ms. Milne stated certain inconsistencies in testimony do not mean the rest of the witness's testimony is untruthful. For example, the fact Mr. Aluma did not recall if it was Sheila or Shelly makes no major difference to the rest of the information he has put before the Hearing Tribunal.

Ms. Milne disagreed with Ms. Akgungor's submission that the discrepancy in time did not have any significant impact. She noted the difference in time has the potential to have a significant impact. The potential of having six to nine staff being in the area at the time Mr. Aluma states he was on the Unit, increases the risk of being caught exponentially. If it happened at the time put forward by Ms. Racich, there is less chance of being caught.

Ms. Milne submitted it was plausible Ms. Racich reacted forcefully when poked abruptly and unexpectedly. Ms. Racich's reaction does not substantiate the allegation that Mr. Aluma grabbed her breast. Ms. Milne again urged the Hearing Tribunal to consider the reasons Ms. Racich gave for her delay in reporting.

Reply Submissions on behalf of the Complaints Director

In reply, Ms. Akgungor addressed the issue of standard of proof and noted there is one standard of proof, which is the balance of probabilities.

Questions and Comments from Independent Legal Counsel

Ms. Gagnon noted on the record the legal advice she would provide the Hearing Tribunal was that the decision of the Supreme Court of Canada in *F.H. v. McDougall*, 2008 SCC 53 establishes there is only one civil standard of proof, which is the balance of probabilities. The parties were provided an opportunity to make further submissions on this point, but did not provide anything further.

Ms. Gagnon asked some clarification questions regarding the submissions of the parties, including which provisions of the HPA, the Standards of Practice and the Code of Ethics might apply to the Allegations if the Hearing Tribunal finds the conduct constitutes unprofessional conduct.

(8) Decision of the Hearing Tribunal

The onus is on the CLPNA to establish the facts as alleged in the Statement of Claim occurred, and that the conduct, if proven, rises to the level of unprofessional conduct as defined in the HPA. The Hearing Tribunal accepts there is only one standard of proof in civil cases being the balance of probabilities. The Supreme Court of Canada in *F.H. v. McDougall*, stated as follows:

[40] Like the House of Lords, I think it is time to say, once and for all in Canada, that there is only one civil standard of proof at common law and that is proof on a balance of probabilities. Of course, context is all important and a judge should not be unmindful, where appropriate, of inherent probabilities or improbabilities or the seriousness of the allegations or consequences. However, these considerations do not change the standard of proof ...

[45] To suggest that depending upon the seriousness, the evidence in the civil case must be scrutinized with greater care implies that in less serious cases the evidence need not be scrutinized with such care. I think it is inappropriate to say that there are legally recognized different levels of scrutiny of the evidence depending upon the seriousness of the case. There is only one legal rule and that is that in all cases, evidence must be scrutinized with care by the trial judge.

[46] Similarly, evidence must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test. But again, there is no objective standard to measure sufficiency. In serious cases, like the present, judges may be faced with evidence of events that are alleged to have occurred many years before, where there is little other evidence than that of the plaintiff and defendant. As difficult as the task may be, the judge must make a decision. If a responsible judge finds for the plaintiff, it must be accepted that the evidence was sufficiently clear, convincing and cogent to that judge that the plaintiff satisfied the balance of probabilities test.

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 Allegations 1, 2 and 3 are proven and the conduct for all three allegations constitutes unprofessional conduct. The Hearing Tribunal's findings and reasons are set out below.

(9) Hearing Tribunal Findings and Reasons

The Hearing Tribunal carefully reviewed and considered all witness evidence and exhibits. The Hearing Tribunal finds Ms. Uhl, Ms. Bozic, Ms. Deppner and Ms. Szulc to have provided evidence to the best of their recollection, however, none of these witnesses had any direct involvement in the incidents. As such, limited weight was placed on their evidence.

With respect to the interview notes taken by Ms. Uhl, the Hearing Tribunal finds the notes are evidence only of what Ms. Uhl recorded during the interviews. They do not provide any direct evidence of what occurred during the incidents. In addition, the notes are not a complete transcript of the interviews. Limited weight was placed on these notes.

The only two witnesses with direct knowledge of the events of May 11, 2018 and May 25, 2018 are Mr. Aluma and Ms. Racich. Mr. Hamm was present on May 25, 2018 and had some relevant evidence although he did not see the incident. Their evidence is reviewed in more detail below.

The Hearing Tribunal reviewed and considered the cases cited by both parties regarding findings of credibility. The Hearing Tribunal considered as well, the cases cited by Ms. Akgungor regarding myths and assumptions around reporting by victims and conduct of victims in cases involving allegations of inappropriate sexual behavior or sexual assault. In *R. v. Seaboyer*, [1991] 2 S.C.R., Justice L’Heureux-Dubé noted two of these myths as follows, at 653:

Emotionality of Females: Females are assumed to be “more emotional” than males. The expectation is that if a woman is raped, she will get hysterical during the event and she will be visibly upset afterward. If she is able to “retain her cool,” then people assume that “nothing happened”...

Reporting Rape: Two conflicting expectations exist concerning the reporting of rape. One is that if a woman is raped she will be too upset and ashamed to report it, and hence most of the time this crime goes unreported. The other is that if a woman is raped she will be so upset that she will report it. Both expectations exist simultaneously.

Similarly, in *R. v. C.P.* 2016 ONCJ 879, the Court held:

[91] I reject the defence argument that the fact that Ms E.H. did not call out for help is inconsistent with her evidence that the defendant sexually assaulted her. I also reject the defence argument that her not running reflects adversely on her credibility. People can react in different ways to a sexual assault. A complainant in a sexual assault trial is not automatically unbelievable because she did not cry out or raise a “hue and cry”. In saying this, I am not suggesting that a trier of fact should uncritically accept any evidence a complainant gives about why she reacted the way she did without any scrutiny. A trier of fact must scrutinize the evidence and the complainant’s reaction in the context of all the evidence. ...

Allegation 1: On or about May 11, 2018, engaged in inappropriate behavior when he touched co-worker CR’s breast with his hand, without her consent.

Both Ms. Racich and Mr. Aluma worked on May 11, 2018, at the Royal Alexandra Hospital. This was confirmed by their testimony and shift schedules set out in Exhibit 2. There is also common

ground that there was some form of interaction at the nursing desk during their respective shifts on May 11.

Ms. Racich worked on Unit 51 from 0700 to 1915 hours and then she worked four hours of overtime from 1915 to 2300 hours. Mr. Aluma worked on Unit 51 from 1900 to 2300 hours and then on Unit 41 for an overnight shift from 2315 to 0715 hours. Ms. Racich places the time of the incident in question around 2100 to 2130 hours. However, Mr. Aluma said that he went to the unit around 2000 hours and was there for about 30 minutes. He ate his supper and then proceeded to the desk near the nursing station. He estimated the interaction between them lasted about two minutes. This would place the time of the incident around 2030 hours. There is about a half an hour time discrepancy between Ms. Racich's estimate of 2100 hours and Mr. Aluma's time estimate of 2030 hours. The Hearing Tribunal finds it does not need to determine the exact time of the incident as both parties acknowledge an incident occurred.

Ms. Racich stated she was sitting at the desk on the left hand side chair looking at the computer. When she turned a quarter turn, she saw Mr. Aluma standing and looking at the assignment board. He then came over to her, moved the chair to face her, and sat with his legs on either side of hers. Mr. Aluma then leaned over and with an open palm reached out and grabbed her breast. Ms. Racich testified that Mr. Aluma squeezed her breast without her consent. In response Ms. Racich sat back, covered her chest, and said to Mr. Aluma, "What are you doing?" Mr. Aluma smiled, got up and left. Ms. Racich continued charting, finished her shift and went home. Ms. Racich testified that no words were exchanged and that the entire interaction only took about two minutes.

Mr. Aluma has a different version of events. Mr. Aluma testified he was already sitting at the desk at the nursing station in the chair on the right-hand side looking at the hour book. He noticed a pack of cigarettes on the desk to his left and while sitting facing forward towards the computer monitor he asked, "Whose cigarettes are these?" Mr. Aluma indicated someone answered his question and that person had stated the cigarettes belonged to Ms. Racich. He also acknowledged in cross-examination a further statement made by the person that "cigarettes are expensive". Ms. Racich then came over and sat down on the chair on the left-hand side. Mr. Aluma started to joke with her asking her how she would educate her patients not to smoke if she herself was smoking. He then put the cigarettes in Ms. Racich's right side scrubs pocket and then they proceeded to both leave the desk area. Mr. Aluma acknowledged in his testimony he never took steps to confirm who the person was who responded to him. He initially indicated this person was Sheila Deppner and identified her based on her having tattoos. When it was clear the person was not Ms. Deppner, he indicated he is not good with names. Mr. Aluma also acknowledged it was not usual for staff to leave cigarettes on the desk. It is usually patient items left on the desk. He was not caring for any patients on Unit 51 that day.

The Hearing Tribunal prefers the evidence of Ms. Racich over that of Mr. Aluma. Her version of events is more plausible. Mr. Aluma acknowledged it is more usual for patients to leave items on the desk, rather than staff. The Hearing Tribunal finds it is unusual for Mr. Aluma, who is on the Unit only to eat his dinner (i.e. not responsible for patients on the Unit) to try to identify who cigarettes belong to, when they likely belong to a patient not in his care. Mr. Aluma was not working on the Unit at the time of the incident. It would not be up to him to identify whose cigarettes were on the desk, especially when items on the desk are generally those of a patient. The Hearing Tribunal also finds it unusual to ask a question randomly out loud while facing a computer and not turn to identify who has responded.

Further, Ms. Deppner and Mr. Aluma had known each other for about three years at the time of the incident. After working with someone for three years, the Hearing Tribunal would expect that Mr. Aluma would have known who answered his question. Mr. Aluma would not be expected to be confused as to the person's identity. In addition, this person was a witness available to support his account. However, Mr. Aluma made no effort to locate this individual who could have supported his version of the events after being advised it was not Ms. Deppner.

In considering Mr. Aluma's evidence, the Hearing Tribunal found Mr. Aluma's version of events less plausible than that of Ms. Racich. The Hearing Tribunal found the above noted issues negatively affected Mr. Aluma's credibility.

As such, the Hearing Tribunal finds that Ms. Racich was more credible as a witness and that Ms. Racich's version of events was more plausible. The Hearing Tribunal finds that Ms. Racich was sitting at the nursing desk, as she described, that Mr. Aluma came over, sat beside her and put his legs on either side of her legs and touched her breast.

Finally, the Hearing Tribunal considered the issue of reporting by Ms. Racich. While disclosure is not proof that an event occurred, the Hearing Tribunal did consider the disclosure in the context of the evidence, given the closing submissions made by Ms. Milne and as described in the case of *R. v. C.P.* While Ms. Milne submits Ms. Racich did not disclose the event, the Hearing Tribunal finds she did disclose it to her friend, Aldona Szulc. The evidence of Ms. Racich and Ms. Szulc confirms this. Ms. Racich made the disclosure the day following the incident. Ms. Racich's explanation for not going to management at the time is plausible, given her prior problems with her manager, Ms. Uhl was a new manager, and Ms. Szulc told her she would not report it but rather would wait and see if it resolved on its own. These explanations are plausible in the context of all of the evidence provided and Ms. Racich's statement that she hoped it would go away.

The Hearing Tribunal finds Allegation 1 is proven on a balance of probabilities. The Hearing Tribunal finds the conduct 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 conduct breached the following principles and standards set out in CLPNA's Code of Ethics and Standards of Practical Nurses in Canada:

CLPNA Code of Ethics:

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

4.2 Collaborate with colleagues in a cooperative, constructive and respectful manner with the primary goal of providing safe, competent, ethical and appropriate care to individuals, families and communities.

CLPNA Standards of Practice:

Mr. Aluma's conduct breached one or more of the following Standards of Practice for Licensed Practical Nurses in Canada adopted by the CLPNA on June 3, 2013, which state as follows:

Standard 1: Professional Accountability and Responsibility – LPNs are accountable for their practice and responsible for ensuring that their practice and conduct meet both the standards of the profession and legislative requirements. Standard 1 specifically provides that LPNs:

- 1.9 Practice in a manner consistent with ethical values and obligations of the Code of Ethics for Licensed Practical Nurses; and

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. Standard 3 specifically provides that LPNs:

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

Standard 4: Ethical Practice – Licensed Practical Nurses uphold, promote and adhere to the values and beliefs as described in the Canadian Council for Practical Nurse Regulators (CCPNR) Code of Ethics. Standard 4 specifically provides that LPNs:

- 4.6 Maintain professional boundaries in the nurse/client therapeutic relationship at all times.

The act of touching a co-worker's breast is clearly unprofessional. It does not constitute constructive or respectful conduct towards a colleague. It is a clear breach of boundaries and does not promote and support a safe and ethical work environment. It is also clearly conduct that harms the integrity of the profession. The public and the profession would clearly not support this behaviour between colleagues.

Allegation 2 On or about May 25, 2018, engaged in inappropriate behavior when he touched co-worker CR's breast with his hand, without her consent.

On May 25, 2018, both Ms. Racich and Mr. Aluma worked at the Royal Alexandra Hospital. This was verified in testimony and shift schedules set out in Exhibit 2. Ms. Racich worked on Unit 51 from 1900 to 0715 hours. Mr. Aluma worked on Unit 53 from 0845 to 1915 hours. There is also common ground that there was some form of interaction at the nursing station between Mr. Aluma and Ms. Racich that evening. This is confirmed by Ms. Racich, Mr. Aluma and Mr. Hamm.

Ms. Racich testified she was standing in the nursing station by the white board and grey filing cabinet. She was preparing labels as she had just received a patient admission. The Unit lights were turned off. Ms. Racich said she did not have her cell phone with her. Mr. Hamm was sitting on the chair facing forward. Other colleagues were in the vicinity. Ms. Racich said she made a quarter to a half turn, when she saw Mr. Aluma and he walked over to her. Mr. Aluma stood at an angle and grabbed her right breast with his left hand. Ms. Racich was shocked, she then slapped Mr. Aluma's chest pushing him back and said sternly, "What are you doing?" Mr. Aluma did not reply, he only smiled and walked away. Ms. Racich places the time of the incident in question around 2100 to 2200 hours. Later that evening, Ms. Racich told Mr. Hamm and Ms. Bozic that Mr. Aluma had grabbed her breast.

Mr. Hamm testified he was checking charts at the nursing station and his back was to Ms. Racich. Mr. Hamm confirmed he heard a loud slap and Ms. Racich say, "What are you doing?" to Mr. Aluma. Mr. Hamm turned and saw Mr. Aluma flinching back and noted Ms. Racich had a grimace on her face. Mr. Hamm stated the incident would have occurred between 1900 hours to 2300 hours.

Mr. Aluma testified that after his shift ended at 1915 hours he went to Unit 51 to change his shoes and get his backpack around 1920 to 1925 hours. He saw Ms. Racich standing with her back towards the white board. Ms. Racich was on her personal cell phone holding it with both hands. Mr. Aluma said he wanted to show Ms. Racich his children's pictures because she had asked him to see photos of his children the month prior. Mr. Aluma felt it was important to keep his word to show her the pictures. It was Mr. Aluma's original intention to show her birthday photos of his kids; however, he stated he had taken photos before their birthday (which is on May 28) which he wanted to show her. When Mr. Aluma tried to get Ms. Racich's attention by stating her name, she did not respond. Mr. Aluma then softly poked Ms. Racich with two pens he was holding in his hand on her right side. Mr. Aluma confirmed that Ms.

Racich slapped him on the chest; however, he does not recall her saying, “What are you doing?” He stepped backward. According to Mr. Aluma he did not say anything to Ms. Racich and just left the Unit as he thought that she must have been in a bad mood that day. Mr. Aluma stated he changed his shoes, left the hospital at 1930 hours and he did not return to the hospital that evening.

The Hearing Tribunal has considered the discrepancy in the time frame. While there are different accounts of when the interaction occurred between Mr. Aluma and Ms. Racich, there is no doubt in the evidence that an interaction did occur on May 25. The Hearing Tribunal finds that in order to consider the allegation, it is not required to determine what time the incident occurred.

The Hearing Tribunal prefers the evidence of Ms. Racich over that of Mr. Aluma. The Hearing Tribunal does not find Mr. Aluma’s explanation of where he poked Ms. Racich to be plausible. He initially stated he poked her ribs, but it was clear in questioning that if Ms. Racich was holding her phone in both hands with her arms to the side, as described by Mr. Aluma, that he would not have been able to poke her in her ribs. He stated in his testimony that he poked her below her arms. This would not be in the ribs. An LPN would be expected to know whether he poked someone in the ribs or not. His evidence on this point was confusing and not plausible. The Hearing Tribunal found this line of questioning concerning and that it negatively affected Mr. Aluma’s credibility.

In addition, the reaction of Ms. Racich sternly asking, “What are you doing?”, slapping Mr. Aluma so that he stepped back and Ms. Racich having a grimace on her face are more consistent with Ms. Racich’s version of events.

Mr. Aluma had known Ms. Racich for three years. The Hearing Tribunal heard from witnesses, in particular from Ms. Racich, that the relationship between her and Mr. Aluma was such that they would poke each other, pretend to kick each other, and the relationship was not 100 percent professional all the time. The Hearing Tribunal finds it is more probable that Ms. Racich would react in the manner she did from Mr. Aluma grabbing her breast, rather than a soft poke in the ribs.

As such, the Hearing Tribunal finds that Ms. Racich was standing in the nursing station by the white board and grey filing cabinet. She was preparing labels as she had just received a patient admission. Mr. Aluma walked up to her and touched her breast. She reacted by slapping him on the chest and saying sternly, “What are you doing?” Mr. Aluma stepped back and then walked away.

Finally, as noted in Allegation 1, the Hearing Tribunal again considered the issue of disclosure by Ms. Racich. Ms. Racich disclosed what occurred to her co-workers the same evening as the incident. Her manager, Ms. Uhl, was not working on the weekend, and Ms. Racich disclosed to

her what occurred when Ms. Uhl reported to work on Monday morning. The reason for disclosing at this time is plausible in the context of all of the evidence provided.

The Hearing Tribunal finds Allegation 2 is proven on a balance of probabilities. The Hearing Tribunal finds that the conduct 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:

- (iii) 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 that the same sections of the Code of Ethics and Standards of Practice are breached as in Allegation 1. The reasons for finding the conduct in Allegation 2 is unprofessional conduct are the same as in Allegation 1, given the conduct is similar in nature and are, therefore, not repeated here.

Allegation 3 On or about May 28, 2018, Mr. Aluma attempted to contact CR by telephone after being informed by his employer that an investigation was being conducted into CR's allegations, contrary to instructions not to speak to anyone.

Mr. Aluma has admitted to this allegation and admitted his conduct constitutes unprofessional conduct.

On May 28, 2018, Mr. Aluma worked a day shift at the Royal Alexandra Hospital. At 1300 hours, Ms. Uhl met with Mr. Aluma and notified him there had been allegations made against him by Ms. Racich and there would be an investigation. Ms. Uhl told Mr. Aluma he must not speak to anyone regarding this issue because it was confidential. Mr. Aluma proceeded to telephone Ms. Racich. Ms. Racich did not answer the phone.

Ms. Racich called Ms. Uhl and notified her that Mr. Aluma had called her. At 1330 hours, Ms. Uhl met with Mr. Aluma in the lunchroom and notified him again that under no circumstances was he to contact Ms. Racich. Mr. Aluma agreed not to contact Ms. Racich and to keep the matter confidential.

In his testimony, Mr. Aluma testified he did not initially understand the direction from Ms. Uhl to mean he could not contact Ms. Racich since Ms. Racich had made the allegations. That is, there would be no confidentiality with respect to Ms. Racich. The Hearing Tribunal accepts this evidence. Mr. Aluma also testified he called Ms. Racich to apologize to her. The Hearing Tribunal also accepts this evidence.

The Hearing Tribunal finds, therefore, that the allegation is proven on a balance of probabilities. Given the admission of unprofessional conduct made by Mr. Aluma and given that his actions

were in contravention of Ms. Uhl's direction to him, the Hearing Tribunal finds that the conduct constitutes unprofessional conduct.

The Hearing Tribunal finds that the conduct 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:

- (xii) Conduct that harms the integrity of the regulated profession.

The Hearing Tribunal finds that in this circumstance, given the express direction of Ms. Uhl, Mr. Aluma's failure to follow such direction is conduct that harms the integrity of the regulated profession of licensed practical nursing. However, the Hearing Tribunal accepts Mr. Aluma's explanations and as such, notes the conduct is on the lower end of the spectrum of unprofessional conduct for Allegation 3.

(10) Conclusion of the Hearing Tribunal

Allegations 1, 2, and 3 are found to be proven on a balance of probabilities. The Hearing Tribunal finds the conduct in Allegations 1, 2, and 3 constitutes unprofessional conduct, for the reasons noted above.

The Hearing Tribunal will need to determine what, if any, orders it will make pursuant to section 82 of the HPA.

The Hearing Tribunal will receive submissions from the parties on sanction. 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 6th DAY OF AUGUST, 2019

THE COLLEGE OF LICENSED PRACTICAL NURSES OF ALBERTA



Kunal Sharma, LPN
Chair, Hearing Tribunal

**IN THE MATTER OF A HEARING UNDER THE *HEALTH PROFESSIONS ACT* REGARDING THE
CONDUCT OF GEORGE ALUMA, LPN #36510, WHILE A MEMBER OF THE COLLEGE OF LICENSED
PRACTICAL NURSES OF ALBERTA**

DECISION OF THE HEARING TRIBUNAL ON SANCTION

(1) Hearing

The Hearing Tribunal convened by telephone conference call on January 21, 2020 to consider a joint submission on penalty.

Hearing Tribunal:

Kunal Sharma, LPN, Chairperson
Donna-Lee Wowk, LPN
James Lees, Public Member
Marg Hayne, Public Member

Independent Legal Counsel for the Hearing Tribunal:

Julie Gagnon

(2) Preliminary Matters

In a decision dated August 6, 2019, the Hearing Tribunal found George Aluma guilty of unprofessional conduct on the following allegation:

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

1. On or about May 11, 2018, engaged in inappropriate behavior when he touched co-worker CR’s breast with his hand, without her consent.
2. On or about May 25, 2018, engaged in inappropriate behavior when he touched co-worker CR’s breast with his hand, without her consent.
3. On or about May 28, 2018, attempted to contact co-worker CR by phone after being informed by his employer that an investigation was being conducted into CR’s allegations, contrary to instructions not to speak to anyone.”

Ayla Akgungor, counsel for the Complaints Director and Kathie Milne, AUPE Representative for Mr. Aluma provided a joint recommended penalty by way of a letter from Ms. Akgungor dated January 13, 2020 and attached Joint Submission on Penalty signed by Mr. Aluma and Sandy Davis, Complaints Director.

(3) Written Submissions of the Parties

The parties jointly recommend the following sanction:

1. The Hearing Tribunal's written reasons for decision dated August 6, 2019, shall serve as a reprimand.
2. Mr. Aluma's practice permit shall be suspended for a period of four (4) months, with such suspension to commence within seven (7) working days of Mr. Aluma learning of the Hearing Tribunal's decision on penalty.
3. Mr. Aluma shall read and reflect on the following CLPNA documents located on the CLPNA website at www.clpna.com within **sixty (60) days** of service of the Hearing Tribunal's written reasons for decision on penalty (the "Penalty Decision") and provide a signed, written declaration to the Complaints Director confirming that he has reviewed the documents:
 - a. Code of Ethics for Licensed Practical Nurses in Canada;
 - b. Standards of Practice for Licensed Practical Nurses in Canada;
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9. Should Mr. Aluma fail or be unable to comply with any of the above orders for penalty, or if any dispute arises regarding the implementation of these orders, the Complaints Director may do any or all of the following:
 - a. Refer the matter back to the Hearing Tribunal, which shall retain Jurisdiction with respect to penalty;
 - b. Treat Mr. Aluma's non-compliance as information under s. 56 of the Act and seek an immediate interim suspension in accordance with s. 65 of the Act; or
 - c. In the case of non-payment of the costs described in paragraph 6 above, suspend Mr. Aluma's practice permit until such costs are paid in full or the Complaints Director is satisfied that such costs are being paid in accordance with a schedule of payments agreed to by the Complaints Director.

The parties made the following submissions with respect to the factors from *Jaswal v. Newfoundland Medical Board*:

- (a) The nature and gravity of the proven allegations

Mr. Aluma was found by the Hearing Tribunal to have engaged in inappropriate behavior, on two occasions (May 11 and 25, 2018), when he touched co-worker CR's breast with his hand,

without her consent. This conduct is in the nature of a sexual assault and is therefore on the most serious end of the spectrum of unprofessional conduct. This type of conduct points to the need for very serious penalties.

As noted by the Hearing Tribunal, the act of touching a co-worker's breast is clearly unprofessional. It does not constitute constructive or respectful conduct towards a colleague. It is a clear breach of boundaries and does not promote and support a safe and ethical work environment. It is also clearly conduct that harms the integrity of the profession. The public and the profession would clearly not support this behaviour between colleagues.

Mr. Aluma was also found, on or about May 28, 2019, to have attempted to contact co-worker CR by phone after being informed by his employer that an investigation was being conducted into CR's allegations. This attempted contact was contrary to instructions from Mr. Aluma's employer not to speak to anyone. While this conduct is plainly less serious than the findings of inappropriate sexual contact, it was a clear violation of an employer directive and deserving of an appropriate penalty.

(b) Age and experience of the LPN

Mr. Aluma obtained his LPN designation in 2013. At the time of the incidents in question in May 2018, Mr. Aluma had about 5 years of experience as an LPN.

However, the type of unprofessional conduct at issue here is not the type of conduct that might be mitigated by age or inexperience. An LPN of any age or at any point in their career would recognize that inappropriate sexual contact with a co-worker is plainly unacceptable behavior for an LPN. The same can be said with respect to compliance with employer directives. An LPN of any age or at any point in their career would recognize the importance of compliance with employer directives, especially when they relate to a sensitive workplace investigation.

(c) Prior issues of character and prior complaints

Mr. Aluma has no prior history of findings of professional conduct with the CLPNA. This factor may be viewed as a mitigating factor with respect to the seriousness of the penalties.

(d) The number of times the conduct was proven to have occurred

There were two instances of inappropriate sexual contact found by the Hearing Tribunal. One instance occurred on May 18, 2018 and the other on May 25, 2018. Multiple instances of the same type of unprofessional conduct, especially conduct of this serious nature, would generally point to the need for greater penalties to denounce an established pattern of unprofessional conduct and this should be considered by the Hearing Tribunal in this case. However, the Hearing Tribunal may also consider that the two instances of inappropriate sexual contact occurred at

points very close in time and the Hearing Tribunal does not otherwise have evidence of a prolonged or sustained pattern of sexual misconduct on Mr. Aluma's part.

Mr. Aluma's failure to follow his employer's directive not to contact co-worker CR appears to be an isolated incident and this factor may be considered by the Hearing Tribunal when assessing the orders for penalty.

(e) The role of the LPN in acknowledging what occurred

Where an LPN acknowledges and takes responsibility for unprofessional conduct, this may be considered a mitigating factor when assessing penalty. While Mr. Aluma did not admit or acknowledge unprofessional conduct with respect to allegations 1 and 2, it is important that the Hearing Tribunal recognize that the failure to admit unprofessional conduct does not amount to an aggravating factor when assessing penalties. Every regulated member is entitled to his or her "day in court" and a member should not be treated more harshly in the imposition of penalties simply for exercising his or her right to defend themselves against allegations of unprofessional conduct. Accordingly, Mr. Aluma's decision to participate in a contested hearing with respect to allegations 1 and 2 should not serve to increase the penalties ordered.

Mr. Aluma did admit allegation 3 and acknowledge that his conduct with respect to this allegation amounted to unprofessional conduct. Mr. Aluma is to be commended for accepting responsibility for this conduct and this factor may be recognized by the members of the Hearing Tribunal when determining the orders for penalty.

(f) Other serious financial or other penalties

In assessing the overall proportionality of the penalties it orders, the Hearing Tribunal is entitled to consider any other penalties suffered by the regulated member as a result of the unprofessional conduct in question. As a result of the conduct at issue in these proceedings, Mr. Aluma was suspended for one day by his employer. While this is a serious penalty from his employer, the impact on Mr. Aluma would have been the loss of one day's pay. When the penalty from his employer is considered together with the orders for penalty put forward by the parties, the penalties sought in the unprofessional conduct proceedings remain proportionate in light of the conduct at issue.

(g) The impact of the incident on the affected individual

The Hearing Tribunal may also consider the impact of the unprofessional conduct on the affected individual. In the present case, the affected individual was a co-worker rather than a patient.

When speaking about the events to management or co-workers, CR was described by witnesses as being both calm and nervous and anxious. Whether CR was calm or nervous and

anxious or upset may provide some indication of the impact of the incidents on CR. However, as individuals can react very differently to trauma, the individual's demeanor will not necessarily be informative of the ultimate impact on the individual.

CR described herself as shocked by the incidents and ultimately reported them to management. On balance, it can be reasonably concluded that CR was negatively impacted by the unprofessional conduct in question.

(h) The need to promote specific and general deterrence

The conduct at issue in this case, inappropriate sexual contact and failing to follow a management directive regarding a sensitive workplace investigation, is very serious and a message must be sent to both Mr. Aluma and to all members of the profession, that, in particular, inappropriate sexual contact with a co-worker is completely unacceptable and will be appropriately censured. The penalties in this case must be severe enough to drive home to Mr. Aluma that his conduct fell well below acceptable standards of conduct and to ensure that Mr. Aluma will not repeat this conduct.

Similarly, the penalties must be severe enough to send a message to the profession in general that if you engage in this type of conduct, you can expect serious and significant penalties and the profession will not take the conduct lightly. The penalties must be significant enough to deter other members of the profession from engaging in the same type of conduct as Mr. Aluma.

(i) The need to maintain the public's confidence in the nursing profession

The public needs to be assured that all LPNs continue to meet or exceed the CLPNA's standards of conduct and practice. Members of the public, including co-workers, have the right to expect that LPN workplaces are safe and comfortable environments within which to carry out their duties. Members of the profession who, by their conduct, create unsafe workplaces by engaging in inappropriate physical contact with co-workers must be appropriately penalized. It is only in this way that public confidence in the profession can be maintained.

LPNs hold a position of trust, both with respect to members of the public and co-workers. Where this trust is betrayed, the profession must respond by imposing penalties which are sufficient to safeguard the public's confidence.

(j) Range of Penalties in other similar cases

The parties provided a prior decision of the CLPNA Hearing Tribunal involving multiple instances of inappropriate contact with two co-workers.

The parties submit that the proposed order is within the range of penalties awarded in other similar cases.

(4) Decision of the Hearing Tribunal

The Hearing Tribunal has carefully reviewed and considered the joint recommended penalty and the written submissions provided by the parties. The Hearing Tribunal finds that the joint recommended penalty is appropriate having considered all of the circumstances of the case. The joint recommended penalty is reasonable and serves to protect the public interest.

The Hearing Tribunal also agrees with the parties regarding the appropriate factors to be considered and accepts and adopts the parties' submissions and analysis on the application of the factors in *Jaswal v. Newfoundland Medical Board*. The Hearing Tribunal finds that the proposed sanctions adequately considered the factors as set out in *Jaswal v. Newfoundland Medical Board*.

The reprimand and suspension are fair and appropriate in the circumstances of this case. These serve to denounce the conduct, and also serve as a deterrent to both Mr. Aluma and to members of the profession generally. The courses are also appropriate. They serve to help ensure that the conduct does not reoccur by providing education to the member and help protect the public interest. The imposition of costs is also appropriate in this case. The Hearing Tribunal recognizes that the costs are significant but finds that they are reasonable in the circumstances. It is also appropriate to give Mr. Aluma time to pay the costs.

(5) Order of the Hearing Tribunal

The Hearing Tribunal hereby orders:

1. The Hearing Tribunal's written reasons for decision dated August 6, 2019, shall serve as a reprimand.
2. Mr. Aluma's practice permit shall be suspended for a period of four (4) months, with such suspension to commence within seven (7) working days of Mr. Aluma learning of the Hearing Tribunal's decision on penalty.
3. Mr. Aluma shall read and reflect on the following CLPNA documents located on the CLPNA website at www.clpna.com within **sixty (60) days** of service of the Hearing Tribunal's written reasons for decision on penalty (the "Penalty Decision") and provide a signed, written declaration to the Complaints Director confirming that he has reviewed the documents:
 - a. Code of Ethics for Licensed Practical Nurses in Canada;
 - b. Standards of Practice for Licensed Practical Nurses in Canada;
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- b. Treat Mr. Aluma's non-compliance as information under s. 56 of the Act and seek an immediate interim suspension in accordance with s. 65 of the Act; or
- c. In the case of non-payment of the costs described in paragraph 6 above, suspend Mr. Aluma's practice permit until such costs are paid in full or the Complaints Director is satisfied that such costs are being paid in accordance with a schedule of payments agreed to by the Complaints Director.

DATED THE 5th DAY OF FEBRUARY 2020.

THE COLLEGE OF LICENSED PRACTICAL NURSES OF ALBERTA

A handwritten signature in black ink, appearing to read 'K. Sharma', written in a cursive style.

Kunal Sharma, LPN
Chair, Hearing Tribunal