

IN THE MATTER OF a Hearing of the Hearing Tribunal by the
College Dietitians of Alberta into the conduct of AMY
CHERNIWCHAN, pursuant to the *Health Professions Act*,
RSA 2000 c. H-7

**DECISION
OF THE HEARING TRIBUNAL OF THE
COLLEGE DIETITIANS OF ALBERTA**

I. HEARING

1. The hearing was conducted pursuant to the Health Professions Act ("**HPA**") and virtually on May 3, 2022, with the following individuals participating:

Hearing Tribunal (the "**Hearing Tribunal**")

- Cathy Alberda, RD, Chair
- Shonagh Colebrook-Fonseca, RD
- Anita Warnick, Public Member
- Juane Priest, Public Member

Independent Legal Counsel to Hearing Tribunal

- Blair E. Maxston, Q.C.

College Dietitians of Alberta (the "**College**")

- Doug Cook, Complaints Director
- Greg Sim, Legal counsel for the Complaints Director

Investigated Member

- Amy Cherniwchan ("**Ms. Cherniwchan**")
- Kelli Lemon, Legal counsel for Ms. Cherniwchan

Court Reporter

II. PRELIMINARY MATTERS

2. The Hearing Tribunal was held virtually on May 3, 2022 starting at 9:00 AM. The Chair made opening comments, including introductions of the parties and a brief review of the allegations in the Notice of Hearing, Notice to Attend and Notice to Produce dated November 22, 2021 (the "**Notice of Hearing**").
3. There were no objections to conducting the hearing virtually or to the composition of the Hearing Tribunal. No Hearing Tribunal members identified a conflict of interest and there were no objections to the jurisdiction of the Hearing Tribunal to proceed.
4. The hearing proceeded as a consent hearing by way of an Agreed Statement of Facts and Acknowledgement of Unprofessional Conduct document and a Joint Submission on Sanctions. Accordingly, no witnesses were called to give evidence during the hearing.

III. EXHIBITS

5. The following exhibits were entered with the consent of both parties at the hearing:

Exhibit 1: Agreed Statement of Facts and Acknowledgement of Unprofessional Conduct;

Exhibit 2: Joint Submission on Sanctions; Note: Exhibit 2 was provided to the Hearing Tribunal on the date of the hearing and after the liability phase of the hearing.

IV. BACKGROUND

6. The facts in this matter are not in dispute and are set out in detail in the Agreed Statement of Facts. As such, they do not need to be repeated in detail in this Decision.
7. Briefly, Ms. Cherniwchan became employed at the Saddle Lake Health Centre as a Registered Dietitian in the Aboriginal Diabetes Initiative Program ("ADI") in February of 2016. In October of 2016, Dr. Jeff Winterstein began offering a telehealth diabetes clinic to patients of the Saddle Lake Health Centre and Ms. Cherniwchan worked closely with the telehealth clinic as she had become a Certified Diabetes Educator (CDE) in June of 2019.
8. The College received two complaints concerning Ms. Cherniwchan relating to events from October 2016 to December 2019 where Ms. Cherniwchan allegedly provided instructions to a pharmacist for a client's prescription to be filled but not provided to the patient and that she distributed or dispensed drugs to ADI patients without authorization to carry out that activity.

V. ALLEGATIONS

9. Three (3) allegations are set out in the Notice of Hearing as follows:
 1. On or about October 2016 to December 2019, while engaged in the Aboriginal Diabetes Initiative program at the Saddle Lake Health Centre (the "ADI"), collected or retained patients' prescription records or other individually identifying personal health information without authorization or consent;
 2. On or about October 2016 to December 2019, while engaged in the ADI, sent or delivered an insured patient's prescription to the Saddle Lake Health Centre pharmacy and asked for the prescription to be filled but not provided to the patient;
 3. On or about October 2016 to December 2019, while engaged in the ADI, distributed or dispensed drugs regulated by a schedule to the *Pharmacy and Drug Act*, RSA 2000, c. P-13 to ADI patients, thereby engaging in a restricted activity pursuant to the *Government Organization Act*, RSA 2000, c. G-10, Schedule 7.1, section 4 without authorization.

All of which is contrary to the provisions of the *Health Information Act*, RSA 2000 c. H-5, including sections 18, 20, 22, 24, 57, 58 and 62, the *Government Organization Act*, RSA 2000, c. G-10, Schedule 7.1, the *Health Professions Act*, RSA 2000, c. H-7, including section 1(1)(pp)(i), (ii), (iii), or (xii), the *Registered*

Dietitians and Registered Nutritionists Profession Regulation, Alta. Reg. 79/2002 including sections 9, 10 and 10.1 or the regulations, by-laws, Code of Ethics or Standards of Practice enacted pursuant thereto as amended from time to time, constituting unprofessional conduct.

Mr. Sim advised that Allegation 1 was withdrawn by the Complaints Director and that only Allegations 2 and 3 were proceeding.

VI. ADMISSION OF UNPROFESSIONAL CONDUCT

10. Section 70 of the HPA permits an investigated member to make an admission of unprofessional conduct. An admission under section 70 of the HPA must be acceptable in whole or in part to the Hearing Tribunal.
11. In the Agreed Statement of Facts and Admission of Unprofessional Conduct, Ms. Cherniwchan made admissions to both remaining allegations and acknowledged that her conduct amounts to unprofessional conduct within the meaning of section 1(1)(pp) of the HPA concerning these allegations.

VII. SUBMISSIONS OF THE PARTIES

A. Submissions from the Complaints Director: Liability Phase of Hearing

12. Mr. Sim's submissions on behalf of the Complaints Director can be summarized as follows:
 - Mr. Sim reviewed Exhibit 1 and the two complaints that were received by the College.
 - Mr. Sim also reviewed the Agreed Statement of Facts, the background facts relating to the two specific allegations before the Hearing Tribunal and related matters.

B. Submissions from Ms. Cherniwchan: Liability Phase of Hearing

13. Ms. Lemon's submissions on behalf of Ms. Cherniwchan can be summarized as follows:
 - It was important to consider the context regarding the Saddle Lake Telehealth Clinic, Dr. Winterstein and the virtual diabetes clinic.
 - Ms. Cherniwchan has admitted unprofessional conduct regarding the two allegations, cares deeply about patients and all of her actions were done with the best of intentions.
 - Ms. Cherniwchan's focus was on protecting her patients and ensuring their safety.
 - In terms of Allegation 3, Ms. Cherniwchan was not involved in prescribing but acknowledges that she was not authorized to provide these Schedule 1 samples. She has admitted her mistake and recognizes that her actions were outside of her scope of practice.

14. In response, Mr. Sim submitted that for Allegation 3, it is up to Ms. Cherniwchan to understand her scope of practice and she could not rely on others to remind her of what she is permitted to do as a dietitian. Mr. Sim submitted that it was not appropriate for the Hearing Tribunal to consider what they would have done "if this was your mother" and that the issues before the Hearing Tribunal were that it was misleading for Ms. Cherniwchan to ask a pharmacist to process the prescriptions (particularly since that misled the insurance company as well).

C. Findings of the Hearing Tribunal

15. After private deliberations, the Hearing Tribunal reconvened and advised both parties that it had accepted the admission of unprofessional conduct and had made findings of unprofessional conduct concerning Allegations 2 and 3.

D. Submissions from the Complaints Director: Penalty Phase of Hearing

16. Mr. Sim's submissions on behalf of his client concerning penalties can be summarized as follows:
- Mr. Sim reviewed the Joint Submission on Sanctions document and advised that with respect to order 2 the Complaints Director and Ms. Cherniwchan have already agreed on dates for the suspension.
 - Mr. Sim reviewed the *R. v. Anthony Cook* Supreme Court of Canada case and the deference that the Hearing Tribunal should show to a joint submission concerning penalty. Mr. Sim referred to the "public interest test" and submitted that the Hearing Tribunal should accept the joint penalty submission unless it is unfit or contrary to the public interest or brings the administration of justice into disrepute, which he argued was a high bar.
 - Mr. Sim then reviewed the *Jaswal* factors for penalty orders. Mr. Sim stated that although the allegations were not of the most serious type they did relate to important issues: a lack of integrity by misleading persons (including the insurer) and a failure to comply with the law in relation to prohibited restricted activities.
 - Ms. Cherniwchan had been practicing as a dietitian for 18 years and should have understood her professional obligations.
 - There was no prior discipline history with Ms. Cherniwchan and the College. Mr. Sim also noted Ms. Cherniwchan's admissions of unprofessional conduct and Ms. Cherniwchan losing her job as mitigating factors.
 - The objectives of general deterrence and specific deterrence are served by the joint penalty submission and will ensure the public's confidence in the integrity of the profession bearing in mind the degree to which the conduct falls outside what is acceptable for dietitians.
 - There are no other comparable discipline cases to refer to given the unique circumstances of this case.

E. Submissions of Ms. Cherniwchan: Penalty Phase of Hearing

17. Ms. Lemon's submissions can be summarized as follows:
- The *Jaswal* decision and the factors it contains should guide the Hearing Tribunal's decision making process.
 - The penalty orders are also there to ensure Ms. Cherniwchan's rehabilitation while fulfilling general and specific deterrence.
 - Ms. Cherniwchan has signed the Joint Submission on Sanctions and supports it.
 - Ms. Cherniwchan poses no risk to the public. This is her first discipline matter with the College and she has an exemplary record otherwise.
 - No patient was hurt as the result of Ms. Cherniwchan's actions and she acted out of concern for her patients.
 - The PBI course will greatly benefit Ms. Cherniwchan and she has learned from this experience and is committed to asking questions in her practice.
 - Ms. Lemon reviewed the consequences that Ms. Cherniwchan has suffered including losing her job, having to take four months to find new work and the effect of the one-month suspension and the costs order.
18. Ms. Cherniwchan also made a statement directly to the Hearing Tribunal where she acknowledged her mistakes, stated that providing samples was rare and only occurred with Dr. Winterstein's directions and that she knows she exceeded her scope of practice.
19. Ms. Cherniwchan acknowledged that she would ask questions where necessary and didn't consider how the insurer would be misled in these circumstances. She also stated that there was no malicious intent on her part and that she had no personal gain as the result of her actions.

VI. DECISION OF THE HEARING TRIBUNAL AND REASONS

20. The Hearing Tribunal is faced with a two-part task in considering whether an investigated member is guilty of unprofessional conduct. First, the Hearing Tribunal must make findings as to whether the facts of the alleged unprofessional conduct occurred. If the Hearing Tribunal finds that the alleged conduct did occur, it must then proceed to determine whether that conduct rises to the level of unprofessional conduct under the circumstances and as defined in the HPA.
21. With respect to the first task, the Hearing Tribunal carefully reviewed all of the exhibits (including the Agreed Statement of Facts) and the verbal submissions of both parties, as well as Ms. Cherniwchan's admission of unprofessional conduct. There is no disputing the facts relating to the events that took place and the Hearing Tribunal finds that the facts do support the allegations admitted to by Ms. Cherniwchan.
22. With respect to the second task, the Hearing Tribunal accepts Ms. Cherniwchan's admission of unprofessional conduct based on the evidence as set out in the Agreed Statement of Facts, including the acknowledgement of responsibility by Ms. Cherniwchan.
23. The Hearing Tribunal finds that the conduct admitted to by Ms. Cherniwchan clearly meets the threshold for unprofessional conduct as defined in the HPA and as reflected in the references immediately after Allegations 2 and 3 in the Notice of Hearing.

24. More specifically, the Hearing Tribunal members, when presented with the Agreed Statement of Facts, found there was sufficient evidence to show that Ms. Cherniwchan's actions were unprofessional and harmful to the dietitian profession in Alberta. By not meeting her professional obligations, the actions of Ms. Cherniwchan have eroded the trust placed in her by her patients and, by extension, the public.
25. The Hearing Tribunal also accepted the submissions of the Complaints Director and the Member in terms of the findings of unprofessional conduct. Although Ms. Cherniwchan was concerned about patient safety, Ms. Cherniwchan's actions were clearly outside her legal scope of practice and clearly breached the ethical obligations of a dietitian.
26. Consistent with her admission of unprofessional conduct, it is clear that Ms. Cherniwchan engaged in a restricted activity by providing a Schedule 1 drug (as defined in the *Alberta Pharmacy and Drug Act*) without legal authorization to do so. This was a serious breach of Ms. Cherniwchan's legal and ethical obligations despite the fact that there was no malicious intent and that she was concerned about patient welfare.
27. The Hearing Tribunal also acknowledged that Ms. Cherniwchan has been a willing and candid participant in the consent hearing process. This has made for a very efficient, open and transparent hearing.

VII. JOINT SUBMISSION ON PENALTY

28. As reflected in the Joint Submission on Penalty, the Complaints Director and Ms. Cherniwchan jointly submit and agree that the following penalty orders are appropriate:
 - (1) The Hearing Tribunal's final written decision shall serve as a Letter of Reprimand.
 - (2) Ms. Cherniwchan's practice permit shall be suspended for a continuous period of one month on dates acceptable to the Complaints Director.
 - (3) Ms. Cherniwchan shall complete the PBI Education Professional Boundaries and Ethics course and provide proof of successful completion to the Complaints Director within six months of the Hearing Tribunal's written decision.
 - (4) Ms. Cherniwchan shall pay costs of the investigation and hearing of this matter in the total amount of \$5,000.00 within six months of the Hearing Tribunal's written decision.
 - (5) In the event that Ms. Cherniwchan fails to comply with any of these sanctions, this matter may be referred back to a Hearing Tribunal for further consideration with respect to sanctions.

VIII. DECISION OF THE HEARING TRIBUNAL ON PENALTY

29. The Hearing Tribunal carefully reviewed the Joint Submission on Sanctions from the Complaints Director and Ms. Cherniwchan and is satisfied that those sanctions meet the public interest test and uphold the integrity of the profession. As such, the Hearing Tribunal accepts the proposed penalty orders as presented in the Joint Submission on Penalty.
30. The Hearing Tribunal agreed with the Complaints Director's and Ms. Cherniwchan's submissions concerning the penalty orders and the *Jaswal* factors.
31. Ms. Cherniwchan's actions put the safety of the public at risk and she did not ask the appropriate questions of the physician or question him about whether what she ultimately did was appropriate.
32. Ms. Cherniwchan's age and experience in the profession should have resulted in her understanding that her actions were inappropriate and that her actions were illegal and related to a restricted activity that she could not perform.
33. The Hearing Tribunal did take into account the mitigating factors in this matter including Ms. Cherniwchan's cooperation and admissions which resulted in a consent hearing and avoiding a lengthy and costly contested hearing. The Hearing Tribunal was also satisfied that Ms. Cherniwchan does not present a risk to the public and that these events have had a significant professional and personal impact on her and have resulted in serious negative consequences for her (including losing her job).
34. The order that Ms. Cherniwchan pay \$5,000.00 of the costs associated with the investigation and hearing serves as a deterrent to other regulated members of the College from committing similar acts of unprofessional conduct. In addition, that order maintains the integrity of the profession, demonstrates that the College and the Hearing Tribunal are committed to upholding the discipline process contained in the HPA in a responsible manner and ensures that Ms. Cherniwchan shall bear proportionate financial consequences for her actions.
35. The Hearing Tribunal commends Ms. Cherniwchan for her acceptance of responsibility and for understanding the implications of her unprofessional conduct.

IX. ORDERS OF THE HEARING TRIBUNAL

36. The Hearing Tribunal therefore makes the following orders:
 - (1) The Hearing Tribunal's final written decision shall serve as a Letter of Reprimand.
 - (2) Ms. Cherniwchan's practice permit shall be suspended for a continuous period of one month on dates acceptable to the Complaints Director.
 - (3) Ms. Cherniwchan shall complete the PBI Education Professional Boundaries and Ethics course and provide proof of successful completion to the Complaints Director within six months of the Hearing Tribunal's written decision.

- (4) Ms. Cherniwchan shall pay costs of the investigation and hearing of this matter in the total amount of \$5,000.00 within six months of the Hearing Tribunal's written decision.
- (5) In the event that Ms. Cherniwchan fails to comply with any of these sanctions, this matter may be referred back to a Hearing Tribunal for further consideration with respect to sanctions.

DATED the 2nd day of June, 2022 in the City of Edmonton, Alberta.

Cathy Alberda
Cathy Alberda, Chair,
On behalf of the Hearing Tribunal