Issue: Step 4 Formal Performance Improvement Counseling Form with Termination; Hearing Date: 08/16/17; Decision Issued: 08/22/17; Agency: UVA Medical Center; AHO: Cecil H. Creasey, Jr., Esq.; Case No. 11033; Outcome: Partial Relief.

COMMONWEALTH of VIRGINIA

Department of Human Resource Management
Equal Employment and Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In the matter of: Case No. 11033

Hearing Date: August 16, 2017
Decision Issued: August 22, 2017

PROCEDURAL HISTORY

Grievant, a nurse with the University of Virginia Medical Center ("Agency"), was issued a Step 4 Formal Performance Improvement Counseling Form, with job termination, on April 20, 2017. Agency Exh. 2. The discipline was issued under the authority of the Medical Center Human Resources Policy No. 701, *Employee Standards of Performance and Conduct*. Agency Exh. 7. Grievant timely filed a grievance to challenge the Agency's action. On June 5, 2017, the Office of Equal Employment and Dispute Resolution, Department of Human Resource Management ("EEDR") appointed the Hearing Officer. The hearing was scheduled at the first date available between the parties and the hearing officer, August 16, 2017, at which time the grievance hearing was held at the Agency's offices.

The Agency submitted exhibits that were agreed to by the Grievant and, thus, admitted into the grievance record as joint exhibits, and they will be referred to herein as Agency's Exhibits, numbered respectively. The hearing officer has carefully considered all evidence presented.

APPEARANCES

Grievant
Counsel for Grievant
Representative for Agency
Counsel for Agency
Witnesses

ISSUES

1. Whether Grievant engaged in the behavior described in the Step 4 termination?
2. Whether the behavior constituted misconduct?

3. Whether the Agency's discipline was consistent with law (e.g., free of unlawful discrimination) and policy (e.g., properly characterized under applicable 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?

The Grievant requests rescission or, alternatively, reduction of the Step 4 termination and reinstatement.

BURDEN OF PROOF

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances. In all other actions, such as claims of retaliation and discrimination, the employee must present his evidence first and must prove his claim by a preponderance of the evidence. *In this disciplinary action, the burden of proof is on the Agency*. 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.

APPLICABLE LAW AND OPINION

The General Assembly enacted the Virginia Personnel Act, Va. Code § 2.2-2900 et seq., establishing the procedures and policies applicable to employment within the Commonwealth. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provides for a grievance procedure. The Act balances the need for orderly administration of state employment and personnel practices with the preservation of the employee's ability to protect his rights and to pursue legitimate grievances. These dual goals reflect a valid governmental interest in and responsibility to its employees and workplace. *Murray v. Stokes*, 237 Va. 653, 656 (1989).

Code § 2.2-3000 sets forth the Commonwealth's grievance procedure and provides, in pertinent part:

> It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints . . .
> To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for the resolution of employment disputes which may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

Agency Policy No. 701 defines the progressive discipline that is expected from Agency management. Agency Exh. 7. The Policy provides a course of progressive discipline to ensure fair and equitable treatment of all employees. However, management reserves the right to take appropriate action in circumstances where an employee's performance or misconduct warrant

greater sanctions, including termination of employment without performance improvement couseling.

Under Policy No. 707, *Violations of Confidentiality*, three levels of violations are established. A Level 2 violation includes the unauthorized access to protected health information (PHI) of any individual including, but not limited to, a friend's, co-worker's, or relative's (including minor child, adult child, spouse, or any other family member). A Level 3 violation includes the unauthorized disclosure of any other individual's PHI to any third party, including a parent or family member. Agency Exh. 8.

Under the policy, a single Level 2 violation involving PHI shall result in a performance warning with a three (3) day suspension without pay. Multiple Level 2 violations involving PHI shall, in most instances, result in termination of employment. "Multiple accesses" is defined in the policy to include 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.

Under Policy No. 0021, *Confidentiality of Patient Information*, at § D.1., Agency personnel shall access and use only the PHI that they have a need to know as part of their authorized role-related duties. The policy, at § D.7., provides employee sanctions, including suspension or termination of employment as well as reporting to applicable licensing boards. Agency Exh. 9.

Va. Code § 2.2-3005 sets forth the powers and duties of a Hearing Officer who presides over a grievance hearing pursuant to the State Grievance Procedure. Code § 2.2-3005.1 provides that the hearing officer may order appropriate remedies including alteration of the Agency's disciplinary action. Implicit in the hearing officer's statutory authority is the ability to determine independently whether the employee's alleged conduct, if otherwise properly before the hearing officer, justified the discipline. The Court of Appeals of Virginia in *Tatum v. Dept. of Agr. & Consumer Serv.*, 41 Va. App. 110, 123, 582 S.E. 2d 452, 458 (2003) (quoting Rules for Conducting Grievance Hearings, VI(B)), held in part as follows:

> While the hearing officer is not a "super personnel officer" and shall give appropriate deference to actions in Agency management that are consistent with law and policy..."the hearing officer reviews the facts *de novo*...as if no determinations had been made yet, to determine whether the cited actions occurred, whether they constituted misconduct, and whether there were mitigating circumstances to justify reduction or removal of the disciplinary action or aggravated circumstances to justify the disciplinary action."

The Offense

After reviewing the evidence presented and observing the demeanor of each testifying witness, the Hearing Officer makes the following findings of fact and conclusions. The operable facts alleged by the Agency are set forth in the Agency's Step 4 termination. Agency Exh. 2. It states

[The Grievant] is being terminated for unauthorized access of Protected Health Information (PHI) of a patient of the Medical Center and for unauthorized disclosure of PHI to a third party which are violations of Medical Center Human Resources Policy No. 707 -Violations of Confidentiality, Medical Center Human Resources Policy No. 701 - Employee Standards of Performance and Conduct and Employee and Medical Center Policy No. 0021 -Confidentiality of Patient Information.

On 4/4/17, the Social Work Manager reported to the Corporate Compliance Privacy Office that a patient reported to her that she thought [the Grievant], who is a family member of the patient accessed her electronic medical record (EMR) without a business need. The patient stated that the reason she believed that [the Grievant] accessed her EMR was due to the fact that [the Grievant] knew a lot about her medical condition. An audit conducted by Corporate [Compliance] revealed that [the Grievant] used her Medical Center account and password in Epic (the Medical Center[']s electronic medical record system) to access the patient's EMR on seven different dates (4/12/17, 4/11/17, 4/10/17, 4/4/17, 3/29/17, 3/28/17 and 3/27/17). The audit also revealed that [the Grievant] accessed various screens in the patient's EMR, including facesheets (patient demographics) and nursing flowsheets. These documents contain information about the patient's vital signs, other ongoing information related to patient status and safety, and various confidential health care provider notes regarding the care·the patient received.

On 4/18/17, a predetermination meeting was held. When the Corporate Compliance Officer asked [the Grievant] about the multiple accesses to the patient's EMR, [the Grievant] responded that the patient was her significant other, son's girlfriend. [The Grievant] stated that the patient was admitted to the hospital and that the son of her significant other was concerned about the patient and that he and his mother wanted to know about the patient's condition. [The Grievant] admitted that she went into the patient's EMR to look at the patient's diagnosis and that she relayed the patient's diagnosis to the family. [The Grievant] stated that she knew that she should not have gone into the patient's EMR and that she should have asked the patient's care team about the patient's status. When asked if she recalled going into the patient's EMR on multiple occasions, [the Grievant] stated that it was a possibility that she could have since the family was concerned about the patient. When asked if she had been assigned to provide care to the patient while she was receiving care at the Medical Center, [the Grievant] responded that she had not been assigned to provide care to the patient. [The Grievant] stated that she realized what she did was wrong and that the family was very upset and that she was just trying to help them out.

[The Grievant] has received yearly Medical Center training on refraining from violating confidentiality; this training clearly states that patient records are to be accessed for business purposes only.

Management concludes that [the Grievant] intentionally accessed the patient's EMR on multiple occasions without authorization and/or a business need. [the Grievant's] multiple intentional and unauthorized accesses of the patient's PHI constitutes multiple level 2 violations of MC HR Policy, 707. Her disclosure of the PHI was also a level 3 violation under MC HR Policy No. 707. Pursuant to MC HR Policy No. 707, multiple level 2 violations warrant termination and a level 3 violation warrants termination. Medical Center Management has taken into consideration [the Grievant's] 27 years of service with the Medical Center; however, since no mitigating reasons for the multiple

> access and disclosure were provided and [the Grievant] deliberately violated the trust that Management instilled in her, termination is warranted.

The discipline imposed was immediate termination. Agency Exh. 2.

The Grievant stipulated to the offense of multiple accesses to the patient's EMR. The patient involved was her step-son's girlfriend. The Grievant denies and disputes management's allegation and conclusion that she disclosed any PHI to anyone. The Agency's witnesses testified consistently with the allegations of the Step 4 discipline cited above regarding the Grievant's unauthorized access to PHI. However, the evidence on the Grievant's disclosure of PHI is, at best, equivocal.

The patient's social worker testified that the patient complained to her of her suspicion of unauthorized access and disclosure of information in her medical records by the Grievant. The patient specifically complained that her mother learned PHI that the patient had not shared with her mother. The social worker testified that the Grievant had sent text messages to the patient's mother about her medical condition and diagnosis. The social worker, however, had no direct evidence of the patient's suspicion of the Grievant, and the social worker was somewhat confused by the identity of persons the patient identified as her boyfriend's mother. No evidence was produced of any contact between the Grievant and the patient's mother.

The compliance and privacy analyst investigated the allegation and, through audit of the database, confirmed multiple accesses of the patient's EMR by the Grievant that were not for a legitimate business reason. Agency Exh. 6. She participated in the predetermination meeting, at which she testified that the Grievant admitted disclosure of PHI to family members. She characterized the Grievant's admission to be a confirmation of the patient's diagnosis, and that such confirmation was a disclosure of PHI. On cross-examination, the analyst wavered on her certainty of disclosure as compared to the Grievant more simply discussing her independent, inherent, general knowledge of the patient's diagnosis already known to the family members.

The corporate compliance and privacy officer (supervisor of the privacy analyst) testified generally to her knowledge of the investigation and her understanding, from the analyst, that the Grievant admitted at the predetermination meeting to the disclosure of PHI. She also testified that the policies in this area must be consistently applied.

The human resources employee relations consultant testified regarding the predetermination meeting on April 18, 2017. She testified that the Grievant admitted the multiple unauthorized accesses and disclosure to family members. She testified that the Grievant told the family of the patient's diagnosis. She testified that the Grievant was apologetic for her infraction and explained she did it because of family concerns. She also testified that she considered the Grievant's years of good service, but that the policies must be applied consistently and that the record of multiple accesses, alone, justified termination. At the ultimate termination meeting, the Grievant disputed that she ever admitted, at the predetermination meeting, to any disclosure of PHI.

The Agency's chief CRNA, the Grievant's supervisor and issuer of the Step 4 termination, testified that the Grievant said she discussed the patient's diagnosis and potential

treatment options, but she did not remember exactly what the Grievant said by way of admission of disclosure of PHI. She testified that she regrettably agreed with the termination based on the multiple instances of unauthorized access to the patient's EMR.

The Grievant's wife testified that she received no medical information about the patient from the Grievant, and that her son told her about the patient's diagnosis even before the Grievant ever learned that the patient was being treated at the Agency's facility. She also testified that her son's mother, "T", who was located distantly in another state, was a "stalker" of her son and his girlfriend (the patient) through social media and actually hired a private detective to obtain information that she spread to the patient's mother. The Grievant's wife testified that T actually contacted the patient's mother about her discovered information, and that the Grievant had no way to contact the patient's mother and was aware of no such opportunity to do so.

A co-worker of the Grievant's wife testified that the Grievant's wife knew of the patient's diagnosis from her son before the Grievant ever became aware of the patient's medical situation and treatment. The co-worker also testified that the Grievant's wife's son (Grievant's step-son) also worked at the same business, and she knew both the Grievant's wife and son well.

The Grievant testified that, out of family concern, without anyone asking her to do so, she accessed the patient's EMR on multiple occasions. She testified that she disclosed no PHI and did not confirm the patient's diagnosis for anyone. She testified that she had last spoken to her step-son in January or February 2017, before the patient became a concern, and that she had not been in contact with the patient or the patient's mother. The Grievant credibly testified that she did not admit to any disclosure during the predetermination meeting. When receiving her termination, she expressed her dispute of the disclosure conclusion to the Chief CRNA, but was told "it didn't matter." The Chief CRNA ultimately testified on rebuttal that the multiple instances of unauthorized access required termination.

With the stipulation and evidence of multiple instances of unauthorized access to EMR, the Agency has shown that the Grievant is guilty of the alleged multiple accesses of a patient's PHI without a business reason. However, the Agency has not met its burden to prove the Grievant engaged in any prohibited disclosure of PHI. I find that the evidence of disclosure of PHI is speculation and inference, but not proved fact, based on the Grievant's discussion with family about the patient's diagnosis. The Grievant credibly refuted her alleged admission to disclosure of PHI (the basis of including it in the discipline), and no other witnesses testified to facts of any actual disclosure of PHI by the Grievant. Accordingly, the Step 4 discipline will be amended to omit disclosure of PHI.

Without the element of a Level 3 disclosure, the multiple Level 2 unauthorized accesses to the patient's EMR is still sufficient to support termination under the applicable policy. Under the administrative rulings from EEDR, when the reduced discipline still supports termination, the termination should be upheld. While the Hearing Officer may have reached a different level of discipline, he may not substitute his judgment for that of the Agency when the Agency's discipline falls within the limits of reasonableness. The Agency has the discretion to act within the continuum of disciplinary options. The Agency has proved (i) the employee engaged in the behavior described in the Step 4 discipline (as modified herein to omit the unauthorized

disclosure), (ii) the behavior constituted misconduct, and (iii) the discipline was consistent with law and policy (as modified to multiple Level 2 offenses). Thus, the termination must be upheld absent evidence that the discipline exceeded the limits of reasonableness. *Rules for Conducting Grievance Hearings* ("Hearing Rules") § VI.B.1. Further, § VI.B.1, provides:

> When the hearing officer sustains fewer than all of the agency's charges, the hearing officer may reduce the penalty to the maximum reasonable level sustainable under law and policy so long as the agency head or designee has not indicated at any time during the grievance process or proceedings before the hearing officer that it desires that a lesser penalty be imposed on fewer charges.

While the nature of the charges is modified, the policy directive to the hearing officer is clear—to maintain the maximum reasonable discipline imposed by the Agency for the upheld offense(s). Thus, termination, unless the Agency indicates a lesser penalty may be imposed, is supported by the disciplinary record. The Agency most definitely has not indicated a lesser penalty.

Mitigation

As with all mitigating factors, the grievant has the burden to raise and establish any mitigating factors. *See e.g.*, EEDR Rulings Nos. 2010-2473; 2010-2368; 2009-2157, 2009-2174. *See also Bigham v. Dept. of Veterans Affairs*, No. AT-0752-09-0671-I-1, 2009 MSPB LEXIS 5986, at *18 (Sept. 14, 2009) citing to *Kissner v. Office of Personnel Management*, 792 F.2d 133, 134-35 (Fed. Cir. 1986). (Once an agency has presented a prima facie case of proper penalty, the burden of going forward with evidence of mitigating factors shifts to the employee).

Under Virginia Code § 2.2-3005, the hearing officer has the duty to "receive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with rules established by the Department of Human Resource Management pursuant to § 2.2-1202.1." Thus, a hearing officer may mitigate the agency's discipline only if, under the record evidence, the agency's discipline exceeds 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.

Regarding the level of discipline, the Agency had leeway to impose discipline along the permitted continuum. Given the nature of the Step 4 termination, as decided above, the impact on the Agency, and the repeated conduct, I find no evidence or circumstance that allows the hearing officer to reduce the discipline further than explained above. The Agency has proved (i) the employee engaged in the behavior described in the Step 4 discipline (as modified), (ii) the behavior constituted misconduct, and (iii) the discipline was consistent with law and policy. Thus, the discipline of termination must be upheld absent evidence that the discipline exceeded the limits of reasonableness. Hearing Rules § VI.B.1.

Termination is the normal disciplinary action for multiple unauthorized accesses of PHI unless mitigation weighs in favor of a reduction of discipline. Under Virginia Code § 2.2-3005, the hearing officer has the duty to "receive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with rules established by the Department of Human Resource Management." Va. Code § 2.2-3005(C)(6). Under the Hearing Rules, "[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 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.

On the issue of mitigation, the Grievant bears the burden of proof. She has produced compelling evidence of outstanding job performance and good character, in addition to her long service to the Agency. Agency Exh. 1. Under the Hearing Rules, an employee's length of service and satisfactory work performance, standing alone, are not sufficient to mitigate disciplinary action. There is no evidence of other mitigating circumstances.

Under EEDR's Hearing Rules, the hearing officer should give the appropriate level of deference to actions by Agency management that are found to be consistent with law and policy, even if he disagrees with the action. However, in light of the applicable standards, the Hearing Officer finds no basis that provides any authority to reduce or rescind the disciplinary action further than the removal of the disclosure element of the Step 4 discipline. In this case, the Agency's action of termination based on the multiple unauthorized accesses is within the limits of reasonableness, even for the modified and limited nature of the offense(s). By all accounts, the Agency is losing an outstanding and valuable employee, but there are no mitigating circumstances that allow the hearing officer to reduce the maximum reasonable discipline elected by the Agency.

DECISION

For the reasons stated herein, the Agency's Step 4 discipline and termination is modified to exclude the element of unauthorized disclosure of PHI. However, because of the upheld multiple unauthorized accesses to EMR supporting termination under applicable policy, the termination must be, and is, upheld.

APPEAL RIGHTS

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

Please address your request to:

Office of Equal Employment and Dispute Resolution
Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

or, send by e-mail to 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.[1]

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

I hereby certify that a copy of this decision was sent to the parties and their advocates shown on the attached list.

Cecil H. Creasey, Jr.
Hearing Officer

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