

Issue: Step 4 Formal Performance Improvement Counseling Form (HIPAA violation);  
Hearing Date: 01/22/19; Decision Issued: 04/16/19; Agency: UVA Medical Center;  
AHO: Carl Wilson Schmidt, Esq.; Case No. 11285; Outcome: No Relief – Agency  
Upheld.



# ***COMMONWEALTH of VIRGINIA***

## ***Department of Human Resource Management***

### **OFFICE OF EMPLOYMENT DISPUTE RESOLUTION**

#### **DECISION OF HEARING OFFICER**

In re:

**Case Number: 11285**

Hearing Date: January 22, 2019

Decision Issued: April 16, 2019

#### **PROCEDURAL HISTORY**

On September 26, 2018, Grievant was issued a Step 4, Termination, Formal Performance Improvement Counseling Form for violating Policy 707 regarding confidential information.

On October 15, 2018, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On November 5, 2018, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On January 22, 2019, a hearing was held at the Agency's office.

#### **APPEARANCES**

Grievant  
Grievant's Counsel  
Agency Party Designee  
Agency's Counsel  
Witnesses

#### **ISSUES**

1. Whether Grievant engaged in the behavior described in the Formal Performance Improvement Counseling Form?

2. Whether the behavior constituted misconduct?
3. Whether the Agency's discipline was consistent with law (e.g., free of unlawful discrimination) and policy?
4. Whether there were mitigating circumstances justifying a reduction or removal of the disciplinary action, and if so, whether aggravating circumstances existed that would overcome the mitigating circumstances?

### **BURDEN OF PROOF**

The burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary action against the Grievant was warranted and appropriate under the circumstances. The employee has the burden of raising and establishing any affirmative defenses to discipline and any evidence of mitigating circumstances related to discipline. Grievance Procedure Manual ("GPM") § 5.8. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM § 9.

### **FINDINGS OF FACT**

After reviewing the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

The University of Virginia Medical Center employed Grievant as a Nurse Practitioner. Grievant worked in one of the units focused on treating cancer patients. Grievant was involved in patient lung screening. She had been employed by the Agency for approximately two years. No evidence of prior active disciplinary action was introduced during the hearing.

The Agency has an electronic medical records database called EPIC. This database contains information about patient appointments, contact information, and detailed medical treatment. EPIC is a patient's official medical record. Employees may access EPIC only for business related reasons. The Agency has another database called MyChart which patients can use to view personal health history, test results, and appointments. Patients can give others access to their MyChart account information but cannot give access to others to view their records in EPIC.

Grievant had a unique log in identification and password to EPIC. The Agency could determine each record in EPIC accessed by Grievant. Grievant could use EPIC to access the appointment books of every Agency provider.

In April 2017, Grievant received re-training regarding the Agency's rules governing access to EPIC and MyChart. As part of the training, Grievant learned that an employee:

May NOT access his/her child's or other family members' EPIC record, even with the family member's permission.

Instead, [employees] have several options:

- Request copies of records from health information management, presenting a signed patient authorization.
- Use MyChart proxy access.
- Contact the physician's office directly.

Ms. K was a 21 year old woman with a three year old daughter. Mr. P was the daughter's father. Mr. P was related to Grievant. Grievant considered Ms. K and her daughter to be Grievant's family members.

Ms. K had a history of severe depression. She did not have health insurance and was "self-medicating" by taking "old" anti-depressant medication. Ms. K was not a patient receiving any treatment in the cancer unit where Grievant worked.

On April 29, 2018, Ms. K consumed "old" medications and also consumed an excessive amount of alcohol. She was unable to properly driver a vehicle. Nevertheless, she placed her daughter into a vehicle and drove to the house of Grievant's family. Grievant's family recognized that there was something wrong with Ms. K. Ms. K's behavior was disturbing and concerning to those who observed her. Ms. K had difficulty walking. Her speech was slurred. She had difficulty answering questions accurately. She was disheveled. Grievant had several conversations with Ms. K. Ms. K asked Grievant to help Ms. K obtain treatment for her medical condition and appropriate prescription medication.

Grievant questioned whether Ms. K was still seeing her Nurse Practitioner R for treatment. Ms. K said she had not seen Nurse Practitioner R because Nurse Practitioner R's fees were too expensive and she did not have evening appointment hours.

On April 30, 2018, Grievant checked the availability of Nurse Practitioner R. At 9:02 a.m., Grievant sent a text message to Ms. K stating, "FYI, [Nurse Practitioner R] has available evening appointments as late as 6:30 today, tomorrow, and Thursday." Ms. K replied, "Thank you."

On April 30, 2018 at 3:05 p.m., Grievant viewed the patient list of Nurse Practitioner R to see if Ms. K scheduled an appointment. Grievant scrolled up and down the patient list and was able to see the names of many of Nurse Practitioner R's patients. The patient list showed Ms. K had an appointment at 4:30 p.m.

At 4:01 p.m., Grievant sent Nurse Practitioner R an email indicating she was concerned about Ms. K and provided details of Ms. K's behavior on the prior day.

Ms. K attended her appointment with Nurse Practitioner R.

At 8:13 p.m., Ms. K sent Grievant a text message, "Went to the doctor today. Everything is straight."<sup>1</sup>

On May 1, 2018 at 11:51 a.m., Grievant viewed the patient list of Nurse Practitioner R to verify that Ms. K attended her appointment. She scrolled up and down the patient list to find Ms. K's name.

The Agency's EPIC system records when users access patient information. Ms. K's access history in EPIC showed that Grievant viewed Ms. K's SNAPSHOT on April 30, 2018 and May 1, 2018. The SNAPSHOT for Ms. K showed her picture, gender, age, last 4 visits, contacts and comments, allergies, medications, health maintenance, specialty comments, and immunizations/injections, implant, registries, and care team and communication.<sup>2</sup>

Grievant's objective was to ensure the safety of Ms. K for the benefit of Ms. K and Ms. K's daughter.

On August 30, 2018, Ms. K contacted an Agency employee and alleged that two employees had accessed her EPIC record without a job-related need. The Agency began an investigation and reviewed employee access to Ms. K's electronic medical record. Grievant was honest throughout the Agency's investigation.

On September 7, 2018, Ms. K wrote a letter to the Agency stating:

Anything against [Grievant] regarding me [Ms. K] should be stopped. The days (4/30/18, 5/1/18) she looked up an appointment for me was because I asked her for help and [Grievant] being the kind hearted person she is and as a nurse practitioner at UVA, she did so to help a person in need. \*\*\* I gave [Grievant] permission to access my chart to help me, she was ensuring my safety and assisting me in getting care. She had my authorization to look at my appointment and my chart. Please do not hold her accountable or punish her for my mistake. She is a wonderful person and an even more wonderful nurse practitioner.<sup>3</sup>

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<sup>1</sup> Agency Exhibit 6.

<sup>2</sup> Grievant argued she did not click on the screen giving her access to the SNAPSHOT information. The Agency presented sufficient evidence to show that Grievant accessed Ms. K's SNAPSHOT information.

<sup>3</sup> Agency Exhibit 3.

## CONCLUSIONS OF POLICY

Policy 701 sets forth the Agency's Standards of Performance for its employees. Progressive performance improvement counseling steps include an information counseling (Step One), formal written performance improvement counseling (Step Two), suspension and/or performance warning (Step Three) and ultimately termination (Step Four). Depending upon the employee's overall work record, serious misconduct issues that may result in termination without prior progressive performance improvement counseling.

Policy 701 provides that, "[v]iolations of Confidentiality will be addressed pursuant to Medical Center Human Resources Policy 707 'Violations of Confidentiality.'"<sup>4</sup>

Policy 707 governs Violations of Confidentiality. Confidential Information is:

Any information in the custody of the Medical Center regardless of its form (oral, paper, electronic) or storage media, that constituted medical records or other Protected Health Information. \*\*\*

Policy 707, paragraph (C)8, defines PHI as, "Protected Health Information consists of all individually identifiable health and billing/payment information about a patient regardless of its location or form."

Policy 707, paragraph (C)9, defines Unauthorized Access or Disclosure as:

Any Access to or Disclosure of Confidential Information that is not necessary to support treatment or business operations or that is otherwise authorized by law and Medical Center policy.

This policy defines "Access" as:

- Obtaining, opening, retrieving, or otherwise handling Confidential Information, including but not limited to, a patient's Protected Health Information, regardless of its format.

"Multiple Access" is defined as:

- Accessing more than one record, including, but not limited to patients records, regardless of the time frame within which the Access occurs; or
- Accessing the same record, including but not limited to a patient's records more than once regardless of the time frame within which the Access occurs.<sup>5</sup>

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<sup>4</sup> Agency Exhibit 8.

Policy 0021 (D) states:

Personnel shall access and use only the PHI that they have a need to know as part of their authorized role-related duties.<sup>6</sup>

Protected Health Information (PHI) is:

Healthcare-related information that is protected by federal law and must be kept confidential. It includes:

- any medical information that can be identified as belonging to a particular person.
- any combination of medical and personal information such as name, medical record number, address, telephone number, birth date, or dates of admission, treatment and discharge.<sup>7</sup>

Policy 707, paragraph (C)11 defines Violations including:

Level 2:

A Level 2 Violation occurs when an employee deliberately Accesses Confidential Information without authorization (an “Unauthorized Access”) or otherwise directly assists an Unauthorized Access.

Examples of Level 2 Violations include but are not limited to:

Unauthorized Access to PHI of any individual including, but not limited to, a friend’s, go-worker’s, or relative’s (including minor child, adult child, spouse, or any other family member) (NOTE – a Healthcare Power of Attorney does not authorize one to access PHI in the EMR):

On April 30, 2018, Grievant engaged in a Level 2 violation because she deliberately accessed the confidential information and PHI of Ms. K without authorization by Agency staff or policies. On May 1, 2018, Grievant engaged in a Level 2 violation because she deliberately accessed the confidential information and PHI of Ms. K without authorization by Agency staff or policies. On each date, Grievant used her unique log in name and password to view the EPIC database. Grievant viewed the electronic medical records of Ms. K including her protected health information. Grievant viewed Ms. K’s SNAPSHOT containing her medical information, personal information such as name, picture, and dates of treatment. Grievant did not have a reason to access Ms. K’s PHI as part of her role related duties.

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<sup>5</sup> Agency Exhibit 9.

<sup>6</sup> Agency Exhibit 10.

<sup>7</sup> Agency Exhibit 14,

Grievant also viewed the names of Nurse Practitioner R's patients. This was PHI for which Grievant was not authorized to view. Grievant argued that when she scrolled up and down Nurse Practitioner R's patient list, Grievant was able to see patient names that were otherwise printed and posted in every provider's workroom and viewable to anyone in the workroom. The fact that the information might otherwise be visible to someone in a workroom, would not serve to authorize or excuse Grievant's access using EPIC.

Policy 707, paragraph (C)12 addresses Corrective Action and provides:

Any employee committing a Violation shall be subject to corrective action based on the nature of the Violation as well as the facts and the circumstances surrounding the Violation. \*\*\*

Multiple Level 2 Violations involving PHI ... shall, in most instances, result in termination of employment.<sup>8</sup>

Grievant had a Level 2 violation on April 30, 2018 and May 1, 2018 thereby constituting multiple Level 2 violations. Her violations involved PHI. The Agency has presented sufficient evidence to support the issuance of a Step 4, Formal Performance Improvement Counseling Form with removal.

Grievant argued that Ms. K gave her authority to access Ms. K's appointment information. Ms. K was not authorized to give Grievant authority to access EPIC to view Ms. K's appointment information. Ms. K could have granted Grievant authority to view Ms. K's appointment information contained in MyChart. Grievant used EPIC, not MyChart to view Ms. K's appointment information.

Grievant presented an example of where she had accessed the EPIC record of a family member and the Agency did not object to that access. The evidence showed that the family member had lung cancer and was being treated in the unit employing Grievant. Thus, Grievant's actions were authorized since she was performing her duties for a unit patient. Ms. K was not a patient in Grievant's unit.

*Va. Code § 2.2-3005.1* authorizes Hearing Officers to order appropriate remedies including "mitigation or reduction of the agency disciplinary action." Mitigation must be "in accordance with rules established by the Department of Human Resource Management ...."<sup>9</sup> Under the *Rules for Conducting Grievance Hearings*, "[a] hearing officer must give deference to the agency's consideration and assessment of any mitigating and aggravating circumstances. Thus, a hearing officer may mitigate the agency's discipline only if, under the record evidence, the agency's discipline exceeds

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<sup>8</sup> Agency Exhibit 9.

<sup>9</sup> Va. Code § 2.2-3005.



the limits of reasonableness. If the hearing officer mitigates the agency's discipline, the hearing officer shall state in the hearing decision the basis for mitigation." A non-exclusive list of examples includes whether (1) the employee received adequate notice of the existence of the rule that the employee is accused of violating, (2) the agency has consistently applied disciplinary action among similarly situated employees, and (3) the disciplinary action was free of improper motive.

Grievant demonstrated that her reason for accessing Ms. K's EPIC record was for the safety and care of Ms. K as well as Ms. K's daughter. Grievant's actions were not for any personal gain. Grievant's motivation is a factor the Agency could have considered to mitigate the disciplinary action. The Hearing Officer's standard, however, is much different. Grievant's desire to help someone in need is not a mitigating circumstance under the EDR mitigation standard. In light of the standard set forth in the Rules, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

## DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Step 4, Formal Performance Improvement Counseling Form with removal is **upheld**.

## APPEAL RIGHTS

You may request an administrative review by EDR within **15 calendar** days from the date the decision was issued. Your request must be in writing and must be **received** by EDR within 15 calendar days of the date the decision was issued.

Please address your request to:

Office of Employment Dispute Resolution  
Department of Human Resource Management  
101 North 14<sup>th</sup> St., 12<sup>th</sup> Floor  
Richmond, VA 23219

or, send by e-mail to [EDR@dhrm.virginia.gov](mailto:EDR@dhrm.virginia.gov), or by fax to (804) 786-1606.

You must also provide a copy of your appeal to the other party and the hearing officer. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when requests for administrative review have been decided.

A challenge that the hearing decision is inconsistent with state or agency policy must refer to a particular mandate in state or agency policy with which the hearing decision is not in compliance. A challenge that the hearing decision is not in compliance with the grievance procedure, or a request to present newly discovered

evidence, must refer to a specific requirement of the grievance procedure with which the hearing decision is not in compliance.

You may request a judicial review if you believe the decision is contradictory to law. You must file a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.<sup>[1]</sup>

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or call EDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EDR Consultant].

*/s/ Carl Wilson Schmidt*

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Carl Wilson Schmidt, Esq.  
Hearing Officer

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<sup>[1]</sup> Agencies must request and receive prior approval from EEDR before filing a notice of appeal.