

THE SASKATCHEWAN EMPLOYMENT ACT

PROVINCE OF SASKATCHEWAN

IN THE MATTER OF AN ARBITRATION PURSUANT TO A COLLECTIVE BARGAINING AGREEMENT RESPECTING THE GRIEVANCE OF DR. HELMER

BETWEEN:

**HEALTH SCIENCES ASSOCIATION OF SASKATCHEWAN and DR. HELMER**

UNION/GRIEVOR

– and –

**SASKATOON REGIONAL HEALTH AUTHORITY**

EMPLOYER

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**AWARD**

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before

**John Comrie, QC, FCI Arb**

**Arbitrator**

Heard in Saskatoon, Saskatchewan on February 10, 11 and 12 and April 3 and 4, 2017

For the Employer:

**Gary Bainbridge, QC**

For the Union:

**Kevin Zimmerman**

## **INTRODUCTION AND BACKGROUND**

[1] This arbitration arises because of a grievance (“Grievance”) brought by the Health Sciences Association of Saskatchewan (“Union” or “HSAS”) on behalf of Dr D’Arcy Helmer (“Dr. Helmer” or “Grievor” or “Employee”), who at the time of his suspension worked full time for Saskatoon Regional Health Authority (“SRHA”) as a PhD Psychologist.

[2] The Grievance was dated January 18, 2016, and stated that Dr. Helmer had been “disciplined...without just cause”.

[3] The parties agreed that I had jurisdiction to deal with the Grievance and waived compliance with section 6-50(1) of The Saskatchewan Employment Act.

## **FACTUAL CHRONOLOGY**

### **The Grievor’s Employment History**

[4] The SRHA is a major provider of medical services to Saskatchewan residents and includes the provision of services through the Department of Adult Mental Health. Tracy Muggli is the Director of Mental Health and Addiction Services. She testified that by virtue of the relevant Saskatchewan legislation and applicable SRHA policies, the privacy of all personal health information had to be protected. Importantly, she noted that around mental health and addiction services, the issue of protecting the privacy of every individual’s personal health information was particularly sensitive and given the highest attention possible to insure all such information was protected as required by law.

[5] The Health Sciences Association of Saskatchewan is the certified bargaining agent for all “health support practitioners” employed in Saskatchewan by regional health authorities, including the SRHA. Psychologists fall within the definition of a health practitioner.

[6] Dr. Helmer is a PhD Clinical Psychologist who began working for SRHA in August 1999 as what his job description labels as a “Psychologist” and has held that position since that time. Since 2003 he has worked in the Department of Adult Mental Health and Addiction Services-Community Adult Programs. He works four 10-hour days per week on the fifth floor of a wing of the SRHA facility known as the Nurse Alumni Wing or the “NAW”.

[7] In addition to his work for SRHA, Dr. Helmer also operates a private clinic on Fridays. In that clinic, he has practised with his common-law spouse, Barbara Wieler since 2013.

[8] At all times relevant to this factual chronology, Dr. Helmer reported to Michelle Buglas, Program Manager, Community Adult Programs, Mental Health and Addiction Services. Her office was in another part of the SRHA, not on the fifth floor.

[9] Apart from the discipline letter and warning related to the same events as gave rise to this arbitration, Dr. Helmer’s employment record is excellent.

### **Dr. Helmer’s Repeated Requests to Employ Barb Wieler and Ms. Buglas’s Repeated Refusals**

[10] Dr. Helmer and his supervisor, Michelle Buglas discussed the issue of whether Barb Wieler could be considered for a psychometrist position at SRHA from at least late November 2014 and perhaps earlier until June 23, 2015 all as described in a chain of emails submitted as Exhibit E5 and in the verbal evidence at the hearing.

[11] Ms. Wieler is a qualified psychometrist who under Dr. Helmer’s supervision could work without significant training because of her experience, and therefore, have an immediate impact on a long waitlist at SRHA. In November, Ms. Buglas had indicated that if there were no internal candidates, then SRHA would consider Barb Wieler for this position.

[12] It is also worth noting at this time that there are references throughout Exhibit E5 to stress experienced by Dr. Helmer due to pressure on him to reduce the length of the wait list at the same time as he and Ms. Buglas faced considerable difficulty in finding qualified professionals to support his work.

[13] By January 6, 2015, Ms. Buglas had been informed that Dr. Helmer and Barb Wieler “shared a home” and she advised Dr. Helmer she needed to “check into the situation” before making any decision as to her employment as a psychometrist. Three days later, Ms. Buglas sent Dr. Helmer a copy of the protocol and procedure entitled “Employment of Relatives” (“SRHA Employment of Relatives Policy” or “Relatives Policy”) (Exhibit E4) and asked him if his relationship with Ms. Wieler would preclude him from “supervising” her in the new psychometrist position. The concept of “supervision” in Ms. Buglas’s question turned out to be a significant aspect of her query and it was repeated several times as events unfolded.

[14] By January 12, 2015, Dr. Helmer impliedly acknowledged the problem and asked Ms. Buglas to consider an exemption, as provided in the protocol, due to the “critical recruitment problems” in finding a qualified psychometrist.

[15] On January 13, 2015, Ms. Buglas informed Dr. Helmer that “I spoke with People and Partnerships (*the SRHA equivalent of a human resources department-Ed*) and they will not allow an exemption to the policy at this time.” (Exhibit E5). Dr. Helmer responded with a detailed explanation of why it was imperative to find someone with sufficient training and background in several areas. Otherwise, he would have to spend a large part of his time training and supervising a new employee, with the result that the wait list would grow rather than shrink.

[16] Ms. Buglas responded sympathetically to his analysis, and suggested they keep moving forward to find a masters level psychometrician, although that would require a wait of 30 days to solicit the union’s approval of a new position.

[17] Following SRHA refusal to authorize an exemption to its protocol, the matter appeared to die down while Dr. Helmer discussed hiring Barb Wieler for the FASD Study as described below. However, by April the subject reappeared when Dr. Helmer reviewed the CV’s for several new applicants for the open psychometrist position, and responded by again raising the issue of hiring Barb Wieler for this position.

[18] In an April 17<sup>th</sup> email, Ms. Buglas replied “In regard to Barbara the same policy applies as before. Please see attached and let me know if your relationship with this applicant would preclude you from supervising her per this protocol.” This was Ms. Buglas’ second request for Dr. Helmer to consider the “supervision” issue relative to compliance with the Relatives Policy.

[19] In response, Dr. Helmer acknowledged again that his common law spousal relationship with Barb Wieler created a negative answer to the question of whether the Relatives Policy precluded him from “supervising” his wife. In reply therefore, he asked whether Ms. Wieler could report to “Victoria”, the same person who provided “clinical” supervision over him. In this manner, he suggested the “supervision” problem could be avoided.

[20] A back and forth exchange then occurred around the issue of how that would work because Ms. Buglas thought from previous communications that the psychometrist required “very specific supervision”, which Victoria would be unable to do, due to a lack of training. Dr. Helmer responded that since Ms. Wieler has been fully trained, “supervision isn’t really an issue”.

[21] It is important to note that in this context, Dr. Helmer was saying that because of Ms. Wieler’s training, “supervision” was not an issue. But again, the whole point of Dr. Helmer suggesting Barb Wieler could report to Victoria was to get around the prohibition in the Relatives Policy. Sections 1.2 and 1.3 of that Policy provide that the supervision of “relatives” is prohibited, unless an exemption is granted.

[22] In the end Ms. Buglas concluded on May 12, 2015 that the idea of having Victoria supervise Barb Wieler was something outside the scope of Victoria’s practice and therefore “it would not work for her to do so. We will have to explore other avenues.”

[23] Notwithstanding clear responses in both January and May, Dr. Helmer raised the supervision issue again for at least the third time on June 23, 2015 when he emailed Ms. Buglas and argued that if Victoria can supervise him clinically, and he is not outside her scope of practice, then she should be able to supervise Barb Wieler. His argument was based in part on the fact that in his opinion, Ms. Wieler could work independently and quickly help alleviate the workload situation.

[24] On June 24, 2015 Ms. Buglas responded with a definitive reply that she was “...going to meet with the psychologist who is finishing up at the end of summer...I am going to go that route.”

### **The FASD Study and the Obligations of the Principal Investigator, Dr. Mela**

[25] Dr. Mansfield Mela is a professor in the Department of Psychiatry at the University of Saskatchewan, who has had a long-term research interest in fetal alcohol spectrum disorder (“FASD”). He is the principal researcher on numerous FASD studies and has collaborated previously with Dr. Helmer on one such study.

[26] Dr. Mela developed an application for operational approval (“Application for Operational Approval”) to the Behavioural Research Ethics Board (“BREB”) of the University of Saskatchewan for a study entitled “Psychiatric Diagnosis Assessment and Treatment of Fetal Alcohol Spectrum Disorder in Forensic Psychiatric Patients” that was reapproved on February 22, 2012. (Exhibit E16). Among other things the study hoped to develop an algorithm that would assist in the accurate identification of patients with Fetal Alcohol Syndrome Disorder (“FASD”).

[27] The documentation contains a broad set of legal obligations to which the Principal Investigator, Dr. Mela, personally committed to honor and fulfill by signing the Application for Operational Approval. They are summarized below in Part B of the Decision section of this Award.

### **Request for Dr. Helmer and SRHA to Assist Dr. Mela with the FASD Study**

[28] Dr. Mela testified that he first contacted Dr. Helmer in January 2014 about doing some work on another FASD study (“FASD Study” or “Study”). A year later, on February 19, 2015 Dr. Mela emailed Dr. Helmer to ask if he could) review some CV’s to determine who might best work as a psychometrist on the FASD Study, ii) consider “providing some guidance to the selected person”, and iii) “peruse the assessment reports” (*i.e. the reports to be prepared by the psychometrists-Ed*). Dr. Helmer had previously told Dr. Mela that he did not have time to do the testing himself, but that if the actual testing work could be done by some research assistants, then the balance of the work could be done

by Dr. Helmer. Dr. Helmer had an interest in the subject and wanted to help complete the FASD Study.

[29] Dr. Mela testified for the Employer (under subpoena) and his evidence was clear and is supported by the February 19<sup>th</sup> email quoted in the previous paragraph, namely that he was looking to Dr. Helmer to be responsible for the entire package of psychological assessments. If Dr. Helmer felt that was too much work for him to take on himself, Dr. Mela was satisfied to have Dr. Helmer offload some of that as he saw fit. He said, however, he did not turn his mind to any of the more administrative type questions.

[30] Indeed, this February 19<sup>th</sup> email is clearly looking to Dr. Helmer “to provide guidance” and “to peruse the assessment reports” in each case for the research assistants, all of which is consistent with a supervisory role for Dr. Helmer relative to the Study work performed at SRHA.

[31] Moreover, when Dr. Helmer responded to Dr. Mela’s February 19<sup>th</sup> email the next day, he did not disavow any of the requests made of him, so presumably he was willing to provide guidance and perusal of the assessment reports. Dr. Helmer’s response was directed to insuring Dr. Mela saw the CV of Barb Wieler, before he spoke to her.

[32] Significantly, Dr. Mela was so comfortable delegating all this work to Dr. Helmer that, as he testified, he never met personally with Barb Wieler before she was engaged to do the work. He was completely comfortable delegating all this work to Dr. Helmer.

[33] Dr. Helmer had had special training in FASD matters and was very interested in supporting the Study. However, he did not receive any money for assisting with the research nor any publication credit. Dr. Helmer testified the only way it could work was if the people doing the testing and creating the data could have office space for 2 people near his office. Again, presumably that was so he could oversee their work.

[34] Dr. Mela’s initial proposal was to have two public health nursing students act as the research assistants. After reviewing the CV’s of these students however, Dr. Helmer was concerned none of them had the requisite background or training in psychometric testing and measurement, the key component of the work.

[35] Dr. Helmer then had some conversation with Dr. Mela about hiring Barb Wieler for this FASD Study because in his February 20, 2015 email to Dr. Mela enclosing her CV, he indicated he wanted Dr. Mela to know some of her background.

[36] In response to questions from Employer’s counsel, Dr. Mela testified he was looking to Dr. Helmer to oversee the psychometric testing of the subjects of the FASD Study, including among other things, the training and supervision of one of the practicum students that had been offered to assist with the FASD testing. He testified he was comfortable having Dr. Helmer choose the people to do the testing and make arrangements with them to do the work, which is what happened.

[37] He also testified that he understood Dr. Helmer sent him Barb Wieler's CV because she was a psychometrist Dr. Helmer thought could do the job. Dr. Mela emphasized he was not able to judge who was a good psychometrist to hire and he relied on Dr. Helmer to hire people that could do the job under his supervision, or could be trained so that they could do the job under his supervision. Dr. Mela "just assumed" he said that Barb Wieler was "part of the SRHA system". He did not know her, he never worked with her previously and never met with her until later in the year at a luncheon he organized for the people working on the study.

[38] In due course, and after getting approval from Dr. Mela, Dr. Helmer was instructed to make arrangements with Barb Wieler to be one of the people to do the testing as well as Jessica Zagrodny ("Jessica"). The latter was a PhD student and research assistant from the University of Saskatchewan that could also do the job, albeit with some training, unlike Ms. Wieler.

[39] At this same time, there was also some discussion about how these psychometrists would be paid. The PhD student would do the work as part of her training without cost, but would receive credit at the University for her work. It was agreed the work performed by Barb Wieler would be charged to the research project at a lump sum price of \$5000. Dr. Mela remembered the discussion about the amounts to be paid quite clearly, as he was grateful for what he considered a reasonable fee.

[40] However, and notwithstanding his legal obligations under the BREB approval documentation outlined below, he was also quite clear about one thing, namely, he had no idea about, and there was no discussion about, how the payment process was to work. He said he knew nothing about the administrative process to be followed and he did not know or discuss whether the funds would go to the hospital or to Dr. Helmer and then to Barb Wieler, or whether she was to be paid directly. He testified he knew he had to pay, but he wasn't sure how to pay. He also testified that when asked by Tracy Muggli, somewhat later he told her there was no written contract to cover the psychometric services.

[41] The first written indication of any communication between Dr. Helmer and his supervisor, Ms. Buglas concerning the work for the FASD Study was his March 3, 2015 email which states "I may be working with two psychometrists interns from May to Aug 2015 on a joint study with Medicine. I would appreciate it if I might have the offices 4126 and 4123 during May to August 2015. Thanks. D'Arcy"

[42] Dr. Helmer did testify that over the period from January to May 2015, he raised the subject of the Study with Ms. Buglas verbally on six occasions in her office, in the hallway and the morning huddles and that she was supportive. He also testified he had six written communications with her by email to the same effect and her only concern throughout this period was how this Study work would affect his referral workload. However, only one of these written communications was put in evidence and if others existed, they were not put in evidence.

[43] A significant issue in this hearing was whether in any of these communications, Dr. Helmer ever advised his supervisor that Barb Wieler would be one of the psychometrists performing work for the study, under his supervision. Dr. Helmer testified that he had mentioned her name to Ms. Buglas

in one of the morning “huddles”, although that was denied by Ms. Buglas. She confirmed some mention of the Study in the huddles, but denied that Barb Wieler’s name was ever used.

[44] Dr. Helmer also testified he was certain he had emailed that information to her as well. However, both Ms. Buglas and her supervisor, Tracy Muggli testified that they searched the SRHA computer records and no such email was ever sent by Dr. Helmer to Ms. Buglas. At one point, Dr. Helmer seemed to suggest that someone may have deleted the email from the system when his computer was left open.

[45] The Board finds as a matter of fact that Dr. Helmer never informed Michelle Buglas that Barb Wieler would be working on the SRHA site at the NAW on the FASD Study (which he did inform her about).

[46] Dr. Helmer testified the Study involved a total of 25 patients that would be sent to the SRHA by Dr. Mela. Dr. Helmer arranged for the tests to be performed in the morning and afternoon by Jessica and Barb Wieler respectively. The tests consisted of “interviews” as opposed to a clinical assessment. The tests had the effect of producing a numerical “score” for each of several cognitive skills or “domains” that was then further interpreted by Dr. Helmer.

### **Performance of the FASD Study**

[47] Dr. Helmer spent some time describing the work performed by Barb Wieler and Jessica. Dr. Mela would have his assistant create a batch referral of patients with their names on a list that was sent to SRHA. Dr. Mela would note on the form that the whole batch was for the FASD Study. No phone calls took place.

[48] Ms. Buglas had directed that each such patient be input into the SRHA system and assigned a number that identified them by name in the computer. Dr. Helmer testified that by this process, each patient became a patient of the SRHA.

[49] Dr. Helmer testified that both Barb Wieler and Jessica started in May 2015 and their work was shut down on June 24, 2015. He also testified that each of them were introduced to people in the wing of the SRHA where these offices were located. Importantly, it was agreed Ms. Wieler was never introduced to Dr. Helmer’s supervisor, Ms. Buglas.

[50] Jessica made the appointments for the patients to come to the NAW and specific tests were assigned to be conducted on each patient by Jessica and Barb Wieler. At the end of the day, Dr. Helmer would get a series of test result numbers that he collated and would submit to Dr. Mela, who was looking for daily reports on the work in the Study.

[51] Each patient would have been contacted by Jessica to make an appointment for them to do their testing. The patient would arrive at reception in the NAW and was told to ask for Jessica. Information received from each patient included their name, birthday and a phone number. No



diagnosis of anything existed on any of the forms, although it was clear each patient was there for the Study and that was marked on the forms.

[52] Each patient signed two consent forms (Exhibits U7 and U8), one to permit the testing and the second to permit the release of the information. These were forms that Dr. Helmer said he used in his regular personal practice which he said were designed with enough specificity to insure they met his professional psychologist ethical standards.

[53] Without the requirement for FASD Study patients to sign these two forms, it was not clear that there would have been any consent obtained to the testing process, as no one appeared to have asked or questioned the process by which such patients had been processed, other than registering them in the central SRHA computer.

[54] It is important to note at this point Dr. Helmer's testimony to the effect he had never seen the SRHA Privacy and Confidentiality Policy and was not aware of any of its provisions. This contradicts the evidence of the Ms. Atkinson, the SRHA Privacy Commissioner who stated every employee was required to sign this document because it was not possible to gain access to any SRHA computer without having done so.

[55] However, Dr. Helmer was quite clear both that he had never signed such a document and was not aware of the policy. He said he assumed there must be agreements like that for regular employees. He had himself taken the practices he had developed in his personal professional practice that he felt were better than any others he had seen, including regular SRHA consent forms for example, and adapted these personal forms and standards to his work at SRHA.

[56] Dr. Helmer's discussion during this phase of his testimony indicated an appreciation of the importance of privacy laws and a professional approach to respecting them in his practice. Where his evidence contradicts the evidence of the Privacy Commissioner on this issue, the Board accepted that of Dr. Helmer.

[57] The nature of the tests was to assess a patient's "thinking ability" through a series of cognitive assessments each designed for specific cognitive domains. The tests were administered in the morning and afternoon by Jessica and Barb respectively and provided numbers or scores for each test that could be interpreted by Dr. Helmer for use by Dr. Mela in the development of his algorithm.

[58] Dr. Helmer testified that relative to the design of the Study, he was certain not all patients suffered from FASD as it was important for there to be a control group. Therefore, just because a patient was identified as being part of the FASD Study, one could not conclude that person suffered from FASD.

## **Discovery of Barb Wieler Working at the NAW in the SRHA Facility**

[59] Michelle Buglas was at lunch on June 24, 2015 and asked Jessica, who was also in the lunch room, how the testing work was going for Dr. Helmer. Jessica responded she was done for the day and was waiting for Barb Wieler to finish. Ms. Buglas said she was shocked to hear Barb Wieler's name and asked, "What was going on?"

[60] She testified she left the lunch room and went to the NAW receptionist to ask where Dr. Helmer's testing was going on. She was told the doctor's assistant who comes to do the testing was in a room down near Dr. Helmer's office. Ms. Buglas then called her Director, Tracy Muggli, who suggested she see Dr. Helmer and ask him for clarification.

[61] Ms. Buglas went to Dr. Helmer's office and asked if he could help her understand how Barb Wieler was working at the hospital as his research assistant. Dr. Helmer confirmed she was there for the Study. Ms. Buglas testified she told Dr. Helmer that Barb Wieler working for him was a conflict of interest and that had been disallowed previously.

[62] By this point the discussion became very animated and Dr. Helmer began yelling at Ms. Buglas. According to Ms. Buglas, Dr. Helmer seemed more focused on the frustration of his heavy case load and lack of support than the question of whether Ms. Wieler should be working under his supervision. Eventually, Dr. Helmer got to the point where he said, "Discipline me if you want, but get out of my office!" and slammed the door after she left.

[63] Ms. Buglas returned to her office and called her Director, Tracy Muggli. Suddenly, Dr. Helmer was at her door yelling "What am I accused of?" and then entered her office and closed the door. Soon there was another knock at the door, and another colleague was in the door and asked to see Ms. Buglas immediately, so Dr. Helmer got up and left.

[64] Again, shortly thereafter, while her colleague was still in the office, there was another knock at the door, and Dr. Helmer was standing there with Barb Wieler. He shouted out loud "This is Barb Wieler - now you've met her!" followed by Barb Wieler saying "Nice to meet you" and then the two of them walked away.

[65] At about 3:30 pm that afternoon, Ms. Buglas received an email (Exhibit E6) from Dr. Helmer reviewing what had just happened from his perspective and alleging a lack of support from Ms. Buglas. He notes in the message that he had reviewed the FASD Study in detail previously with Ms. Buglas, referring to past communications between them on that subject. However, he did not state that he had told Ms. Buglas that Barb Wieler would be assisting with the testing work for the Study. It is noteworthy that at this point so close to the events, he does not take issue with Ms. Buglas' point at the hearing to the effect that she had never been told of Barb Wieler's presence in the NAW.

[66] Most of the email again outlines Dr. Helmer's view that he has not had the requisite support he was entitled to from his supervisor, Ms. Buglas. "I have done nothing but work flat out here, and I'm beginning to wonder about that point. I maintain that I have done nothing but support patient

care plans and have not done anything ethically wrong by doing a collaborative study and working with two psychometrists to do so.”

[67] After these events, Ms. Muggli froze all work on the FASD Study, suspended Dr. Helmer with pay, and asked Dr. Helmer, Barb Wieler and Jessica to leave. At the end of that day, Ms. Buglas went to Dr. Helmer’s office and picked up all the loose files she found and locked them inside her own office. She then submitted a formal complaint to Human Resources (Exhibit E7) regarding Dr. Helmer’s conduct that day.

[68] The complaint led to an investigation that led to a meeting with Dr. Helmer on July 3<sup>rd</sup>, conducted by Blake McMullen, the Manager of Employee Relations. These events led to a written warning dated August 13, 2015 (Exhibit E8) being given to Dr. Helmer relative to his inappropriate conduct with Michelle Buglas on that afternoon.

[69] Dr. Helmer went on a paid suspension June 24, 2015 and returned to work around July 12, 2015. When he returned to work, he discovered that 18 patient records had been removed from his office. As it turned out these were the records that Ms. Buglas had taken from his office and locked in her office at the end of the day on June 24, 2015.

[70] This led to a complaint (Exhibit E10) being filed by Dr. Helmer with the SRHA privacy commissioner, with a copy sent to the Saskatchewan Office of the Information and Privacy Commissioner (“SOIPC”), alleging that these records were “stolen” from his office between June 24, 2015 at 3:20 pm and July 12, 2015 and that the removal of these files was a breach of privacy under Saskatchewan HIPPA law.

### **Allegations of Breach of Privacy and Subsequent Investigations**

[71] Dr. Helmer’s allegation of a breach of privacy (Exhibit E10) described the records removed from his office by Ms. Buglas as containing “...clinical information about each of these eighteen patients” and requested the SRHA Privacy Officer to conduct an investigation and have the outcome reported to him.

[72] The SRHA Privacy Officer, Wenda Atkinson testified that she conducted the investigation requested by Dr. Helmer, starting with a call to him. He confirmed the files were from the FASD Study. During the call he was passionate with a raised voice and demanded a meeting, which Ms. Atkinson agreed to if he could tone down his comments.

[73] They subsequently met and Dr. Helmer described the individuals who came through patient intake and were then tested. Ms. Atkinson testified he described the records as having identifiable information from each person that she concluded was “Personal Health Information” (“PHI”) under

the SRHA Policy Number 7311-75-003 entitled “PRIVACY AND CONFIDENTIALITY” (the “SRHA Privacy Policy”).

[74] In due course, she concluded SRHA was the Trustee of the PHI involved and even though removed from Dr. Helmer’s office, it was still under the control and custody of the Trustee and hence no breach occurred. She copied her report to SOIPC and sent it to Dr. Helmer.

[75] In the meantime, Ms. Atkinson was also conducting a second investigation into whether the testing of SRHA patients and the related processes adopted by Barb Wieler and Jessica during May and June 2015 for the FASD Study had led to a breach of privacy under the SRHA Privacy Policy. In this connection, she attended a meeting on July 3, 2015 conducted by labour relations manager, Blake McMullen which had been set up to review all the events on June 24, 2015.

[76] Ms. Atkinson testified she had been trying to understand Barb Wieler’s status while doing the testing work for the FASD Study, in particular whether she had a contract with Dr. Mela. Dr. Helmer advised everyone that was the case at the July 3<sup>rd</sup> meeting. She subsequently contacted Dr. Mela in August (who had been on vacation) and he said he initially thought Barb Wieler was an employee of the SRHA so he didn’t think she needed a contract with him to do the work. It was only at the end of June that he learned otherwise.

[77] Ms. Atkinson reported to her superiors that there was no contract between Dr. Mela and Barb Wieler, and for that reason, she could not complete her report until she could follow up with Dr. Helmer to ask further questions of him. Due to a leave of absence taken by Dr. Helmer, he was not available to answer these questions until a meeting was arranged with the interested parties on December 16, 2015.

[78] At that meeting Ms. Atkinson advised the allegation was that he, Dr. Helmer, had given Barb Wieler access to the NAW and access to PHI that consisted of the patients’ names, their inclusion in the FASD Study and the test scores. Moreover, Barb Wieler’s presence on the site was not approved and she had not signed a confidentiality agreement. Dr. Helmer responded he believed Dr. Mela had a contract with Ms. Wieler, based on conversations with him. Ms. Atkinson also testified that she told Dr. Helmer that Dr. Mela had denied there was a contract between Ms. Wieler and himself.

[79] Because of this information, Ms. Atkinson subsequently met again with Dr. Mela in December who advised that Ms. Wieler had signed a contract with the University to provide the testing services for the FASD Study between June 1, 2015 and July 2015 or the end of the project. The contract stated it was made on October 8, 2015, but apparently signed by Ms. Wieler on November 17, 2015.

[80] Ms. Atkinson’s report was called a “Privacy Incident Overview” (“Atkinson Privacy Report”) (Exhibit E11). The form of contract signed by Barb Wieler is attached to the Atkinson Report. In cross-examination of Ms. Atkinson, she advised the Grievor’s counsel that she had concluded that Barb Wieler never had an employment relationship with the SRHA.

[81] Ms. Atkinson testified as well that the SRHA Privacy Policy applied to all staff, including volunteers, who have access to the health data of clients or patients. As well, she testified that Jessica for example had signed a confidentiality agreement with the University of Saskatchewan and, so it was not necessary for her to sign another, if she did not have SRHA computer access. Anyone who was given computer access and a SRHA computer ID had to first sign a confidentiality agreement in the form of the Appendix to the SRHA Privacy Policy (“SRHA Confidentiality Agreement”). However, Dr. Helmer testified that he had never seen the SRHA Privacy Policy and never signed the SRHA Confidentiality Agreement (Exhibit E3). No such signed document was put in evidence by the Employer relative to Dr. Helmer.

[82] Ms. Atkinson then testified as to the basis on which she had concluded Dr. Helmer had been responsible for the most serious kind of privacy breach, described in the SRHA Privacy Policy Appendix B as a Level 3 breach. In her view it was clear the data provided to Barb Wieler (such as the patient’s name), the SRHA intake number assigned to that person, and the information from Dr. Mela listing the patients as being referred for the FASD Study testing work was all PHI. Furthermore, the test scores obtained by Barb Wieler during the testing process was also PHI. As a result, providing Ms. Wieler with any of this information, without her having signed a SRHA Confidentiality Agreement was a breach of the SRHA Privacy Policy by Dr. Helmer.

[83] The Atkinson Report also concluded the breach was intentional because Dr. Helmer knew Ms. Wieler had not signed such an agreement. Furthermore, in her opinion, because the breach resulted in a personal benefit to Dr. Helmer (i.e. the increase in the household income resulting from Ms. Wieler’s compensation for her work), the breach should be categorized as a Category III breach. Such a breach exists where one knowingly contravenes the SRHA Privacy Policy or applicable legislation relative to PHI for the purpose of either personal benefit or to harm another person. The Report was submitted internally as well as to the SOIPC. Her report was finalized and dated December 21, 2015.

[84] The SOIPC reviewed her report and in June 2, 2016 confirmed its agreement with the conclusions of Ms. Atkinson.

### **Completion of the FASD Study by Barb Wieler Off-Site**

[85] Barb Wieler testified that the tests remaining to be conducted on the last three participants were conducted by her at Dr. Mela’s off-site clinic. She conducted all the tests that needed to be done, including those originally done by Jessica.

[86] She finished her last work on the FASD Study on August 26, 2015 and then invoiced Dr. Mela who replied that there would be some delay in paying the invoice as he had to navigate the internal University bureaucracy. It turns out the “bureaucracy”, was the requirement to develop a written

contract not between Dr. Mela, but with the Department of Psychiatry and Ms. Wieler with a number of new provisions that had never been discussed previously. The contract was signed by Ms. Wieler on November 17, 2105 and attached to the internal Atkinson Report referred to above.

[87] Following the suspension of the FASD work at SRHA facilities, Dr. Helmer testified that he was told by Karen Kawula (the Director of Mental Health and Addiction Services) to complete the Study on his own time offsite. He did assist with this work, consisting mostly of collating test data from the patients who were not tested as part of the work planned for SRHA facilities. He then added this data to the previous work he had done and delivered it all to Dr. Mela.

### **Discipline of Dr. Helmer**

[88] Following the resumption and completion of Ms. Atkinson's report, SRHA disciplined Dr. Helmer via the delivery of the letter to him from Tracy Muggli dated January 7, 2016 ("Discipline Letter") (Exhibit E1). The letter advised SRHA had completed its investigation into the series of events that had occurred in May and June 2015.

[89] The letter advised Dr. Helmer that he had committed a "violation of policy involving several SHR clients" and among other things, the investigation made the following conclusions, summarized in the discipline letter under 7 bullet points (each of which is referred to in the remainder of this Award as the "1<sup>st</sup> bullet point" to the "7<sup>th</sup> bullet point" respectively):

- He had arranged for his common law spouse, Barb Wieler, to come into SRHA offices to interview "SHR clients" without informing his manager, Michelle Buglas;
- He had previously been advised by his manager he could not work directly with Barb Wieler because she was his common law spouse, and this was a conflict of interest;
- He had deliberately concealed from his manager that Barb Wieler was working in his office under his direction, notwithstanding several opportunities to so advise his manager and a specific request from his manager, all of which was considered insubordinate;
- He claimed there was an email to his manager advising of the presence of Barb Wieler working in his office, but no such email or other written communications was ever found;
- Barb Wieler did not have SRHA employment status or a signed contract for the work she was doing at the time she did the work, she did not sign the SRHA Confidentiality Agreement, he had not followed SRHA policies and procedures relative to confidentiality, and Ms. Wieler had been given access to SRHA facilities and access to SRHA patients PHI

without necessary protections in place, all of which amounted to the conclusion that Dr. Helmer had not followed the SRHA Privacy Policy;

- He had not fully cooperated and answered all questions during the investigative review; and
- He did not admit or accept responsibility for his actions as described above.

[90] After considering Dr. Helmer's employee file, arbitration jurisprudence and related matters, the Employer assessed discipline in the form of an unpaid suspension of 30 days from January 7, 2016 to February 6, 2016.

## **THE ARGUMENTS**

[91] The respective arguments and submissions of the parties are summarized below in the order they were presented.

### **The Employer's Submissions**

[92] The Employer argued that taken together the various elements of Dr. Helmer's actions over the relevant time period amounted to just cause for the discipline imposed on two separate and independent grounds, each of which it was submitted, fully justified the need for discipline and the extent of the discipline.

[93] In the Employer's written argument, Counsel describes the first ground as "Privacy and Confidentiality Breach – Unauthorized Access" and the second ground as "Insubordination". In the analysis of the Employer's argument below these two items are considered in that order.

### **The Union's Submissions**

[94] The Union denied all claims by the Employer, denied any wrongdoing by Dr. Helmer and argued:

- a) On a balance of probabilities, Dr. Helmer did not engage in conduct that amounted to just cause for imposing discipline;

b) Even if it did, the penalty imposed of a 30-day unpaid suspension was not appropriate.

### **Authorities Relied Upon by the Parties**

[95] The Parties relied upon numerous arbitral, judicial and legislative authorities in support of the respective arguments.

## **THE DECISION**

### **Part A: Introduction and the Nature of Privacy Obligations:**

**The underlying claims in this dispute involve several contradictory factual allegations, significant emotional issues between various individuals, incorrect interpretations of privacy obligations and institutional deficiencies relating to privacy obligations that must be clarified before any assessment of Dr. Helmer's conduct is made.**

### **Backdrop to the Atkinson Privacy Report and related sanctions of Dr. Helmer**

[96] In addition to the general “violation of policy” sanction in the body of the Discipline Letter, the document also outlined seven bullet points as the basis for Dr. Helmer’s suspension. Although only the fifth bullet dealt with privacy issues, ultimately it was the most serious. The fifth bullet adopted by reference the related Atkinson Privacy Report issued by the SRHA Privacy Commissioner. The Discipline Letter concluded Dr. Helmer’s actions during the February to June 2014 period constituted a “violation of privacy involving several SHR clients”.

[97] The Privacy Commissioner’s investigation also concluded Dr. Helmer had committed a Level 3 breach of the SRHA Privacy Policy. A Level 3 breach under the terms of that Policy is one that has been determined to be both “intentional” and “malicious”, obviously a conclusion of significant concern, particularly to Dr. Helmer.

[98] This is the most serious issue in this dispute because if true, it would not only be a devastating mark against the reputation and career of Dr. Helmer, but at the same time, it would undermine and perhaps constitute a breach of the SRHA’s own statutory fiduciary privacy obligations and those of its management if they had failed in their “duty to protect” PHI.

[99] As it turns out in the detailed analysis in Part B below, this allegation against Dr. Helmer was unjustified and results from a badly managed series of events that should never have got to this



conclusion. As outlined in more detail in Parts B and C below, that series of events can be summarized as follows:

- a. Dr. Helmer was frustrated by his work load and by what he saw as management's failure to support him.
- b. He therefore proposed to hire his spouse to assist him with the work which was determined to contravene the SRHA Relatives Policy which frustrated him even more.
- c. He was given a mandate by Dr. Mela to assist in finding a research assistant for the FASD Study and he chose his spouse for this role.
- d. Dr. Helmer requested and obtained approval from SRHA to do the FASD Study itself,
- e. Unfortunately, consistent with his distrust of his employer's support and his attitude of not disclosing more than he thought necessary, he did not inform SRHA of his spouse's role in the FASD Study, presumably also because he was afraid they may not approve of such hiring.
- f. Management found out about the hiring and was extremely angry because Dr. Helmer disobeyed clear instructions not to hire his spouse.
- g. Management and the SRHA Privacy Commissioner began to investigate how this happened.
- h. The investigations couldn't find any paperwork or regular procedures followed to bring the spouse onto SRHA premises, including a SRHA Confidentiality Agreement signed by Barb Wieler.
- i. Dr. Mela, who authorized Dr. Helmer to hire a research assistant on his behalf and who was not concerned whether such assistant was Dr. Helmer's spouse, was unable to explain or describe any regular institutional process or procedure that he followed as required by the applicable guidelines and personal commitments he had made to SRHA and the University of Saskatchewan in connection with the FASD Study all as outlined in the Application for Operational Approval.
- j. Dr. Helmer was not overly cooperative in assisting with the investigation and SRHA assumed that Dr. Helmer had intentionally and maliciously breached the SRHA Privacy Policy by hiring his spouse.
- k. In the meantime, Dr. Helmer went on an extended leave and Dr. Mela was not very available to explain what had happened.

- l. In an atmosphere of anger, frustration and distrust on both sides, management completed its investigation of Dr. Helmer's conduct relative to SRHA obligations to protect PHI (as well as his alleged breach of the Relatives Policy).

[100] The Privacy Commissioner concluded Dr. Helmer intentionally hid the hiring of his spouse and avoided having her sign a confidentiality agreement to allow her to increase her income and therefore indirectly, increase Dr. Helmer's household income.

[101] In the opinion of the Privacy Commissioner that therefore constituted an intentional and malicious Level 3 breach of the SRHA Privacy and Confidentiality Policy. That conclusion was subsequently buttressed by the report of the Office of the Saskatchewan Information and Privacy Commissioner which agreed with her conclusions, without access to all the relevant documents and facts.

[102] Management relied on the SRHA Privacy Commissioner's report in support of the fifth bullet in the Discipline Letter.

[103] At the hearing and in the Employer's brief, SRHA counsel argued that simply because the SRHA Privacy Policy clearly states that it applies to "all staff", that that makes Dr. Helmer responsible for compliance with all its terms, without addressing the issue of how or when or in what manner Dr. Helmer became responsible for such compliance. At a minimum the SRHA should have produced a signed SRHA Confidentiality Agreement or provided some proof of training of Dr. Helmer.

[104] The only evidence was the implied assertion by Ms. Atkinson that because as a matter of SRHA policy, nobody was allowed access to the SRHA computer system without signing the document, it followed that Dr. Helmer must have seen the Policy and signed the Agreement. That is not sufficient to found a breach of the Policy and impose discipline on an employee without further proof.

[105] The other argument of the Employer was that when Dr. Helmer knowingly provided Barb Wieler access to PHI without signing the SRHA Confidentiality Agreement, he knowingly breached the provisions of that document. Again, without proof that Dr. Helmer had signed or otherwise committed himself to the terms of the Agreement, and considering the other bases he had for assuring protection of PHI, this too does not support any discipline.

[106] The Atkinson Privacy Report unfortunately reached this conclusion without examining the systemic nature of SRHA privacy obligations, the applicable institutional procedures at the University of Saskatchewan and SRHA for research projects and whether they were complied with.

[107] These had been clearly created to translate the SRHA's and the University of Saskatchewan's statutory obligations into effective employee practices to insure compliance with the basic fiduciary responsibilities of a trustee under Saskatchewan Privacy Laws. Had she done that, many deficiencies

in the institutional procedural processes at both the University and SRHA would have become evident and the privacy allegations against Dr. Helmer would likely not have moved forward.

[108] Those deficiencies are significant enough that they color the entire effort to hold Dr. Helmer responsible for whatever his personal privacy obligations were. It is helpful to consider these deficiencies as the specific privacy obligations of Dr. Helmer can only be understood in that light.

### **The nature of privacy obligations and SRHA systemic deficiencies.**

[109] The very nature of privacy obligations relating to the identity of an individual and his or her PHI is that they start with broad enterprise or institution-wide statements of responsibility that must be interpreted in the context of best practices for that kind of institution and a specific set of facts and circumstances.

[110] For that reason, Dr. Helmer's specific privacy obligations can only be understood and properly assessed in the context of the existence of these broader systemic obligations and their satisfaction or otherwise in that institution.

[111] This systemic structure is similar to the manner in which government policy uses the law to enforce obligations it has created for many broad social purposes. Environmental and safety laws for example display a similar structure. Broad wide-ranging obligations are created and imposed on institutions to for example "protect PHI".

[112] This is accomplished by requiring the institution to "...establish policies and procedures to maintain administrative, technical and physical safeguards that will...protect the confidentiality of the information...and.. otherwise ensure compliance...by its employees." (quoted from Section 16 of Saskatchewan Privacy Laws).

[113] The law therefore obligates the institution to create a systemic plan that applies to the entire institution at all levels and includes details of how the plan is to become operational and effective for every employee. That is to say, to satisfy its statutory fiduciary trustee obligations under Saskatchewan Privacy Laws, the SRHA and the University of Saskatchewan must establish policies and procedures that "...otherwise **ensure** (*emphasis added*) compliance ...by its employees ..." with the law such as Section 16 among others, of the Saskatchewan Privacy Laws.

[114] As is evident in Part B below, SRHA did have a set of reasonably well drafted policies and procedures that if followed would have ensured compliance with the law, but for reasons that were not explained at the hearing, individual employees responsible for following these procedures did not appear to even be aware of some of the procedures they were to follow.

[115] These facts beg an answer to the question of whether a trustee can satisfy its fiduciary obligations to “establish policies and procedures that ...will protect ...and will ensure” the integrity and confidentiality of PHI by simply having a policy that would protect such PHI if the employees did what they were supposed to do under the terms of the document. The fiduciary nature of the obligations almost certainly demands that something further is required, such as some kind of training and ongoing audits to insure the obligation is met.

[116] How that should or could have been done was not the issue in this case, as the existence of these policies and procedures was not put into evidence in the case until late in the hearing, when it was too late to examine people in any depth as to what happened.

[117] Whether SRHA and University took the appropriate steps to ensure their policies and procedures were made effective in the day-to-day lives of their employees is therefore beyond the scope of this award. There are myriad ways that is done in large institutions, such as training employees in the policies and procedures, repeatedly training them each year for example, holding them accountable for their personal compliance by such things as regular audits. Whatever the system was at SRHA it did not seem to work as shown by the very existence of the institutional deficiencies outlined below.

[118] When considering these issues, it is important to remember that SRHA (and the University) are “trustees” of PHI. A “fiduciary” responsibility of a trustee is one of the highest orders of duty prescribed by law and requires considerable ongoing diligence to satisfy its demands. If the Employer or the University or the Principal Investigator failed in their fiduciary responsibilities, that is a serious matter on its own. However, if any one of these institutional deficiencies had been fulfilled by the Employer or otherwise and such fulfillment would have prevented any inappropriate disclosure of PHI to or by Barb Wieler, then that is directly relevant to this Award.

[119] What is important therefore is to assess Dr. Helmer’s conduct in the context of the institutional deficiencies that were disclosed by the evidence in the hearing (regardless how the deficiencies were caused). These institutional deficiencies can be summarized as follows (and are set out in detail in Part B in more depth below):

- a. Deficiencies relating to Dr. Helmer. Although the Privacy Commissioner testified that every employee was required to read the SRHA Privacy Policy and sign the attached SRHA Confidentiality Agreement to get access to the SRHA computer system, Dr. Helmer testified that he was not aware of the Policy and had never signed the attached Agreement. The fact no such signed document was put into evidence by SRHA leads to the inevitable conclusion that Dr. Helmer never saw the Policy and was never asked to sign the SRHA Confidentiality Agreement. This is an institutional deficiency of the first order in a case alleging Dr. Helmer’s breach of privacy obligations.
- b. Why were Jessica’s obligations to protect PHI not questioned by SRHA? The evidence regarding the “other” research assistant was that she was not required to

sign a SRHA Privacy and Confidentiality Agreement because she had signed one with the University of Saskatchewan as a graduate student. This is a common attitude among lay people that such an agreement is a kind of “commodity” that if signed by someone, is effective, regardless who the other party is that has the right to enforce the agreement. This is another fundamental institutional deficiency that was accepted by all the SRHA witnesses as normal practice. If Jessica did breach her confidentiality obligations to protect the PHI of SRHA patients, how would SRHA enforce an agreement to which it was not a party? Would they phone the University and ask them to enforce it? What if the terms of the University’s agreement were not what SRHA wanted in its agreements so that even if the University agreed to take action to enforce its agreement with Jessica, that might not help SRHA. The point is this is another institutional deficiency displaying a lack of understanding of how these agreements must work to satisfy the fiduciary obligations of SRHA.

- c. Lack of SRHA management compliance with SRHA Research Policy relative to the FASD Study. As outlined below, the SRHA Research Policy required that no research on the SRHA premises would be conducted without something called a “Departmental Impact Assessment”. Had it been conducted, the other deficiencies around the FASD Study work would have been made obvious and presumably avoided. As well, the policy outlines a significant series of obligations of the Principal Investigator that were apparently completely ignored by all concerned.
- d. Dr. Mela’s lack of awareness, let alone compliance, with his personal commitments under the Operational Approval of the FASD Study. The Application for Operational Approval contains an extensive series of personal obligations in respect of which Dr. Mela actually signed a statement promising to ensure compliance. In his evidence he gave no indication that he even acknowledged the existence of these responsibilities. Moreover, the process of the University’s Behavioural Research Ethics Board for allowing contracts to be signed after the fact begs all kinds of questions about their procedures, all of which are beyond the scope of this Award.
- e. Dr. Mela’s batch referral system. The SRHA Privacy Commissioner concluded that the initial information Dr. Mela sent to SRHA was all PHI and again, that process begs the question of how that could be done without any consideration of whether that information was properly protected when transmitted to SRHA.

[120] This was the context in which the Discipline Letter concluded that Dr. Helmer had created a “violation of policy”. How and why that conclusion was incorrect and completely inappropriate is set out below.

## **Part B: Privacy Issues:**

Condensed to its essential parts, the basic privacy allegation against Dr. Helmer in the discipline letter (Exhibit E1) was that he “...did not follow the SHR policies/procedures as it relates to Confidentiality”. Although the discipline letter is not overly clear in this regard and does not specify any particular section of the policy that was contravened, the letter suggests that the justification for this allegation is that (taken from the fifth bullet in the discipline letter – the only bullet dealing with privacy issues):

- a) **“the research assistant did not have SHR employment status or a signed contract for this work...;**
- b) **“the research assistant did not sign the SHR confidentiality/privacy agreement;**
- c) **“the research assistant was given access to SHR premises, access to SHR clients to interview them and collect their health information.**

[121] On their face, the above allegations simply do not justify any kind of discipline in part because Dr. Helmer testified he was not aware of the SHR Privacy and Confidentiality Policy and had never signed the SHR Confidentiality Agreement and no signed agreement was produced by the Employer to contradict this.

[122] Moreover, even if he was aware of the terms of the SRHA Privacy and Confidentiality Policy, Dr. Helmer could argue as follows:

- a. Nothing in the SRHA Privacy Policy specifically requires an independent contractor (as Ms. Wieler is determined to be below) to have employment status or have a signed contract for the work they did for the FASD Study. The defined term “all staff” includes the phrase “affiliate employees” but that would obviously not apply to an independent contractor. The general obligation of Section 3.1 is simply that “all staff” must protect PHI consistently mirroring the obligations of SRHA under the law. In addition, Sections 4.1.4 and 4.1.5 respectively provide that all staff must “provide adequate safeguards to all PHI” and “maintain the confidentiality of all PHI”. Thus, there was no onus on Ms. Wieler as she did not qualify as “all staff”.
- b. Additionally, Dr. Helmer could argue he was not required to cause Barb Wieler to sign the SRHA Confidentiality Agreement because he was already “protecting” and “providing adequate safeguards” and “maintaining the confidentiality of” PHI. He could make that argument because Barb Wieler was working for him on implied terms identical to those under which she worked for him in his private practice. Those implied terms required her to maintain and protect the confidentiality of all PHI she came in contact with (see analysis below). As well, Ms. Wieler had confidentiality undertakings as a

registered nurse and in that capacity was in fact a trustee of all PHI created in this case, with protective fiduciary obligations; and

- c. The research work done for the FASD Study was approved by Dr. Helmer’s manager, including access to SRHA premises and clients and collection of PHI from study subjects.

[123] The primary concern of SRHA must be to ensure it has policies and procedures in place that will insure (*emphasis added – words taken from Section 16*) the integrity and confidentiality of PHI to meet its own fiduciary obligations. If Dr. Helmer can make arguments such as those above, there is something wrong with the SRHA system that is supposed to ensure that its employees will protect all PHI. SRHA was correct in identifying this problem, but unfortunately, blamed Dr. Helmer for all failures, which it will be seen below was not justified. It is necessary to understand Dr. Helmer’s obligations and failures if any in this wider context.

### **Was any PHI Created through the testing process supervised by Dr. Helmer for the FASD Study?**

[124] The starting point to analyze Dr. Helmer’s privacy accountability is to determine whether any PHI existed that needed protection. One must therefore begin with the definition of PHI and a few of the protective provisions under both the relevant Saskatchewan statutory law and the SRHA Privacy Policy which read respectively as follows:

*The Health Information Protection Act (Statutes of Saskatchewan, 1999 as amended)*  
(“Saskatchewan Privacy Laws”)

Section 2. Interpretation...

(m) **“personal health information”** means, with respect to an individual, whether living or deceased:

- (i) information with respect to the physical or mental health of the individual;
- (ii) information with respect to any health service provided to the individual;

...

- (v) registration information;

...

(q) **“registration information”** means information about an individual that is collected to registering the individual for the provision of health services, and includes the individual’s health services number and any other number assigned to the individual as part of a system of unique identifying numbers that is prescribed in the regulations;

...

(t) **“trustee”** means any of the following that have custody or control of personal health information:

- (i) a government institution;
- (ii) a regional health authority or a health care organization
- ...
- (xii) a person, other than an employee of a trustee, who is:
  - (A) a health professional licensed or registered pursuant to an Act for which the minister is responsible, or
- ...
- (xiv) a person, other than an employee of a trustee, who or body that provides a health service pursuant to an agreement with another trustee;

### **Section 16. Duty to Protect**

**16.** Subject to the regulations, a trustee that has custody or control of personal health information must establish policies and procedures to maintain administrative, technical and physical safeguards that will:

- a) protect the integrity, accuracy and confidentiality of the information...
- c) otherwise ensure compliance with this Act by its employees.”

...

### **Section 20 Duty where one trustee discloses to another**

**20** (1) Where one trustee discloses personal health information to another trustee, the information may become a part of the records of the trustee to whom it is disclosed, while remaining part of the records of the trustee that makes the disclosure.

(2) Where personal health information disclosed by one trustee becomes a part of the records of the trustee to whom the information is disclosed, the trustee to whom the information is disclosed is subject to the same duties with respect to that information as the trustee that discloses the information.

*Saskatoon Health Region Policy Number 7311-75-003 “Privacy and Confidentiality”*

### **“DEFINITIONS**

**Personal Health Information (PHI)** means, with respect to an individual, whether living or deceased:

- (i) information with respect to the physical or mental health of the individual;



- (ii) information with respect to any health service provided to the individual;  
...
- (v) registration information (e.g. demographic information) ...

### 3. POLICY

**3.1 All** staff are responsible for protecting PHI...obtained or accessed during the course of his/her work within the Region.”

[125] The first PHI created for the FASD Study relevant to this award was referred to in the testimony of Dr. Helmer when he described the batch referral system developed for this work. He testified Dr. Mela’s assistant would develop a list of individuals in a “batch” listing the names of each person. Dr. Helmer also testified that Dr. Mela “would note on the form that the whole batch was for the FASD Study”. That form would then be faxed to SRHA intake without any phone call and they would input each patient into the SRHA intake system.

[126] Dr. Helmer acknowledged in his testimony that by this process these individuals became SRHA patients, even though they had not called the facility themselves. Previously, Tracy Muggli and Michelle Buglas had also described this process in similar terms, also stating the purpose of the process was in part to make each individual a patient of SRHA.

[127] There is a good argument that this information alone constituted “information with respect to the physical or mental health” and “registration information” of the individuals listed in each batch. The fact Dr. Mela noted the whole batch was “for the FASD Study” could well be argued to be information that fit the definition of PHI. The fact the information for each batch was apparently faxed to the SRHA intake system would itself constitute a disclosure of PHI from one trustee to another trustee under the Saskatchewan Privacy Laws summarized above. No evidence was presented to suggest this was an issue, but it is worth pointing out that this disclosure was made without any apparent concern relative to who would be able to see or read the PHI when received by the SRHA.

[128] Throughout this whole analysis, it is important to remember the subject of Fetal Alcohol Syndrome Disorder is particularly sensitive because it is debilitating, largely incurable and results from an association with an alcoholic parent that is at best embarrassing to most people. It can be fairly assumed that no individual would want their name publicly disclosed as being associated with this disease, unless necessary for the testing process to which they had consented. Regardless of what they want, they have a right not to have this information disclosed, a right others are obligated to protect. This point is relevant both to the transmission of the batch list and to the disclosure of test scores to Barb Wieler. The former appears to have been done without any concern for who was to see the faxed list with the identification of the names on the list as being part of a “FASD” Study.

[129] Dr. Helmer testified that to create a “control” on the test results, not all of the names necessarily were considered to possibly suffer from FASD. However, this would not be known to

any third party seeing the names as being included in the Study and for that reason, that fact is irrelevant.

[130] Regardless whether this was an issue, the test data obtained by Jessica and Barb Wieler from their tests of the individuals in the FASD Study was PHI, because it was clearly “information with respect to the physical or mental health” of such individuals, as specified in the definition of the term in both the Saskatchewan Privacy Laws and the SHRA Privacy and Confidentiality Policy.

[131] Counsel for the employee seemed to suggest that because these test scores were not clinical interviews nor full psychological assessments and the information did not include personal histories, that somehow this obviated the need for protection from disclosure. This is not correct. Anyone in contact with this information could fairly draw the inference, (whether correctly or not is irrelevant) that each named individual had some association with the disease and this was a disclosure prohibited by Section 16 of the Saskatchewan Privacy Laws and the SRHA Privacy Policy, unless the recipient of the information was obligated to maintain the confidentiality of this PHI and appropriate consents were obtained. And, regardless of the relation to the disease of FASD, the test score numbers on their own fully meet the definition of PHI described above.

### **Who had a statutory fiduciary duty to protect this PHI under Sections 16 and 20 of the Saskatchewan Privacy Laws?**

[132] From the definitions above, and based on the evidence presented at the hearing the following were each a “trustee” of PHI in this case:

- a) University of Saskatchewan – by virtue of the definition of “government institution” under the Saskatchewan Privacy Laws and its role in the authorization of the FASD Study which gave it control over the PHI;
- b) SRHA – by the definition under the Saskatchewan Privacy Laws and by virtue of its role in the authorization of the FASD Study which gave it control over the PHI; and
- c) Barb Wieler by virtue of the fact she is a registered nurse, was not an employee of either SRHA or the University of Saskatchewan and had custody of the PHI. (From the evidence presented at the hearing, it appeared as if she had met and fulfilled these responsibilities in a professional manner.)

[133] Each of the above had access, custody and control of PHI as identified above.

[134] Each of the above therefore had statutory duties arising under Sections 16 and 20 of the Saskatchewan Privacy Laws, which included the obligations to “establish policies and procedures to maintain administrative, technical and physical safeguards that will...protect the integrity, accuracy and confidentiality of the information”

## What other obligations existed amongst the various parties in this case to protect PHI?

[135] Apart from any fiduciary trustee obligations, the following had contractual obligations or other obligations created or assumed by applicable institutional policies or professional association mandates relative to PHI in this case:

- a) The University of Saskatchewan (via its Behavioural Research Ethics Board) (“University”). Exhibit E16 evidenced the general role of the University in approving the FASD Study. Apart from its trustee obligations, it also had obligations that were attended to by the Behavioural Research Ethics Board and incorporated into the documentation dealing with privacy obligations. These two sets of obligations were passed on to Dr. Mela as seen below.
- b) SRHA (operational approval). Exhibit E16 also contained a document on the joint letterhead of the SRHA and the University, addressed to Dr. Mela as the Principal Investigator of the FASD Study, signed by Jim Thornhill in his capacity as Acting Associate Vice-President Research – Health (University of Saskatchewan)/Vice-President Research & Innovation (Saskatoon Health Region) indicating “Saskatoon Health Region is pleased to provide you with operational approval of the... (FASD Study)” (“SRHA Operational Approval”). In addition to the trustee obligations referenced above, the document made reference to obligations in several different areas such as international obligations and the SRHA Research Policy. Again, some of these additional obligations relative to research were passed on to Dr. Mela, but also to SRHA management as seen below.
- c) Dr. Mela. Dr. Mela was the Principal Investigator for the FASD Study. The SRHA Operational Approval was provided based upon the Application for Operational Approval (last page of Exhibit E16) which contained the following language:

### **“Declaration by Principal Investigator**

“By signing below, I certify that all information provided herein is accurate and complete.... I agree to abide to all applicable laws, regulations and international guidelines concerning the conduct of research with humans. I have read and understood and will abide to the Saskatoon Health Region Research Policy....”

*(The application also includes language where it asks the document to name someone from the research study team who will deal with problems and concerns while the research is ongoing and then names the Principal Investigator, Dr. Mela, as the person responsible)*

The above language clearly creates and imposes upon Dr. Mela personal contractual and employee policy obligations to conduct the FASD Study in accordance with all

applicable laws, regulations and international guidelines as well as in accordance with the SRHA Research Policy. The former obligations are summarized above. The latter are outlined below.

SRHA Research Policy. Exhibit E17 is the SRHA Research Policy (including the attached “procedures” to implement same) and include the following applicable provisions:

- a. **“This policy applies to all Saskatoon Health Region (SHR) employees, practitioner staff, contractors, vendors, students and volunteers. It also extends to non-SHR personnel if they use SHR or affiliate facilities, resources, patients, long-term care residents or staff to conduct research.**
- b. **“Department Impact Assessment”** means a process to identify the SHR departments whose services or support will be needed for the research and to determine each department’s ability to provide the needed services or support.
- c. **“1. Purpose** The purpose of this policy is to establish Saskatoon Health Region’s position and requirements regarding research that is conducted in SHR or affiliate facilities or that involves SHR or affiliate resources, patients, long-term care residents or staff.
- d. **“3.1.2 Examples of research subject to this policy include, but are not limited to:**
  - Any research conducted by SHR staff as part of their job duties...
  - Studies where the research is conducted on any person while they are receiving services (e.g. diagnostic tests, treatment procedures) of an SHR or affiliate facility...
  - Studies where SHR resources...are used to support research...
- e. **“3.3 Principal Investigators (PIs) shall ensure that the research is conducted in compliance with applicable international, federal and provincial legislation, regulations, standards and policies...**
- f. **“3.11.1 All PIs and researchers must abide by the following SHR policies and procedures:**
  - Privacy and Confidentiality
- g. **“3.18. When SHR equipment or services are used for a research study, the PI or his or her designee must follow internal SHR policies and procedures for their use.**
- h. **“4.1. SHR Managers and Departments**

4.1.1 The manager...of the SHR department or unit is responsible for evaluating and approving research through the Department Impact Assessment...

**4.2 Principal Investigators**

4.2.1 The PI ...is responsible...for ensuring that they and all persons carrying out the research...comply with the SHR Research Policy

4.2.2 PI's and their research staff are accountable for exercising due diligence in carrying out the ethical and legal requirements for their research...

**4.3 The Vice-President, Research and Innovation...is responsible for: ...**

4.3.6 If the person responsible for an alleged non-compliance or breach of the *Research Policy* is affiliated with another institution, reporting the alleged non-compliance or breach to the appropriate department, college or faculty of that institution

The above extracts undoubtedly disclose a wide-ranging and extensive set of obligations, many of which were passed on to the Principal Investigator.

- d) Tracy Muggli and/or Michelle Buglas. Both of these individuals had management responsibility for the operation of Dr. Helmer's work. Both were employees of SHRA to whom the SRHA Research Policy applied and therefore, were responsible for the completion of the Department Impact Assessment (as outlined above) to identify the services and support needed for the FASD Study, all to assist in the determination of SRHA requirements for this research, as stipulated above.

**Considerations relative to the University's satisfaction of its privacy obligations to protect PHI?**

[136] The first obligations relative to PHI were "trustee" obligations under the Saskatchewan Privacy Laws. The University of Saskatchewan was a trustee with all the fiduciary obligations that come with that designation. The fulfillment of those obligations would normally mean for example that the University would not, or would not enable one of its employees, to send PHI to SRHA without a set of procedures to deal with a whole host of issues that arise when PHI is moving from one trustee to another, which for example might include some form of a data sharing agreement. Section 22 (1) of the Saskatchewan Privacy Laws provides that the obligations of the transferor trustee continue in place until the transferee trustee has taken custody and control of the PHI.

[137] Typical trustees in this situation will normally contract with each other to insure the transferee body receives PHI and assumes custody and control in a manner that insures the privacy of the data being transferred and that insures the transferor trustee has fulfilled its obligations to protect PHI. Perhaps those kinds of provisions do exist somewhere in what was referred to in the evidence as the "partnership" between the University and SRHA, but no evidence of their existence was presented to

the Board and if true, the batch transfer of patient names identified as being part of the FASD Study would be a breach of this trustee obligation.

[138] The University purported to honour its trustee obligations and its obligations under the Behavioural Research Ethics Board by transferring responsibility for all of such matters in the FASD Study to Dr. Mela. Its certification of the whole FASD Study was made on the express written and signed promise of the Principal Investigator, Dr. Mela that he would fulfill all these responsibilities on behalf of the University and the SRHA.

[139] The evidence indicated that, like all academics, Dr. Mela was anxious to complete his research to help advance his career. Query whether imposing on Dr. Mela what, when taken as a whole, was an extraordinary set of obligations was appropriate without further support for him. Assuming these obligations was a condition of allowing him to proceed with the FASD Study. Apparently there was no effective training or effective education of Dr. Mela (although no evidence was presented on this point, other than Dr. Mela's own apparent lack of awareness of his responsibilities in this regard). The statute says, "A trustee must establish policies and procedures to maintain administrative, technical and physical safeguards that **will**: (a) protect the ...confidentiality of the information; and (b) protect against any reasonably anticipated: ... (iii) unauthorized access to or use, disclosure or modification of the information" (*emphasis added*).

[140] Similar questions could be raised again about the contracts administration process of the University's Behaviour Research Ethics Board. He clearly did not understand his administrative responsibilities here.

[141] The evidence was clear from Dr. Mela's testimony that he had no real understanding or even awareness of the personal privacy obligations related to his research work that he had assumed and committed to. He did not pay attention to things he considered purely bureaucratic and otherwise without value such as determining whether Barb Wieler would be his employee and if so, how and when a contract was necessary to document that arrangement. He testified he thought she was already an SRHA employee, but even if that was the case, he should have clarified the relationship with her ahead of time and had it properly documented by the University.

[142] Query whether the University was obliged to engage in some form of training, follow-up, audit or other form of preliminary or subsequent engagement with the Principal Investigator to ensure his compliance with these obligations. Were these obligations satisfied, by definition there would not be any basis for privacy breach allegations in this case against Dr. Helmer.

[143] It is beyond the scope of this award to make any conclusions about whether the University met and satisfied its obligations in this regard. However, when assessing whether Dr. Helmer met and satisfied any of his obligations, it is useful to understand that from a "root cause" perspective, there would have been absolutely no privacy issues in this case if Dr. Mela had fulfilled the obligations he assumed. Whether that is the result of the University not meeting its obligations or the fault of Dr. Mela is beyond the scope of this Award, but it is clearly not the fault of Dr. Helmer.

## **Did SRHA meet and satisfy its privacy obligations to protect PHI?**

[144] Similar questions and answers arise in response to this question.

[145] Considering the next stage of the process, after Barb Wieler and Jessica produced the PHI that resulted from their testing process, one must also ask what were the institutional obligations relative to this data. As described above, the FASD Study research should have been conducted under the umbrella of a systemic protective framework, that met SRHA's obligation under Section 16 of the Saskatchewan Privacy Laws.

[146] A fiduciary obligation to protect PHI means that SRHA should have contracted with the institution receiving the data (i.e. the University) to insure the PHI is protected, so at a minimum the University or Dr. Mela had some responsibility to insure this was attended to in the testing process and to insure its or his obligations under the statute were attended to. How else can a trustee insure its protective fiduciary obligations are fulfilled?

[147] Regardless whether such trustee to trustee obligations were satisfied, what is clear from the SRHA Operational Approval is that Dr. Mela was again responsible for an extensive set of obligations to insure compliance with all applicable laws and policies including the Saskatchewan Privacy Laws and the SRHA Privacy and Confidentiality Policy and the SRHA Research Policy.

[148] In the particular situation of the FASD Study, it would have been appropriate (unless the partnership agreement already does this) at the time of the SRHA "Departmental Impact Assessment" (referred to in the SRHA Research Policy below) for SRHA to determine what practices should be put in place to insure the FASD Study and all related research was conducted in full compliance with applicable privacy laws.

[149] These practices could include a wide range of options such as online module training for all researchers such as Dr. Mela, with appropriate audit and accountability parameters imposed. Again, it is beyond the scope of this Award to determine whether SRHA met its responsibilities under Section 16. If policies are written properly as was the case here, and the cause of a failure to protect PHI is that one or more individual employees did not follow the appropriate policy or procedure, whose fault is that? Is that a breach of SRHA fiduciary obligations?

[150] Had Dr. Mela satisfied any of his obligations under the grant of SRHA Operational Approval or under the SRHA Research Policy, again by definition there would be no privacy allegations against Dr. Helmer as all policies would have been complied with. The failure of Dr. Mela to satisfy his obligations as a Principal Investigator under both the Operation Approval and the SRHA Research Policy is therefore another root cause of the breaches of the SRHA Privacy and Confidentiality Policy.

## Did Dr. Mela meet and satisfy his privacy obligations?

[151] Attached to the University's "Certificate of Re-Approval" of the FASD Study (Exhibit E16) were many other documents.

[152] The first was the Reapproval of the Study which was certified by the Chair of the BREB. The certification language in the approval document stated, "The Principal investigator has the responsibility for any other administrative or regulatory approvals ...and for insuring that the authorized research is carried out according to the conditions outlined in the original protocol submitted for ethics review."

[153] The second was the original protocol for the Study, which included many provisions that dealt with conflicts of interest (none were known at the time) and data sharing provisions such as, storage and release of data, dissemination of data in aggregate form and a requirement that "All patients in the study will be assured of confidentiality...All researchers working on this project are on a contractual agreement to keep information guarded and confidential."

[154] Finally, attached to the certification was the SRHA Operational Approval referred to above.

[155] This document did contain explicit and all-encompassing compliance obligations which Dr. Mela agreed to and signed to signify such agreement on January 18, 2013. They included the following: "I agree to abide to all applicable laws, regulations and international guidelines concerning the conduct of research with humans. I have read, understood and will abide to the Saskatoon Health Region Research Policy." (*emphasis added*)

[156] This SRHA Research Policy, number 7311-100-001 originally dated December 1, 2011 and revised to be effective December 23, 2014 was put in evidence as Exhibit E17 ("SRHA Research Policy") and was stated to apply to any research "conducted by SHR staff as part of their job duties" and to any "Studies where SHR resources...are used to support research..." (Section 3.1.2). It contained additional extensive obligations of the Principal Investigator relative to any such research, which by such terms would include the FASD Study.

[157] In summary, there were extensive personal commitments under the above documents legally obliging Dr. Mela to:

- a) Conduct the FASD Study in accordance with "all administrative and regulatory approvals"
- b) To insure the FASD Study is carried out in accordance with the conditions outlined in the original protocol;
- c) To assure all patients of confidentiality and insure "all researchers working on the project are on a contractual agreement to keep information guarded and confidential" (*emphasis added*);



d) To abide to the Saskatoon Health Region Research Policy;

[158] In addition, this last-mentioned item contained a whole new set of Principal Investigator obligations. For the most part they are beyond the scope of this award, however apart from several provisions that simply repeat the above obligations, one section is directly applicable to this Award. It reads:

#### 4.2.3 “Principal Investigators are responsible for

- “Ensuring that they (i.e. the managers of the SHR departments that will be involved in the research) and their staff have the proper education, training and experience to assume responsibility for a research study at SHR; and
- “Having all confidential disclosure agreements, non-disclosure agreements and clinical research contracts undergo review by the Vice President, Research and innovation...before they are signed.”

[159] In summary, Dr. Mela was responsible for an extensive series of obligations. Although Dr. Mela was called as a witness, at the time his evidence was given, the hearing was not focused on what his obligations were and whether he met and satisfied them. That was unfortunate, although it is clear beyond any doubt that he did have extensive obligations that were not fulfilled.

[160] Who is accountable for Dr. Mela’s failure in this regard is beyond the scope of this award, but again, whomever may be accountable, it is clearly not Dr. Helmer. Indeed if Dr. Mela had satisfied his obligations, by definition he would have insured compliance with all applicable SRHA privacy policies and there would be no complaint against Dr. Helmer.

### **Did Tracy Muggli and Michelle Buglas meet and satisfy their obligations under the SRHA Research Policy?**

[161] There was no evidence presented relative to the fulfillment of these requirements. Perhaps the Department Impact Assessment had been done originally when the FASD Study was first approved in 2007. However, when the research was “reapproved” in 2012 as indicated in Exhibit E16, the Policy clearly applied to the reapproved research (e.g. See 3.1.2, of the research policy above) and there was clearly a requirement to complete this impact assessment.

[162] Although there was disagreement between Dr. Helmer and Michelle Buglas as to whether he informed her of the fact Barb Wieler would be assisting with the work for the FASD Study, there was never any dispute about the fact Ms. Buglas was informed of the Study. The series of March 3, 2015 emails between Dr. Helmer and Ms. Buglas make it clear Dr. Helmer would be working on this Study over the summer months and needed two offices to do that work.

[163] That being the case, the Department Impact Assessment was a requirement and should have been undertaken. Again, while responsibility for this outcome is beyond the scope of this Award, it is obvious from the demands of such an assessment that from a “root cause” perspective, none of the issues in this case would have existed had this assessment been completed.

[164] There was no evidence presented that either of Ms. Muggli or Ms. Buglas were aware of the requirement to conduct this assessment. Without doubt, had it been conducted as stipulated in the SRHA Research Policy, many if not all the issues in this arbitration would not exist. Almost certainly, Dr. Helmer’s role and that of his two research assistants (including their identity) would have been considered and appropriate action taken to insure no risk of disclosure of PHI existed. The failure to fulfill this obligation is another one of the root causes of any breaches of the SRHA Privacy and Confidentiality Policy in this case.

**In the context of the above analysis, what were Dr. Helmer’s privacy obligations and if any, were they met and satisfied?**

[165] Considering that there was no signed SRHA Confidentiality Agreement put into evidence and Dr. Helmer testified he was not aware of the document’s or the related policy’s existence, there were no obligations of Dr. Helmer established in evidence to support the allegation in the fifth bullet of the Discipline Letter that Dr. Helmer “...did not follow the SHR policies/procedures as it relates to Confidentiality”.

[166] There can be no responsibility to follow a particular policy or procedure if one is never informed of it and never signed the agreement as the internal SRHA procedures clearly called for. In light of the SRHA failure to produce any proof of Dr. Helmer’s awareness of the applicable policies, let alone his signature to the required agreement, there were no SRHA privacy obligations established for which Dr. Helmer could be held accountable and no alleged breach of the Policy could be established as a basis for discipline.

[167] Even assuming for the moment that Dr. Helmer was aware of and understood the SRHA Privacy and Confidentiality Policy, Dr. Helmer could answer that he completely met and satisfied his main obligations under that policy which were “All staff are responsible for protecting PHI...obtained or accessed during the course of his/her work...” (section 3.1); to “abide by the policy” (section 4.1.1); “provide adequate safeguards to all PHI” (section 4.1.4); and, “maintain the confidentiality of PHI...” (section 4.1.5).

[168] He could make that argument because he did in fact protect PHI obtained or accessed during the course of his work by keeping it confidential himself and insuring that the person he hired to assist in the research (Barb Wieler) held the PHI she obtained or accessed on the same basis, by virtue of

the implied terms in her contract and the professional obligations she was committed to by being a registered nurse.

[169] Over and above any SRHA privacy obligations (that either he was never informed of if they were, he fulfilled), Dr. Helmer also acknowledged in his testimony certain professional ethical privacy obligations that required him to “protect PHI” at SRHA in the same manner as he was obligated in his private practice to so protect PHI. His testimony on this issue was convincing and there was no doubt he understood the nature of those obligations as they applied to himself and to anyone working under his supervision. It was also clear he fulfilled those professional ethical obligations as he understood them and there was no evidence presented to contradict that.

[170] Indeed, Barb Wieler worked under his supervision on the FASD Study on the same basis as she worked for him in his private practice and one of the terms of that work was that she protect PHI as required by law (see analysis below). Moreover, Ms. Wieler confirmed her understanding of this obligation in her testimony.

[171] There are other potentially applicable statutory legal obligations under the Saskatchewan Privacy Laws (such as Section 29 relating mostly to data sharing agreements), but none of these were raised in argument so they are not dealt with here.

[172] The Board has determined that the following has been established by the evidence presented during the hearing as matters of fact:

- a) Dr. Helmer was commissioned by Dr. Mela to find and hire someone in addition to Jessica to perform some of the psychometric testing required for the FASD Study.
- b) Dr. Helmer chose his common law spouse, Barb Wieler to work with Jessica to conduct the required psychometric tests under his supervision.
- c) There was a discussion between Dr. Helmer and Dr. Mela as to how much the psychometrist would be paid by Dr. Mela and they settled on the amount of \$5000 which confirms that Ms. Wieler worked for Dr. Mela under a verbal contract, the terms of which were negotiated by Dr. Helmer on behalf of Dr. Mela, and in addition to the agreed fee, included the following:
  - a. she would perform the work as prescribed by, and under the supervision of Dr. Helmer as an independent contractor (not as an employee) of the University of Saskatchewan’s Department of Psychiatry;
  - b. she would be given an office in the NAW near Dr. Helmer’s office to do the work;
  - c. all of which work would be done for the University (via Dr. Mela) with the same implied terms she had done work for Dr. Helmer in the past in his private practice, all under Dr. Helmer’s supervision;

- d. those implied terms included a requirement that the quality of her work would be consistent with work she had done for Dr. Helmer in the past and that other usual and customary terms for work of this kind would apply to the work; and
  - e. one of the usual and customary terms employed in Dr. Helmer's personal professional practice was an understood obligation on the part of Ms. Wieler to keep all the PHI she received confidential and to obtain consents from every patient to first do the tests and second, to permit the transmission of the interpreted data back to Dr. Mela.
- d) Ms. Wieler conducted the work and fulfilled her contractual commitments, including the obligation to obtain all applicable consents from every patient and to keep all PHI confidential;
  - e) The written contract signed by Ms. Wieler after the fact was evidence only that there had been a valid oral contract between the parties, but none of the terms in the written contract would be effective if and to the extent they varied from the implied terms in the oral contract outlined above.
  - f) The University of Saskatchewan and Dr. Mela displayed a loose and lackadaisical attitude toward the fulfillment of their privacy obligations; and
  - g) SRHA staff including Tracy Muggli and/or Michelle Buglas displayed a lack of attention to, or perhaps awareness of, the requirements of third party research conducted on SHRA premises all as required under the SHRA Research Policy.

[173] In an atmosphere where the University, Dr. Mela and SRHA staff were not aware of or were careless as to requirements for third party research, Dr Helmer developed his own professional standards to protect SRHA patients and SRHA itself relative to their respective PHI rights and obligations and ensured his research work for the FASD Study was conducted in accordance with such standards.

[174] Had any one of the University, Dr. Mela or SRHA Staff been effectively trained or educated on how to fulfill the extensive series of legal obligations imposed on or assumed by them relative to the FASD Study under the SRHA Research Policy or the SRHA Operational Approval or the SRHA Confidentiality Agreement, it is likely there would be no privacy complaints against Dr. Helmer in this case. The package of legal documents developed by the University and SRHA to make the Principal Investigator responsible are well crafted and if honoured would have ensured compliance with all parties' privacy obligations. The fact this did not happen is not the fault of Dr. Helmer and it would be highly irregular to hold him responsible for the failures of others.

[175] Finally, although it should be obvious from the above, it is worth restating that the subject of privacy obligations in this case under either the Saskatchewan Privacy Laws or under the SRHA

Privacy Policy are of special significance both to Dr. Helmer and to the SRHA because of the ramifications to their respective professional or institutional reputations and more importantly, the potential impact on any individuals whose privacy rights may have been breached. This was acknowledged by both parties in their respective testimony. The Board was satisfied that both Dr. Helmer and SRHA understand this significance and at no time was there any actual intention on either parties' part to ignore or avoid these obligations.

[176] This is of importance because of the finding of the SRHA Privacy Officer to the effect that Dr. Helmer committed what she categorized in her report (Exhibit E11) as a violation level of "Level 3 – intentional, malicious". To be fair to both her and the Saskatchewan Office of the Information and Privacy Commissioner, neither of them had access to the facts available to this Board nor did either of them have the benefit of excellent counsel collecting the relevant witnesses and documents as was the case in this hearing.

[177] Although there are significant privacy issues in this case, the Board finds that there were no grounds for the conclusion that there was a level 3 or any other level of breach of the SRHA Privacy Policy as outlined in the Discipline Letter. Dr. Helmer cannot be held responsible for whatever breaches of SRHA policies might exist if a) he was not aware of them and never signed up for them and, b) there would be no breaches if any one of SRHA, Dr. Mela or SRHA management had fulfilled their obligations. Additionally, there should be no suggestion of any kind as to an improper intent in anything Dr. Helmer did or did not do relative to the privacy issues in this case.

[178] Part A and this Part B include several different personal or institutional criticisms relating to the practices used to protect PHI. However, it is worth noting and of some considerable importance, that notwithstanding the various shortcomings described above, the evidence presented during the hearing was that as a matter of fact, any and all PHI of each individual involved in the FASD Study was protected and never disclosed to anyone that did not properly have a need to access the information to complete the purposes of the approved research.

### **Part C: Did Dr. Helmer engage in conduct that amounted to insubordination?**

#### **The *Aerocide* Rule**

[179] Counsel for the Employee argued that the Employer cannot now, in his written or oral argument at the hearing, amend or recast the grounds for discipline as originally described to Dr. Helmer in the Discipline Letter. Any grounds whether described as "insubordination" or "privacy breach" or whatever, need to be justified at the arbitration on the same grounds used to discipline an employee. There must be a direct organic relationship between the Discipline Letter (including the seven bullets) and the two grounds used as the basis for the Employer's argument in its written brief.

[180] In *Aerocide Dispensers Ltd.*, Chief Justice Bora Laskin put forth the principle that employers should be strictly held to the grounds on which they made their decision to act in the first place, and be prohibited from recasting the grounds after the discipline, because the facts unfolded in a manner somewhat different than originally thought.

[181] Accordingly, does the content of the Discipline Letter describe “insubordination” as a ground for discipline? Indeed, the third bullet actually uses the word “insubordinate in nature” when referring to the actions of Dr. Helmer summarized in the first three bullets. A similar conclusion applies to the ground of “privacy breach” which is described in the fifth bullet of the Letter.

### **Problems with the other arguments of the Union and Dr. Helmer**

[182] The first problem with the Grievor’s argument is the contention that the individuals tested were not SRHA patients, but merely test subjects. In his opinion, the only reason they entered the SRHA system was for tracking purposes. The Union brief (paragraph 41) incorrectly states the only information provided to Barb Wieler and Jessica were the individual’s name, contact information and date of birth. One other bit of information was also provided, namely that these individuals were identified as being in the “FASD Study” and that fact makes the information PHI. As set out above this fact adds weight to the seriousness of these issues. The creation of test data makes this conclusion even more certain. However, this problem with the Grievor’s argument does not affect the “insubordination” issues, other than it adds important context.

[183] The Grievor’s counsel also argued in his brief that the surrounding facts support Dr. Helmer’s contention that he had specifically informed his manager in advance of Barb Wieler’s role in the FASD Study. The Board does not believe Dr. Helmer on this issue for several reasons. Firstly, this contention is completely refuted by Ms. Buglas’s reaction to first finding out about the presence of Barb Wieler. She simply would never have reacted in the manner she did if she had previously known about Barb Wieler’s presence. The Board accepts the evidence that Dr. Helmer did introduce Ms. Wieler to some staff in the NAW and she had use of an office there for two months. However, he clearly never informed Ms. Buglas of Barb Wieler’s presence and his contention that he tried to introduce the two of them, but his manager was “not available”, does not stand up to scrutiny.

[184] It is beyond any doubt in the mind of the Board that Dr. Helmer did not make any effort to inform his supervisor about the presence of Barb Wieler. He hoped she could come and do her work for two months without having to face the issue that he clearly knew Ms. Buglas had prohibited, namely him supervising or working with his spouse. The issue of the FASD Study was undoubtedly discussed at workplace huddles and approved in advance (without compliance with the SRHA Research Policy), but none of that information included the obviously most material fact that Barb Wieler would be involved with the FASD Study.

[185] The Grievor also argued in his brief (paragraph 46) that because there was no request by his manager for more information on the names of Dr. Mela's research assistants and related information, that means he was not hiding their identity from Ms. Buglas. However, in the context of the issues that had already taken place about Ms. Wieler not working for Dr. Helmer, Ms. Buglas asked him in her March 3, 2015 email "Can you please tell me more about these psychometrist interns? I don't know anything about the program..." How much more direct did Ms. Buglas need to be?

[186] Dr. Helmer answered this email by saying "I will totally keep you in the loop with any further developments." That undertaking of Dr. Helmer in response to Ms. Buglas's direct request for further information about the "interns" clearly refutes the notion that everything Dr. Helmer did in this regard was innocent and totally above board.

[187] It clearly was not and at that point he should have raised the issue of the identity of Barb Wieler, which he had already informed Dr. Mela about. Had he done so, things might have been much different. This is not what the Union brief described (at paragraph 49) as "all done openly, in plain sight of everyone". This issue is analyzed in more depth below relative to the question of whether Dr. Helmer understood the order not to supervise his spouse under the insubordination title below.

[188] Finally, as a lead up to the insubordination issue, the Grievor's brief argues that the SRHA premises were really just a "location for conducting the testing as directed by Dr. Mela" (paragraph 50). Again, this contention is simply incorrect and is contravened by the evidence in the case all of which is detailed in the discussion of the "supervision" issue below.

## **Law of Insubordination**

[189] The current law of insubordination has not changed much in recent years and is straight forward. It is usually the interpretation of the facts and the application of the law to them that is not so straight forward and that is the case here as well.

[190] The current law was properly outlined by Counsel for the Employee in the following quote:

"In order to constitute insubordination in law, it has been held that there are three essential components which must be present in the proven version of events. First, there must be a clear order understood by the grievor...Second, the order must be given by a person in authority over the grievor...Finally, the order must be disobeyed. (Arbitrator McLaren in *Re Hunter Rose Co. and Graphic Arts International Union at 344*)"

[191] In the current case, there is no real issue regarding the second element of these requirements as clearly Ms. Buglas was Dr. Helmer's supervisor with the authority to give an order.

[192] In the end, standing back from the evidence and the law on this issue, two conclusions are unavoidable. Firstly, there was clear instruction to Dr. Helmer that he could not “supervise” or “work together” with Barb Wieler because of a conflict of interest, and he understood the instruction. Secondly, the order was disobeyed.

[193] Dr. Helmer’s counsel argued that Ms. Buglas never gave him an explicit “order” not to hire Ms. Wieler. However, Dr. Helmer did in fact understand that the Employer was very concerned about him “supervising” or “working together” with Barb Wieler and he was clearly informed by Ms. Buglas, that SRHA would not allow this to happen, regardless how Dr. Helmer tried to structure his request. This is all that is required. There is no requirement that the prohibition be phrased as a direct “order” if the prohibition was clear, without qualification or equivocation of any kind.

[194] Dr. Helmer tried several times, and in different manners (via a different supervisor or an exemption route for example) to get SRHA senior management to give in to his request, but every time he asked, he got the same answer. The fact he asked so many times in different ways makes it clear as well, that not only was he given a clear instruction, he also understood it. As well, the fact Dr. Helmer did not do anything to inform Ms. Buglas of the arrangement with Ms. Wieler similarly confirms that in fact he did understand that SRHA management would not be happy about the arrangement.

[195] The Discipline Letter therefore correctly refers to SRHA’s concern about the prohibition of supervision regardless how it was structured. It just said that it did not approve of Dr. Helmer “working directly together” (second bullet) with Barb Wieler or the fact that she was working “under his direction” (third bullet).

[196] Equally, although Dr. Helmer understood he had been prohibited from putting Barb Wieler in a position where he would supervise her work at SRHA, he then arranged for her to take a position as someone else’s employee where that is exactly what he did. The fact that Dr. Helmer apparently thought he could avoid the prohibition by arranging for his spouse to work for Dr. Mela is symptomatic of the same kind of thinking that led him to believe having Barb Wieler report to Victoria would solve the supervision problem. He had already been told that kind of structure would not pass muster with SRHA management, but he would not accept it. There is no doubt he clearly understood he was not to supervise her, and his failure to accept this instruction cannot be interpreted to mean he did not understand it. This therefore satisfies the third requirement for a finding of insubordination, namely that Dr. Helmer disobeyed an order.

### **The Logic of Prohibiting Conflicts and the SRHA Relatives Policy**

[197] To understand these two conclusions regarding the first and third requirements of the law of insubordination, some analysis is required. The starting point is to understand the fundamental logic at the heart of the Employer’s opposition to Dr. Helmer putting himself in a position to supervise his spouse, Barb Wieler.



[198] SRHA was paying Dr. Helmer to, among other things, perform his work as professionally as possible. When that work includes supervision of someone else, then the employer is entitled to expect the same standards of performance for this supervision as in any other area of Dr. Helmer's work.

[199] However, when the supervision in issue involves someone overseeing the work of his or her spouse, then all employers, with limited exceptions, will be suspicious. They will have the common sense worry that the supervisor's ability to demand or evaluate his spouse's performance or to discipline her will be compromised because of the danger the supervisor will not act objectively due to his personal relationship with the supervised employee. This conflict is completely unrelated to whether the spouse is an employee of the same organization as the supervisor or works for a third party.

[200] The issue is the "conflict" caused by the supervision and the simplest way to avoid it is to prohibit it, except in exceptional circumstances that is management's responsibility to assess.

[201] Thus, throughout the time period from January to June 2015, each time Dr. Helmer tried to get Ms. Buglas to waive SRHA objections to him hiring his spouse, Dr. Helmer was advised that SRHA would not allow such a situation to develop.

[202] The role of the SRHA Relatives Policy is to outline these concerns as simply and effectively as possible so that management has a consistent manner of explaining the prohibition to its employees whenever necessary. However, the order given to Dr. Helmer was not based so much on the policy, but rather on the concern that a conflict would arise were he to supervise his spouse. This prohibition of "supervision" of his spouse was the core instruction to Dr. Helmer every time he raised the issue.

[203] Discussion at the hearing around the SRHA Relatives Policy was therefore somewhat confused. Interpretation of the Policy is helpful to explaining what management wants and is expecting from its employees. However, it is not necessary (although preferable) that the Employer fit its instruction into the wording of the policy, as long as the basis for the order or prohibition is clear. The employer's issue is that supervision of a relative is fundamentally a problematic conflict and will be prohibited. As long as that is explained to the employee, including Dr. Helmer, that becomes the order which satisfies the first requirement of the law of insubordination.

[204] At the hearing, there was considerable discussion about the wording in the SRHA Relatives Policy that in the end is not determinative of whether a clear order was given and understood by the employee. Counsel for the Employee argued that the Relatives Policy only applied to prohibit the employment of "relatives" (a term left undefined in the Policy, but presumably includes a common law spouse) who wanted to become a SRHA employee. Indeed, Section 1.2 of the Policy can be read in that manner, but not the Policy as a whole.

[205] Section 1.2 of the Policy is clearly focused on controlling, and usually prohibiting, situations where the "relative" in question wanted to become a SRHA employee. The concern in this section is with a supervisor who may be determining such things as his or her relative's salary or potential for

promotion or other items which would only exist in a direct supervisor-employee relationship within the same organization. Counsel for the Employee referred to this section in his argument, but did not address the language in Section 1.3, to which Counsel for the Employer referred in his argument.

[206] Section 1.3 of the Policy is however, clearly focused on controlling, and prohibiting (subject to approved exemptions) situations where the “relative” in question wants to become an employee of SRHA or of any other organization or entity on or in SRHA facilities and an SRHA official “...exercises supervisory control or overall management responsibility where a conflict of interest would occur.” That is to say, the relative does not have to be wanting to work for SRHA itself to be prohibited from working on-site, the relative just has to be working “in an organizational care group or service department” that is supervised by, or using the words in the Discipline Letter, “under the direction” of an SRHA employee.

[207] If you stand back and try to understand the bigger picture policy objectives of the SRHA Relatives Policy, it is obvious this is the only sensible interpretation, namely that the Policy is intended:

- a) to specifically prohibit a SRHA employee from hiring a “relative” as another SRHA employee, where a supervisory relationship would exist between them; but also,
- b) to specifically prohibit a SRHA employee from putting himself or herself into a position where for example, a “relative” employed by a third party on-site contractor would be working on or in the SRHA facility directly with, or supervised by, the SRHA employee, even though they have different employers.

This latter situation requires SRHA to control the third-party contractors on its facility, which it can do through its internal policies, like the Relatives Policy. It can stipulate, as it has here, that it does not want certain kinds of relationships to develop; and indeed, because it obviously controls its own employees, it can enforce the policy with the contractor as well as with its own employees, which it has done in this case.

[208] The point is the SRHA Relatives Policy not only prohibits conflicts of interest that may arise between two people who both want to work for SRHA, but also between two employees where only one of them works for SRHA if the other employee is being supervised by the SRHA employee.

[209] The key point is that in both sections 1.2 and 1.3, the common element that causes the problem is the “supervision” of the “relative” by an SRHA employee, and the language of these two sections therefore explicitly refers to “supervision” for that reason. It is the element of supervision or “direction” that is at the heart of the policy and the reason for the prohibition.

[210] It is a common occurrence in a large workplace for an employee of a third party on-site contractor to be supervised at the workplace, not by his or her employer, but by someone at the worksite from whom he takes direction, but is not his direct employer. If there is a “relatives”

relationship between those two people, then the supervision or direction of the relative will not be free of conflicts of interest. The SRHA has a very legitimate interest in insuring workplace relationships like that are not allowed to develop. They are paying their employee to supervise or direct work being performed at the SRHA facilities, and as such, the Employer is entitled to insist that supervision or direction be done as efficiently and free of conflicts as possible, without the involvement of any relatives.

[211] As it turns out, the situation described in Section 1.3 of the Relatives Policy is exactly the situation that events put Barb Wieler into relative to Dr. Helmer, assuming you accept the analysis of Counsel for the Employee. He took the position that Barb Wieler had a verbal contract with Dr. Mela. In that analysis, Dr. Helmer found himself supervising or directing a non-SRHA employee, namely Barb Wieler, who worked for Dr. Mela (actually the Department of Psychiatry in the end). That relationship was prohibited by Section 1.3 of the Relatives Policy.

[212] However, in the end, it is not the language in the SRHA Relatives Policy that is determinative of the conclusion that Dr. Helmer was given and understood a clear instruction or order. In the end he was not disciplined for breaching the Policy. He was disciplined for disobeying a clear instruction that SRHA did not want him supervising his spouse, as SRHA was perfectly entitled to do, with or without a policy.

[213] Counsel for the Employer made this same point at the hearing that one should not fall into the trap of spending too much time on the SRHA Relatives Policy, because the Employer clearly has the right to instruct its employees that it does not want it to act in a certain way relative to the supervision of relatives of the employee, regardless what is or is not found in the language of the Relatives Policy.

[214] This is clearly correct, so the only issue is whether Dr. Helmer was given a clear instruction. In this case, the evidence as described above demonstrates that Dr. Helmer was in fact given a clear order in this regard. However, it is also required that Dr. Helmer understand the order. Was that the case?

### **Did Dr. Helmer Understand the Order from Ms. Buglas?**

[215] The factual chronology revealed that Ms. Buglas reviewed the SRHA Relatives Policy and the supervision issue with Dr. Helmer on at least three separate occasions. On each occasion, the main issue discussed with Dr. Helmer, either in emails or verbally, was the question of “supervision” of one of his relatives, namely his common law spouse, Barb Wieler.

[216] Ms. Buglas emailed Dr. Helmer the Policy on January 9, 2015 and the main point in her email was to ask him whether his “...relationship with the psychometrist would preclude you from supervising (*emphasis added-Ed*) her per this protocol.” The point is right from the beginning, Ms. Buglas was focused on the supervision issue and directly advising him that if Barb Wieler qualified as

a “relative” under the Policy, he would be prohibited from supervising her. This was very clear and direct instruction to Dr. Helmer. He never did answer this email.

[217] Nonetheless, Ms. Buglas testified that after that email Dr. Helmer came to her office to discuss the situation. Ms. Buglas asked Dr. Helmer why Barb Wieler had the same address on her resume as him. He replied that he was no longer doing private practice work at home. Ms. Buglas asked if Ms. Wieler had put her work address on her resume and Dr. Helmer answered he didn’t know. This was the first time, but not the last, that Dr. Helmer went out of his way to avoid discussing whether Ms. Wieler was in fact living in his home with him as his common law spouse.

[218] Although, Dr. Helmer clearly avoided answering the question as to whether Ms. Wieler was his common law spouse, he did reply on January 12<sup>th</sup>, that “an exemption warrants consideration”, thus implying that he understood the SRHA Relatives Policy did in fact preclude him from supervising Barb Wieler. He had been asked by Ms. Buglas whether the Policy precluded him from supervising Ms. Wieler and his response was to ask whether SRHA would consider exempting Ms. Wieler from the provisions of the Policy. The only possible conclusion from this exchange is that Dr. Helmer understood SRHA was prohibiting his supervision of Ms. Wieler, particularly as SRHA advised on January 13<sup>th</sup> that no exemption would be allowed.

[219] That conclusion is reinforced by the next exchange between Dr. Helmer and Ms. Buglas relative to Barb Wieler. When Dr. Helmer again raised the issue of hiring Barb Wieler, Ms. Buglas responded on April 17<sup>th</sup> by giving him the SRHA Relatives Policy and asking once again, whether it would preclude Dr. Helmer from “supervising” Barb Wieler per this protocol.

[220] This time however, Dr. Helmer quickly acknowledged the centrality of the supervision issue in his April 21<sup>st</sup> response asking whether that problem could be avoided by having Ms. Wieler report to Victoria, the same person that Dr. Helmer reported to. Again, the fact Dr. Helmer was doing his best to explore possibilities of avoiding the conflict caused by the supervision issues, confirms that he understood very clearly this was the essence of SRHA’s objections to working with Barb Wieler.

[221] On June 23<sup>rd</sup>, for the third and final time, Dr. Helmer raised the question of avoiding the supervision issue by having Ms. Wieler report to Victoria, exactly as he had proposed a month earlier. Again, the suggestion was clearly refused by Ms. Buglas.

[222] Ms. Wieler came to work at the SRHA in May and June 2015 because of the arrangements Dr. Helmer had made with Dr. Mela to complete the work for the FASD Study by having Barb Wieler and Jessica conduct psychometric tests under his supervision.

[223] Based on these interactions alone, Dr. Helmer was not only given clear instructions that SRHA did not want him, in the language of the SRHA Relatives Policy to “supervise” Barb Wieler, or in Dr. Mela’s language “provide guidance” to Barb Wieler, or in the language of the Discipline Letter, have Barb Wieler work “under his direction”. Whatever the language used, it all meant the same thing and there is simply no doubt he understood what he was being told.

[224] Other factors confirm this conclusion as well. For example, in all his emails, Dr. Helmer never refers to Barb Wieler by name when talking about the Study. She is always referred to as an “intern” (the most misleading) or a “psychometrist” or Dr. Mela’s “research assistant”. Always, the language appears designed to prevent the reader from learning the identity of this person. The only logical conclusion from this repeated effort to avoid clarifying that Barb Wieler was in fact the “intern” or Dr. Mela’s “research assistant” or the “psychometrist” is that he was afraid if made known more widely, he would end up being sanctioned in just the way he ultimately was.

[225] The arrangements with Dr. Mela had been made by Dr. Helmer back in January and February 2015 and Dr. Helmer testified that he had discussed them verbally with Ms. Buglas at least six times, had discussed them in the morning Huddles and had sent her an email. Yet, there is absolutely no evidence that Dr. Helmer ever informed Ms. Buglas that one of these psychometrists in the FASD Study was his common law spouse Barb Wieler.

[226] When Dr. Helmer first advised Ms. Buglas that he might be working on the FASD Study back on March 3, 2015 and asked for the use of some office space to conduct the tests, it would have been a perfect time for him to advise Ms. Buglas that Ms. Wieler had been hired to conduct the work and he planned to supervise her work, all as already prohibited by Ms. Buglas in January. But, Dr. Helmer said nothing about Barb Wieler, presumably because he was afraid of the answer he would get if he raised the issue with Ms. Buglas, who had already denied this request.

[227] That same day, Ms. Buglas replied to the request for office space by asking Dr. Helmer “Can you please tell me more about these psychometrists interns?” How much more direct a question did Dr. Helmer need to hear, before acknowledging that his common law spouse would be one of the interns? The reference to “interns” at a time when he had already made an agreement with Dr. Mela in February to hire Barb Wieler is misleading at best. Ms. Wieler was not an intern. Dr. Helmer knew at this point that he would not be allowed to supervise Ms. Wieler. The unavoidable conclusion is that he did so to avoid Ms. Buglas learning who would be doing the work under his supervision. There is no other logical conclusion that can be drawn from these facts.

[228] The fact Dr. Helmer consistently avoided informing his supervisor that he was going to be, or was in fact already, supervising Ms. Wieler is clear confirmation that he knew this had been prohibited. Thus, the emails and the testimony at the hearing confirmed that Dr. Helmer was clearly prohibited, or in the language of the emails, “precluded” from allowing Barb Wieler to take a position under his supervision, whether she worked for the SRHA or for anyone else.

[229] Moreover, he fully understood this “supervision” prohibition as evidenced by his efforts to arrange some other form of supervision and by the fact that he did everything to avoid Ms. Buglas learning that Barb Wieler was now working under his supervision. Therefore, the first requirement of the law of insubordination was met and satisfied.

## The “Supervision” Issue - Was the Order Not to Supervise Barb Wieler Disobeyed?

[230] The so-called “supervision” issue is important because it shows a clear direction was given to, and understood by, Dr. Helmer. The “supervision” language of the Relatives Policy is connected to the “supervision” language used in the emails between Ms. Buglas and Dr. Helmer and to the language of “direction” and “working together” in the Discipline Letter. However, the supervision issue is also important, because to satisfy the third requirement of the law of insubordination, SRHA must establish that the direction to Dr. Helmer not to “supervise” Ms. Wieler was disobeyed. That requirement is not satisfied simply by proving that Dr. Helmer arranged for Ms. Wieler to work on the FASD Study. SRHA must also prove that in doing the work for the Study, Dr. Helmer was in fact “supervising” Ms. Wieler.

[231] Was that the case?

[232] Counsel for the Employee went to considerable effort to paint a picture of the Grievor’s and Ms. Wieler’s work for the Study that fit the theory of the grievance, some aspects of which theory were accurate relative to the privacy issues discussed above. Some aspects however were not accurate, particularly on the insubordination issue. In particular, he described Barb Wieler’s work for the Study as if it were done completely independently from Dr. Helmer and directly for Dr. Mela. The painting of this picture started with various interpretations of the facts in this case, that are not entirely accurate. These interpretations, and what is inaccurate about them, are summarized here:

- a) Interpretation: *The primary function of the SRHA in connection with the FASD Study was to provide a location to do the psychometric tests.* The facts around this issue start with the wording in the Operational Approval from the Saskatoon Health Region (Exhibit E16 dated January 13, 2013) which apart from giving its approval to the research in their facility, requested that any publications or presentations resulting from the research “should include a statement acknowledging the assistance of Saskatoon Health Region”. This document and the references in it to the obligations of the Principal Investigator, Dr. Mela, requiring compliance with Saskatoon Health Region Research Policy and other applicable laws, most notably the privacy laws of Saskatchewan, make clear the substantive interest of the SRHA in the FASD Study and how it was conducted. Dr. Helmer himself testified as to Ms. Buglas’ concurrence with the project because of the SRHA’s interest in working together with the University of Saskatchewan on this important research. Not only was the SRHA providing a physical facility for the testing to take place, they were registering the patients in their system which Dr. Helmer acknowledged made them patients of the SRHA. Moreover, the SRHA was paying Dr. Helmer’s salary and offering to have him do his work for the Study without charge to the University. All of this signifies a significant interest in the FASD Study and contradicts the suggestion that it was only providing a physical facility for the work.
- b) Interpretation: *No PHI was given to the SRHA by Dr. Mela, and the test scores and related information generated by Barb Wieler and Jessica were not PHI.* Not only was the information given to SRHA by Dr. Mela’s batch referral system likely PHI, the test scores and all related testing

information for each patient was without doubt PHI. Any suggestion for example that it did not become PHI until “interpreted” by Dr. Helmer is a legal opinion of privacy law which contradicts the express words of the statute and was not justified by reference to any authority or case law.

- c) Interpretation: *Barb Wieler had very little relation if any to Dr. Helmer, as she was “Dr. Mela’s research assistant” and worked for him directly.* The whole subject of Barb Wieler’s employment status on June 24, 2015 has been the source of confusion from that time right through the hearing. For reasons described previously, the conclusion in this Award is that based on the testimony of the witnesses at the hearing (which was consistent on this point), the hiring of the research assistants for the FASD Study was delegated by Dr. Mela to Dr. Helmer. Dr. Helmer hired Barb Wieler for or on behalf of Dr. Mela on the understanding, she was going to be supervised by Dr. Helmer.
- d) Interpretation: *Dr. Helmer’s role in the FASD Study did not include any supervisory responsibility for the work performed on SRHA premises by Barb Wieler or Jessica.* This interpretation of the facts is simply contradicted by the uncontroverted evidence of Dr. Mela, Dr. Helmer and Barb Wieler. To start with, Dr. Mela wanted to hire Dr. Helmer to do all the FASD Study work, which Dr. Helmer was unable to do because of his workload. Dr. Mela also stated when informed of this fact, he replied he was satisfied with an alternative arrangement proposed by Dr. Helmer to use research assistants that were or would be properly trained to do the testing work. Dr. Mela proposed using some public health graduate students do the work, but again he could not assess their ability to do the work without Dr. Helmer, who then reviewed their CV’s and advised they could NOT do the job. What else could this be but the supervision of this work? He then proposed Barb Wieler as someone who could do the work, and Dr. Mela did not even speak to her about it. He was satisfied that if Dr. Helmer proposed her, that was good enough for him. Dr. Mela himself testified he just did not know enough to determine if the work was going to be done properly and he completely relied on Dr. Helmer’s oversight and supervision to insure this was the case. Neither Dr. Helmer or Ms. Wieler said anything to refute this. A number of other factors similarly confirm Dr. Helmer’s supervisory work relative to the FASD Study, including the arrangement for office space made by him which he described as being “...important to... have their offices proximate to mine because of the nature of the study.” (March 3<sup>rd</sup> email, Exhibit E5) and his reference the same day to his work to “conceptualize” the schedule which he saw as difficult because “...I would have to move 25 patients through in four months.” It should also be considered that Dr. Mela never attended the site where the testing was done by Ms. Wieler. Dr. Helmer provided the training that was needed, he determined who would administer what tests, determined who would work in the morning and who in the afternoon. Dr. Helmer, not Dr. Mela, received the test results from Ms. Wieler and Jessica and only he was able to interpret them in a manner that was useful for Dr. Mela. In short, there is absolutely no doubt that Dr. Helmer supervised Ms. Wieler.

[233] The conclusion that necessarily follows from the above review is that Dr. Helmer did in fact “supervise” Barb Wieler in her work for the FASD Study. He therefore disobeyed the clear instructions he had been given by Ms. Buglas not to do so and which he had clearly understood.

**Part D: Was the discipline of a one-month unpaid suspension excessive relative to the insubordination of Dr. Helmer?**

[234] The Board has reviewed all the materials submitted relative to this question and to the law on this issue and has concluded that although Dr. Helmer was innocent of the privacy infractions alleged by SRHA, he was insubordinate in failing to obey the clear instructions, understood by him, not to directly work with or supervise Barb Wieler on the SRHA premises.

[235] In particular, the Board has considered those factors the case law indicates might justify a lesser penalty such as the Dr. Helmer's work record which was exemplary prior to this incident and his length of service which was significant. However, in the opinion of the Board there were several other negative factors which augur against revising the discipline. Some of those applicable circumstances are discussed below.

[236] Throughout the internal meetings and discussions relative to this issue at SRHA, Dr. Helmer exhibited an unwillingness to cooperate with SRHA management. This attitude came through at the hearing as well, where it was difficult at times to get Dr. Helmer to speak openly about what had happened during all the events of 2015. Although there could be many reasons for this, such as Dr. Helmer genuinely believed he was not being supported by Ms. Buglas, employees have a responsibility to be open, honest and forthcoming with their management, particularly on issues that may be closer to home and more difficult to talk about, but have a potential significant impact on work performance.

[237] If Dr. Helmer had been more open and forthcoming about the fact Ms. Wieler was his common law spouse and did not give the appearance he was trying to hide this fact and if he had initially brought to Ms. Buglas the opportunity of Ms. Wieler working for Dr. Mela on the FASD Study in the very beginning, it is even possible SRHA management would have approved this short term, as an exception to the policy, although that can never be known with certainty.

[238] Unfortunately, because of the distrust that had developed between management and Dr. Helmer, he did not see that as a viable option. He therefore decided to try to avoid the issue by not raising it with management when he knew better. The consequences of failing to obey the directions of his management are that he has been insubordinate, and in all the circumstances the 30-day suspension is appropriate.

**CONCLUSION**

[239] For all the reasons outlined above, the Board concludes that on a clear, convincing and cogent balance of probabilities, the Grievor, Dr. Helmer:

- a) did not engage in any conduct that breached the applicable privacy policies of the Employer or any Saskatchewan Privacy Laws, but



- b) did engage in insubordinate conduct that constituted just cause for imposing discipline and that a 30-day suspension was appropriate under all the circumstances of this case all as outlined above.



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John Comrie, QC, FCI Arb

Dated November 20, 2017