Issues: Formal Performance Improvement Counseling Form (accessing medical records without permission) and Termination; Hearing Date: 08/21/09; Decision Issued: 08/27/09; Agency: UVA Health System; AHO: Carl Wilson Schmidt, Esq.; Case No. 9155; Outcome: No Relief – Agency Upheld in Full; **Administrative Review: AHO Reconsideration Request received 09/08/09; Reconsideration Decision issued 11/10/09; Outcome: Original decision affirmed; Administrative Review: EDR Ruling Request received 09/08/09; EDR Ruling #2010-2420 issued 12/04/09; Outcome: AHO's decision affirmed; Administrative Review: DHRM Ruling Request received 09/08/09; DHRM Ruling issued 12/17/09; Outcome: AHO's decision affirmed; Judicial Review: Appealed to Charlottesville Circuit Court on 01/13/10; Outcome pending.**

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9155

Hearing Date: August 21, 2009
Decision Issued: August 27, 2009

PROCEDURAL HISTORY

On January 16, 2009, Grievant was issued a Formal Performance Improvement Counseling Form with removal for inappropriately accessing patient records.

On February 10, 2009, Grievant timely filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and she requested a hearing. On August 4, 2009, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On August 21, 2009, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Representative
Grievant's Counsel
Agency Party Designee
Agency 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 (e.g., properly characterized)?

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. 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 Health System employed Grievant as an Administrative Assistant until her removal effective January 16, 2009. No evidence of prior active disciplinary action against Grievant was introduced during the hearing.

One of Grievant's duties was to access patient records for those patients receiving services in her unit. Medical records were stored in the Agency's electronic database. Grievant was given a unique logon identity and password. Only she could access the Agency's computer medical records using her logon identity. The computer database tracked Grievant's activity with respect to the date and time Grievant accessed patient records.

A patient complained that Grievant may have accessed her medical records improperly. The Agency conducted an audit of Grievant's access to patient medical records from September 2008 through Grievant's removal in January 2009. The Agency compared the medical records accessed by Grievant with the names of patients in the unit for which Grievant had responsibility. Grievant had accessed her mother's medical records, the records of a coworker, a coworker's son and several other people for whom Grievant was not otherwise authorized to access as part of her work duties. On approximately 17 different dates and times, Grievant accessed the medical records of at least eight patients for which she had no authorization.

If a patient wished to authorized another person (not involved in the patient's medical treatment) to access the patient's medical records, the patient was required by the Agency to complete the appropriate paperwork identifying and authorizing access. Grievant was not authorized under the Agency's procedures to view the medical records of the eight individuals whose records she viewed. Her access to medical records was limited to access necessary to perform her job.

Grievant received annual training to remind her that she was not authorized to access patient medical information outside the requirements of her duties. Grievant's unauthorized access of patient information was intentional and not accidental.

CONCLUSIONS OF POLICY

Medical Center Human Resources Policy 707 sets forth the Agency's policy governing breaches of confidentiality by employees.[1] The Agency "maintains a strict policy of confidentiality to protect the privacy and confidentiality of certain data pertaining to patients, employees, and business information." Patient medical records are confidential information under Policy 707. A breach of confidentiality occurs when an individual access medical records "for purposes other than those for which the individual is authorized."

An employee breaching confidentiality shall be subject to corrective action based on the level of the breach. A level 1 breach involves carelessness such as leaving confidential information in a public place. The corrective action for careless is informal counseling with appropriate retraining. A level 2 breach involves an intentional, unauthorized access and/or internal disclosure. An example of a level 2 breach is "[a]ccessing or assisting someone else in accessing [Protected Health Information] without an authorized reason." Grievant's access of medical records was a level 2 breach because her actions were intentional. "A Breach of Confidentiality of this nature shall be considered a serious misconduct infraction. Corrective action for confirmed infractions shall result in Performance Warning with suspension of up to five days without pay for the first offense and disciplinary action up to and including termination for the second offense."

A level 3 breach involves intentional and unauthorized external disclosure of confidential information. Grievant did not disclose externally the information she accessed. Grievant's breach was not a level 3 breach.

Policy 701 sets forth the Agency's Standards of Performance for its employees.[2] One of those standards is, "[e]ach employee shall respect the confidentiality of sensitive

[1] Policy 707 was effective July 1, 2007. It was revised on January 1, 2009. The provisions of the policy relevant to this grievance did not change materially as part of the revision.

[2] Policy 701 was effective October 1, 2007. It was revised on January 1, 2009. The provisions of the policy relevant to this grievance did not change materially as part of the revision.

information." The Agency "uses a process of performance improvement counseling to address unacceptable performance when appropriate, except in cases of serious misconduct where suspension or termination is warranted. The purpose of the performance improvement counseling process is to correct the problem, prevent recurrence, and prepare the employee for satisfactory service in the future."

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).

In cases of serious misconduct, performance warning is the minimum action that may be taken. Examples of first offenses of serious misconduct actions that may warrant a performance warning and suspension without previous progressive counseling include, but are not limited to, "Intentional and unauthorized access of confidential information and/or internal disclosure (See Medical Center HR Policy 707)." Serious misconduct that may result in termination without prior progressive performance improvement counseling include but are not limited to "Intentional and unauthorized external disclosure of confidential patient information (See Medical Center HR Policy No. 707)." (Emphasis added).

Grievant intentionally accessed confidential information without authorization thereby engaging in serious misconduct. Depending on how Agency policy is interpreted Grievant could receive a Formal Performance Improvement Counseling Form with suspension or with removal.

The Agency contends Grievant should be removed from employment based on the language in Policy 707 which states, "Corrective action for confirmed infractions shall result in Performance Warning … and disciplinary action up to and including termination for the second offense." The Agency contends that the word "offense" refers to the behavior of accessing confidential information. Since Grievant accessed confidential information more than one time, she engaged in more than one offense and, thus, it was appropriate for the Agency to issue a Performance Improvement Counseling Form with removal.

Grievant contends that the word "offense" in Policy 707 refers to issuance of a Formal Performance Improvement Counseling Form. In other words, the offense refers to the disciplinary action itself. Because Grievant has not received a prior Formal Performance Improvement Counseling Form, the discipline she may receive may not exceed a performance warning with a five day suspension. Grievant contends the words "infraction" and "infractions" refer to behavior. Because Policy 707 refers to "confirmed infractions" the policy contemplates having one Formal Performance Improvement Counseling Form issued for several instances of misbehavior.

The question becomes the meaning of the word "offense". If "offense" refers to issuance of a Formal Performance Improvement Counseling Form, then Grievant

cannot be terminated because she has no prior active Formal Performance Improvement Counseling Forms. If "offense" refers to Grievant's behavior, Grievant can be removed from employment because she engaged in the behavior of accessing patient records without authorization on several occasions.

Policy 707, Breaches of Confidentiality, does not define the word "offense." Policy 701, Employee Standards of Performance, does not define the word "offense" but it uses the word in a sentence that suggests offense refers to behavior. Policy 701 states:

> Examples of first offense serious misconduct actions that may warrant a performance warning and suspension without previous progressive counseling include, but are not limited to: *** Intentional and unauthorized access of confidential information and/or internal disclosure (See Medical Center HR Policy 0707).

In this part of the policy, the word "offense" is used as part of the description of "misconduct actions." This suggests the word "offense" refers to behavior.

The word "offense" is not used in these policies to refer to a Performance Improvement Counseling Form, but it is used to refer to behavior. Thus, the Agency's interpretation of the policy that multiple misbehavior would also be multiple offenses is supported by the policies. Accordingly, Grievant's removal must be upheld.

Grievant contends it is possible that someone else accessed medical records using her identity if she left her computer without logging out of the system. No credible evidence was presented to suggest this may have happened. The evidence is overwhelming that Grievant was the person who improperly accessed patient medical records.

DECISION

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

APPEAL RIGHTS

You may file an administrative review request within **15 calendar** days from the date the decision was issued, if any of the following apply:

1. If you have new evidence that could not have been discovered before the hearing, or if you believe the decision contains an incorrect legal conclusion, you may request the hearing officer either to reopen the hearing or to reconsider the decision.

2. If you believe the hearing decision is inconsistent with state policy or agency policy, you may request the Director of the Department of Human Resource Management to review the decision. You must state the specific policy and explain why you believe the decision is inconsistent with that policy. Please address your request to:

   Director
   Department of Human Resource Management
   101 North 14th St., 12th Floor
   Richmond, VA 23219

3. If you believe that the hearing decision does not comply with the grievance procedure, you may request the Director of EDR to review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply. Please address your request to:

   Director
   Department of Employment Dispute Resolution
   600 East Main St. STE 301
   Richmond, VA 23219

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 15 calendar days of the date the decision was issued. You must give a copy of all of your appeals to the other party and to the EDR Director. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when administrative requests for review have been decided.

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.[3]

[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

[3] Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 9155-R

Reconsideration Decision Issued: November 10, 2009

RECONSIDERATION DECISION

Grievance Procedure Manual § 7.2 authorizes the Hearing Officer to reconsider or reopen a hearing. "[G]enerally, newly discovered evidence or evidence of incorrect legal conclusions is the basis …" to grant the request.

Newly discovered evidence is evidence that was in existence at the time of the hearing, but was not known (or discovered) by the aggrieved party until after the hearing ended. However, the fact that a party discovered the evidence after the hearing does not necessarily make it "newly discovered." Rather, the party must show that:

> (1) the evidence is newly discovered since the date of the Hearing Decision; (2) due diligence on the part of the party seeking reconsideration to discover the new evidence has been exercised; (3) the evidence is not merely cumulative or impeaching; (4) the evidence is material; and (5) the evidence is such that is likely to produce a new outcome if the case were retried, or is such that would require the Hearing Decision to be amended.

Grievant's argument regarding whether the Agency complied with the grievance procedure is a matter that should have been addressed with the EDR Director during the Step Process. A Hearing Officer has jurisdiction upon the referral of a case from the EDR Director.

Grievant's representation of the facts is flawed. With the issuance of this reconsideration, the Hearing Officer has determined all relevant facts. Grievant restates many of the arguments made during the hearing. Those arguments are not persuasive.

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 Employment Dispute Resolution…."[4] 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 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 contends the disciplinary action should be mitigated based on her length of service and work performance.[5] Based on the evidence presented, Grievant's work performance and length of service are not sufficient factors to show that the Agency's disciplinary action exceeded the limits of reasonableness. With respect to other facts in this case, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.[6]

The request for reconsideration does not identify any newly discovered evidence or any incorrect legal conclusions. For this reason, the request for reconsideration is **denied.**

APPEAL RIGHTS

A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

1. The 15 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,
2. All timely requests for administrative review have been decided and, if ordered by EDR or DHRM, the hearing officer has issued a revised decision.

Judicial Review of Final Hearing Decision

Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the

[4] *Va. Code § 2.2-3005.*

[5] Whether the Agency fully considered Grievant's length of service and work history would not form a basis to reverse disciplinary action. At most, it would be harmless error.

[6] For example, Grievant alleges the Agency's removal of Grievant was motivated in part by a desire to "downsize". No credible evidence was presented to support this allegation.

circuit court in the jurisdiction in which the grievance arose. The agency shall request and receive prior approval of the Director before filing a notice of appeal.

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Carl Wilson Schmidt, Esq.
Hearing Officer

POLICY RULING OF THE DEPARTMENT OF
HUMAN RESOURCE MANAGEMENT

In the Matter of the
University of Virginia

December 17, 2009

The grievant, through her representative, has requested an administrative review of the hearing officer's decision in Case No. 9155. The grievant was issued a disciplinary action and terminated for assessing patients' medical records not related to her performing her job duties. She challenged the disciplinary action by filing a grievance. When she did not get the relief she sought, she requested and received a hearing before an administrative hearing officer. In his decision, the hearing officer upheld the disciplinary action, including dismissal from employment. For reasons stated below, this Agency will not disturb the hearing officer's decision. The agency head of the Department of Human Resource Management, Ms. Sara Redding Wilson, has asked that I respond to this request for an administrative review.

FACTS

The University of Virginia Health System, Medical Center employed the grievant as an Administrative Assistant until she was disciplined and terminated. The hearing officer's Findings of Facts are listed, in part, as follows:

> The University of Virginia Health System employed Grievant as an Administrative Assistant until her removal effective January 16, 2009. No evidence of prior active disciplinary action against Grievant was introduced during the hearing.
>
> One of Grievant's duties was to access patient records for those patients receiving services in her unit. Medical records were stored in the Agency's electronic database. Grievant was given a unique logon identity and password. Only she could access the Agency's computer medical records using her logon identity. The computer database tracked Grievant's activity with respect to the date and time Grievant accessed patient records.
>
> A patient complained that Grievant may have accessed her medical records improperly. The Agency conducted an audit of Grievant's access to patient medical records from September 2008 through Grievant's removal in January 2009. The Agency compared the medical records accessed by Grievant with the names of patients in the unit for which Grievant had responsibility. Grievant had accessed

her mother's medical records, the records of a coworker, a coworker's son and several other people for whom Grievant was not otherwise authorized to access as part of her work duties. On approximately 17 different dates and times, Grievant accessed the medical records of at least eight patients for which she had no authorization. If a patient wished to authorize another person (not involved in the patient's medical treatment) to access the patient's medical records, the patient was required by the Agency to complete the appropriate paperwork identifying and authorizing access. Grievant was not authorized under the Agency's procedures to view the medical records of the eight individuals whose records she viewed. Her access to medical records was limited to access necessary to perform her job.

Grievant received annual training to remind her that she was not authorized to access patient medical information outside the requirements of her duties. Grievant's unauthorized access of patient information was intentional and not accidental.

Summarily, the hearing officer determined that the grievant committed the violations as identified by the agency and the violations were of seriousness that they warranted termination of the grievant.

DISCUSSION

Hearing officers are authorized to make findings of fact as to the material issues in the case and to determine the grievance based on the evidence. In addition, in cases involving discipline, the hearing officer reviews the facts to determine whether the cited actions constitute misconduct and whether there are mitigating circumstances to justify reduction or removal of the disciplinary action. If misconduct is found, but the hearing officer determines that the disciplinary action is beyond the limit of reasonableness, he may reduce the discipline. By statute, the DHRM has the authority to determine whether the hearing officer's decision is consistent with policy as promulgated by DHRM or the agency in which the grievance is filed. The challenge must cite a particular mandate or provision in policy. This Department's authority, however, is limited to directing the hearing officer to revise the decision to conform to the specific provision or mandate in policy. This Department has no authority to rule on the merits of a case or to review the hearing officer's assessment of the evidence unless that assessment results in a decision that is in violation of policy and procedure.

The relevant policies, Medical Center Human Resources Policy No. 701, Employees Standards of Performance, provide standards of performance that employees should adhere to, and Policy No. 707, Breaches of Confidentiality, provide expectations for confidentiality as related to medical information.

In her appeal, the grievant through her representative, put before DHRM the following issues for review:

The Hearing Officer's decision upholding the Agency's termination of the grievant was inconsistent with state or agency policy for each of the following three independent reasons:

A. Because the First Step determination was made by a person that was not a proper First Step Respondent, the decision of the Hearing Officer was rendered without subject matter jurisdiction and is therefore void *ab initio*.

B. The misconduct charged in the written notice, which is the only misconduct found by the hearing officer to have occurred, was a first offense under agency policies 701 and 703, for which misconduct is a five-day suspension is the maximum discipline available.

C. Even were the misconduct charged to be considered to be other than a "first offense" under policies 701 and 703, those same policies mandate that the agency could not terminate the Grievant for such conduct without first carefully considering her exemplary record, and the agency, which has the burden of proof in this grievance involving termination, presented no evidence that it considered Grievant's work record at all, much less carefully.

Concerning item A, this issue was addressed appropriately by the Director of the Department of Employment Dispute Resolution in her ruling dated December 4, 2009, as well as in an earlier ruling (EDR Ruling No. 2009 – 2279). Therefore, this matter warrants no further discussion.

Concerning item B, the grievant was charged with violating policies 701 and 707, not 701 and 703, as indicated by the grievant in her appeal. As per the hearing decision:

> Policy 701 sets forth the Agency's Standards of Performance for its employees. One of those standards is, "[e]ach employee shall respect the confidentiality of sensitive information." The Agency "uses a process of performance improvement counseling to address unacceptable performance when appropriate, except in cases of serious misconduct where suspension or termination is warranted. The purpose of the performance improvement counseling process is to correct the problem, prevent recurrence, and prepare the employee for satisfactory service in the future."
>
> 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).
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> In cases of serious misconduct, performance warning is the minimum action that may be taken. Examples of first offenses of serious misconduct actions that may warrant a performance warning and suspension without previous progressive counseling include, but are not limited to, "Intentional and unauthorized access of confidential information and/or internal disclosure (See Medical Center HR Policy 707)." Serious misconduct that may result in termination without prior progressive performance improvement counseling include but are not limited to "Intentional and unauthorized external disclosure of confidential patient information (See Medical Center HR Policy No. 707)." (Emphasis added).

Grievant intentionally accessed confidential information without authorization thereby engaging in serious misconduct. Depending on how Agency policy is interpreted Grievant could receive a Formal Performance Improvement Counseling Form with suspension or with removal.

The Agency contends Grievant should be removed from employment based on the language in Policy 707 which states, "Corrective action for confirmed infractions shall result in Performance Warning … and disciplinary action up to and including termination for the second offense." The Agency contends that the word "offense" refers to the behavior of accessing confidential information. Since Grievant accessed confidential information more than one time, she engaged in more than one offense and, thus, it was appropriate for the Agency to issue a Performance Improvement Counseling Form with removal.

Grievant contends that the word "offense" in Policy 707 refers to issuance of a Formal Performance Improvement Counseling Form. In other words, the offense refers to the disciplinary action itself. Because Grievant has not received a prior Formal Performance Improvement Counseling Form, the discipline she may receive may not exceed a performance warning with a five-day suspension. Grievant contends the words "infraction" and "infractions" refer to behavior. Because Policy 707 refers to "confirmed infractions" the policy contemplates having one Formal Performance Improvement Counseling Form issued for several instances of misbehavior.

The question becomes the meaning of the word "offense." If "offense" refers to issuance of a Formal Performance Improvement Counseling Form, then Grievant cannot be terminated because she has no prior active Formal Performance Improvement Counseling Forms. If "offense" refers to Grievant's behavior, Grievant can be removed from employment because she engaged in the behavior of accessing patient records without authorization on several occasions.

Policy 707, Breaches of Confidentiality, does not define the word "offense." Policy 701, Employee Standards of Performance, does not define the word "offense" but it uses the word in a sentence that suggests offense refers to behavior. Policy 701 states:

Examples of first offense serious misconduct actions that may warrant a performance warning and suspension without previous progressive counseling include, but are not limited to: *** Intentional and unauthorized access of confidential information and/or internal disclosure (See Medical Center HR Policy 0707).

In this part of the policy, the word "offense" is used as part of the description of "misconduct actions." This suggests the word "offense" refers to behavior.

The word "offense" is not used in these policies to refer to a Performance Improvement Counseling Form, but it is used to refer to behavior. Thus, the

> Agency's interpretation of the policy that multiple misbehavior would also be multiple offenses is supported by the policies. Accordingly, Grievant's removal must be upheld.

The Department of Human Resource Management concurs with the interpretation and use of the word "offense" as per the agency and the hearing officer. Therefore, we will not disturb this decision on that basis.

Concerning item C, just as in B above, the grievant was charged with violating policies 701 and 707, not 701 and 703, as indicated by the grievant in her appeal. Policy 701, states in part, "Progressive Performance improvement counseling steps include an informal counseling, formal (written) performance improvement counseling, suspension and/or performance warning and ultimately termination. Although most cases will follow the sequence below, supervisors shall take into consideration the nature of the performance issue, the employee's intent, the consequences of the employee's actions the employee's past performance record, and other mitigating or aggravating circumstances in determining the appropriate step to take." That policy also states, in part, "The Medical Center uses a process of performance improvement counseling to address unacceptable performance when appropriate, except in cases of serious misconduct where suspension or termination is warranted."

In the instant case, the seventeen separate offenses were deemed to be of such serious nature that the grievant warranted termination, thus bypassing the performance improvement counseling steps. Thus, this Agency will not interfere with the application of the decision.

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Ernest G. Spratley