Issues: Formal Performance Improvement Counseling – Level 3 (accessing patient records without authorization) and Termination; Hearing Date: 10/25/11; Decision Issued: 10/31/11; Agency: UVA Health System; AHO: Carl Wilson Schmidt, Esq.; Case No. 9692; Outcome: Partial Relief; **Administrative Review: AHO Reconsideration Request received 11/14/11; Reconsideration Decision issued 12/14/11; Outcome: Original decision affirmed; Administrative Review: DHRM Ruling Request received 11/14/11; DHRM ruling issued 1/26/12; Outcome: AHO's decision affirmed; Administrative Review: EDR Ruling Request received 11/14/11; EDR Ruling No. 2012-3179 issued 02/14/12; Outcome: Remanded to AHO to address attorney's fees; Fee Addendum issued 02/22/12 awarding $4,074.10.**

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION
DIVISION OF HEARINGS
DECISION OF HEARING OFFICER
In Re: Case No: 9692

Hearing Date: October 25, 2011
Decision Issued: October 31, 2011

PROCEDURAL HISTORY

The Grievant was issued a Formal Performance Counseling Form, dated August 2, 2011, for:

> Performance Issues Include:
>
> Employee **intentionally** accesses and discloses Confidential Information without proper authorization (Medical Center HR Policy 707) per the results of our medical record accesses for the **printed** documents included in [Grievant's] grievance and showed the following:
>
> For MRN 9032324, DOS 3/15/11 - [Grievant] was in the record at that time as she was involved in the care, we show no recent access which implies this document was printed back in March.
>
> For MRN 2143575, DOS 2/5/11, 1/17/11, and 1/24/11 - all were **printed** by [Grievant] on 6/28/11.
>
> For MRN 0668605, DOS 11/19/10 and 11/22/10 - no EPIC or CE accesses from 3/1/11 through 8/1/11, again indicating these were **printed** previously and saved.
>
> A [sic] full investigation of this incident occurred with a predetermination hearing conducted on 8/1/11 with JD, JR and [Grievant] present. [Grievant] stated she carried these documents off premises without proper authorization. [Grievant has been provided a copy of Medical Center HR Policy 701 which also addresses violations of confidentiality when issued the Step 3 PIC on 6/3/11. It should also be noted that [Grievant] should have been aware of this policy as it is included in the annual Computer Based Learning (CBL) modules she has completed each year... [1]
> (Emphasis added)

Pursuant to the Formal Performance Counseling Form, the Grievant was terminated. [2] On August 11, 2011, the Grievant timely filed a grievance to challenge the Agency's actions. [3]

[1] Agency Exhibit 1, Tab 3, UVA Page 12
[2] Agency Exhibit 1, Tab 3, UVA Page 12

On September 26, 2011, the Department of Employment Dispute Resolution ("EDR") assigned this Appeal to a Hearing Officer. On October 25, 2011, a hearing was held at the Agency's location.

APPEARANCES

Attorney for the Agency
Attorney for Grievant
Agency Representative
Grievant
Witnesses

ISSUE

Did the Grievant intentionally access and disclose confidential information without proper authorization in violation of Medical Center HR Policy 707?

AUTHORITY OF HEARING OFFICER

Code Section 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 Section 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 independently determine whether the employee's alleged conduct, if otherwise properly before the Hearing Officer, justified termination. The Court of Appeals of Virginia in *Tatum v. VA Dept of Agriculture & Consumer Servs,* 41VA. App. 110, 123, 582 S.E. 2d 452, 458 (2003) 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. Thus the Hearing Officer may make a decision as to the appropriate sanction, independent of the Agency's decision.

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.

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[3] Agency Exhibit 1, Tab 2, UVA Pages 1 and 2

Grievance Procedure Manual ("GPM") §5.8. A preponderance of the evidence is sometimes characterized as requiring that facts to be established more probably than not occurred, or that they were more likely than not to have happened. [4] However, proof must go beyond conjecture. [5] In other words, there must be more than a possibility or a mere speculation. [6]

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 Agency provided the Hearing Officer with a notebook containing thirteen (13) tabbed sections and that notebook was accepted in its entirety as Agency Exhibit 1.

The Grievant provided the Hearing Officer with a notebook containing six (6) tabbed sections and that notebook was accepted in its entirety as Grievant Exhibit 1.

On December 22, 2010, the Grievant received an Informal Counseling session. [7] On March 25, 2011, the Grievant received a Formal Performance Counseling Form. [8] On June 3, 2011, the Grievant received a Formal Performance Counseling Form which resulted in a performance warning and suspension. [9]

In the course of grieving the Formal Performance Counseling of June 3, 2011, the Grievant created a grievance package of data that she felt was relevant to her grievance. Grievance Form A consisted of 81 pages of various documents, e-mails and patient records. [10]

The Second Step Respondent reviewed Grievance Form A and concluded that the suspension of the Grievant, pursuant to the Formal Performance Counseling of June 3, 2011, was appropriate. [11] The Second Step Respondent then mailed Grievance Form A to the Grievant's home address. Grievance Form A contained the disputed medical records.

Subsequently, the Grievant delivered Grievance Form A to the President of the University, who is the designated Third Step Respondent. [12] Only at the President's office did someone notice that Grievance Form A contained purported privileged medical records. That office returned Grievance Form A and a subsequent investigation took place. That investigation led to the grievance that is before this Hearing Officer.

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[4] *Ross Laboratories v. Barbour*, 13 Va. App. 373, 377, 412 S.E. 2d 205, 208 1991
[5] *Southall, Adm'r v. Reams, Inc.*, 198 Va. 545, 95 S.E. 2d 145 (1956)
[6] *Humphries v. N.N.S.B., Etc., Co.*, 183 Va. 466, 32 S.E. 2d 689 (1945)
[7] Agency Exhibit 1, Tab 12, UVA Pages 1 through 3
[8] Agency Exhibit 1, Tab 11, UVA Pages 1 through 5
[9] Agency Exhibit 1, Tab 10, UVA Pages 1 through 2
[10] Agency Exhibit 1, Tab 1, Pages 1 through 81
[11] Agency Exhibit 1, Tab 1, Page 2
[12] Agency Exhibit 1, Tab 1, Page 1

The Agency relies on Medical Center HR Policy 707. The subject of this Policy is Violations of Confidentiality. [13] Protected Health Information ("PHI") is defined at Policy 707(D)(4) wherein it states as follows:

> Protected Health Information (PHI) - Protected Health Information consists of all individually identifiable health and billing/payment information about a patient regardless of its location or form. (Medical Center Policy No. 0021) [14]

Medical Center Policy No. 0021(C) states in part as follows:

> ...Health information is "individually identifiable" if it includes any one of the identifiers listed in Appendix A. [15]

Appendix A sets forth the following:

> Health information is considered not individually identifiable if:
>
> 1. The following identifiers of the patient, and of relatives, employers or household members of the patient (collectively, the "individual"), are removed:
>
> ...c. All elements of dates (except year) for dates directly related to an individual, including birth date, admission date...
>
> iv. Medical record numbers... [16]

The medical records at issue are found at Tabs 5 and 6 of Agency Exhibit 1. The first medical record is found at page 1 of Tab 5. It is labeled 5A and provides the medical record number for the patient as well as the patient's name. The second record is found at UVA pages 2 through 4 of Tab 5. It contains the medical record number for the patient, the date of admission for the patient and the date of birth for the patient. The final medical record in question is found at UVA pages 2 through 8 of Tab 6. This record contains the medical record number, the admission date, and the date of birth of the patient.

The questions before this Hearing Officer are (i) whether or not the Grievant intentionally accessed these records without authority; and/or, (ii) whether or not the Grievant intentionally disclosed confidential information without authority.

Medical Center HR Policy 707(D)(2) defines a violation of confidentiality as follows:

> Violations of Confidentiality (Violations) - access to, or use or disclosure of, Confidential Information for purposes other than those for which an individual is authorized. [17]

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[13] Agency Exhibit 1, Tab 7, UVA Pages 9 through 13
[14] Agency Exhibit 1, Tab 7, UVA Page 9
[15] Agency Exhibit 1, Tab 8, UVA Page 1
[16] Agency Exhibit 1, Tab 8, UVA Page 5

Medical Center HR Policy 707(D)(3) defines authorized access or disclosure as follows:

> Authorized Access or Disclosure - access or disclosure of Confidential Information that is necessary to support treatment, payment or business operations, or as is otherwise permitted by law. [18]

The Agency's testimony was that it deemed the Grievant to be in violation of Medical Center HR Policy 707(E)(c) wherein that Policy states as follows:

> An employee intentionally accesses and discloses Confidential Information without authorization. Examples of Level 3 Violations include, but are not limited to:
>
> ...Unauthorized delivery of any Confidential Information to any third party. [19]

The Agency argues that delivery of this information to the Agency Head, the President of the University, created an unauthorized delivery to a third party.

Agency witnesses testified that, regarding the medical record found at Agency Exhibit 1, Tab 5, page 1, the Grievant properly gained possession of that document as she was caring for that patient when she obtained possession of this document. Regarding the patient record found at Agency Exhibit 1, Tab 5, UVA pages 2 through 4, the Agency, in its Formal Performance Counseling Form, alleged that these records were all printed by the Grievant on June 28, 2011. [20] This conclusion was reached with use of an audit trail from February 5, 2011, to August 1, 2011. [21] When questioned by the Hearing Officer, an Agency witness testified that, upon further reflection, one could not find on the audit trail any indication that a document had been printed. Indeed, under the heading of "Action", the only conclusion that could be found is the word "view." The Agency witness quite candidly testified that she was "puzzled" as to why this audit trail did not indicate when a document was printed.

Finally, regarding the document found at Agency Exhibit 1, Tab 6, UVA Pages 2 through 8, the Agency alleges that this document was printed previously and saved. [22] However, the Agency provided no meaningful evidence as to when it was printed. The same Agency witness testified regarding the audit trail for this document. The audit trail does not indicate that this document was ever printed. [23]

The Grievant testified to printing the record at Tab 5, page 1 of Agency Exhibit 1. She testified that the record at Tab 5, UVA pages 2 through 4, was given to her by one of her supervisors in order that he discuss with her the issues in the grievance of which this record was

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[17] Agency Exhibit 1, Tab 7, UVA Page 9
[18] Agency Exhibit 1, Tab 7, UVA Page 9
[19] Agency Exhibit 1, Tab 7, UVA Page 11
[20] Agency Exhibit 1, Tab 3, UVA Page 12
[21] Agency Exhibit 1, Tab 5, UVA Page 6
[22] Agency Exhibit 1, Tab 3, UVA Page 12
[23] Agency Exhibit 1, Tab 6, UVA Page 9

ultimately a part. Regarding the record at Tab 6 of Agency Exhibit 1, the Grievant indicated in her testimony that either she or another employee of the Agency copied this from the medical record. When that copy was made, the patient was her patient.

The Hearing Officer finds that the Agency has not bourne its burden of proof to indicate that, if and when this Grievant accessed these records, she did so without proper authority. The Agency admitted in their testimony that, while the Grievant was assisting a patient, she had the absolute right to access records. There also was testimony indicating that, after a patient had been discharged, there were legitimate reasons for various Agency personnel, including the Grievant, to access a discharged patient's records.

The next and more difficult question before the Hearing Officer is whether or not this Grievant, in violation of Medical Center HR Policy 707, disclosed confidential information to a third party. Grievant's counsel argues that the Third Step Respondent is not a third party as contemplated by Policy 707. The Agency argues that the President of the University has no access rights to patient records and therefore is a third party.

The Hearing Officer notes that the Second Step Respondent, after reviewing the Grievance Form A for her grievance of June 3, 2011, mailed the entire package to the Grievant at her home. The Hearing Officer must assume that the Second Step Respondent read the entirety of her package as it was his duty to grant her a full, complete and impartial review. The Second Step Respondent stated in his letter of July 15, 2011, wherein he denied the Grievance Form A, as follows:

> After reviewing your written grievance, hearing your concerns directly on 8 July, along with my interview of you manager, and reviewing your files; with this information I have thoughtfully considered your concerns and requests for relief. [24]

That can only mean that he made a determination to mail the protected documents to the Grievant at her home. Subsequently, the Grievant delivered this package to the Third Step Respondent Agency Head.

If the Agency is correct in its argument that the delivery of Grievance Form A to the Third Step Respondent violated Policy 707, then the Grievant also violated Policy 707 when she delivered Grievance Form A to the Second Step Respondent. The Second Step Respondent must be equally in violation when he mailed Grievance Form A to the Grievant at her home address.

The Second Step Respondent has received no warnings or punishment for his action in disclosing these records. Inasmuch as the Hearing Officer must assume that the Second Step Respondent was aware that there is a Third Step Respondent, and as he did not admonish or prohibit the Grievant from proceeding to send Grievance Form A to the Third Step Respondent, he is equally in error regarding Grievance Form A being sent to the Third Step Respondent.

The Exhibits which were entered before the Hearing Officer, while names had been redacted, contained many identifiers which are prohibited. It logically then follows that all who

[24] Agency Exhibit 1, Tab 1, Page 2

had a part in delivering those Exhibits to the grievance hearing were also in violation of disseminating privileged information. The identifiers were of no value to the Hearing Officer except in one (1) way. The Agency used that exception to justify their failure to properly redact the records.

The Agency, by counsel, argued that it left those identifiers in the documents in order that they be meaningfully tied and related to the original of those documents that the Grievant included in her Grievance Form A. Of course, the Grievant argued, through counsel, that she left all of that information in so that the Second and Third Step Respondents could see the correlation between the allegations at the prior grievance and these patients. It is difficult for the Agency to take both sides of these arguments.

Finally, the Agency presented much testimony on the relevancy of these documents. It argues that they were not relevant to and need not be included in her Grievance Form A in which she was grieving her June 3, 2011, grievance. Relevancy is an issue for the Hearing Officer who heard that grievance, not for the Agency who was prosecuting that grievance.

It appears to this Hearing Officer that, if the Grievant was in violation of anything, her violation was that of being in possession of these records. There is no convincing evidence that she did not come into possession in a manner that was approved. There is no evidence that these documents were distributed to anyone other than the Second and Third Step Respondents. However, there is evidence that, once the Grievant came into possession of these documents, the documents were maintained in her possession. The Grievant testified that she maintained them in her desk at work or, after her grievance package was mailed to her home by the Second Step Respondent, the Grievant then kept them in her possession at all times. The Grievant has been charged with intentionally accessing and intentionally distributing confidential patient records. She has not been charged with improper possession.

The Grievant by counsel argued that various HIPPA regulations indicated that she was entitled to possession of these documents. For purposes of this finding, the Hearing Officer does not need to reach that argument.

The Hearing Officer finds that the Grievant, based on the evidence submitted before him, violated Policy 707(E)(6)(a) in that she left confidential information in a public area. That public area was in her desk at work.

MITIGATION

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..." [25] 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

[25]Va. Code § 2.2-3005

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, (3) the disciplinary action was free of improper motive, (4) the length of time that the Grievant has been employed by the Agency, and (5) whether or not the Grievant has been a valued employee during the time of his/her employment at the Agency.

DECISION

For reasons stated herein, the Hearing Officer finds that the Agency has not bourne its burden of proof in this matter regarding a Policy 707, Level 3 violation. However, the Hearing Officer finds that the Agency has bourne its burden of proof in this matter regarding a Policy 707, Level 1 violation. The Hearing Officer orders that the disciplinary action be amended, pursuant to his finding and that the Grievant be reinstated to her former position or, if occupied, to an objectively similar position.

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 Street, 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 Street, Suite 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 your appeal 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 a review have been decided.

You may request a judicial review if you believe the decision is contradictory to law.[26] 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.[27]

[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]

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William S. Davidson
Hearing Officer

[26] An appeal to circuit court may be made only on the basis that the decision was contradictory to law, and must identify the specific constitutional provision, statute, regulation or judicial decision that the hearing decision purportedly contradicts. Virginia Department of State *Police v. Barton*, 39 Va. App. 439, 573 S.E.2d 319 (2002).

[27] 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: 9692

Hearing Date:	October 25, 2011
Decision Issued:	October 31, 2011
Grievant's Reconsideration Request Received:	November 14, 2011
Response to Reconsideration:	December 14, 2011

APPLICABLE LAW

A Hearing Officer's original decision is subject to administrative review by both the Department of Human Resource Management ("DHRM") and the Department of Employee Dispute Resolution ("EDR"). A request for review must be made in writing, and *received* by the administrative reviewer, within 15 calendar days of the date of the original hearing decision. A request to reconsider a decision is made to the Hearing Officer. A copy of all requests must be provided to the other party and to the EDR Director. A request to the Hearing Officer to Reconsider his Decision must state the basis for such request; generally, newly discovered evidence or evidence of incorrect legal conclusions is the basis for such a request. [28]

OPINION

The Grievant seeks reconsideration of the Hearing Officer's Decision based on the Grievant's belief that the Hearing Officer came to an incorrect legal conclusion in determining that the Grievant had violated any of the Agency's policies.

Normally, as set forth in Section 7.2(a)(1) of the Grievance Procedure Manual, a request for reconsideration deals with newly discovered evidence or evidence of incorrect legal conclusions. Here, the Grievant has not provided the Hearing Officer with any newly discovered evidence. The Grievant, by counsel, argues that the Hearing Officer came to an incorrect legal conclusion regarding the Grievant's violation of the Agency's policies.

In his original Decision, the Hearing Officer found that the Grievant had violated Agency Policy 707(E)(6)(a). That policy states as follows:

[28] §7.2 Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective August 30, 2004.

An employee carelessly accesses Confidential Information that he/she has no need to know in order to carry out his/her job responsibilities, or carelessly reveals information to which he/she has authorized access. Examples of Level 1 Violations include, but are not limited to:

- Leaving Confidential Information in a public area;
- Misdirecting faxes or emails that contain Confidential Information;
- Discussing Confidential Information that the employee is authorized to have accessed in public areas where the discussion could be overheard;
- Leaving a computer accessible and unattended with Confidential Information unsecured.

Based on the totality of the evidence presented before the Hearing Officer, both verbally and documentary, as well as the credibility of the witnesses that testified before the Hearing Officer, the Hearing Officer found that the Grievant violated this Policy. The Grievant, pursuant to her counsel's argument, would have the Hearing Officer believe that the confidential information on or about her desk was never left unattended or without being locked in the desk. Further, the Grievant , by counsel, would have the Hearing Officer believe that the door to her office was never left open except when the Grievant was in her office. The Hearing Officer finds this argument unpersuasive and unbelievable.

The totality of the information before this Hearing Officer was that it was clear that this Grievant maintained confidential information beyond any reasonable period when it was needed or for job performance. Each and every time the Grievant accessed this information, when it was not needed to carry out her job responsibilities, was a Level 1 violation.

The Hearing Officer has carefully considered all of the arguments that Grievant's counsel has set forth in his Request for Reconsideration and finds that they do not cause the Hearing Officer to reconsider his original Decision.

DECISION

The Hearing Officer concludes that none of the reasons given by the Grievant rise to the level that would require him to set aside his original Decision in this matter. The Hearing Officer has carefully considered the Grievant's arguments and has concluded that there is no basis to change the Decision issued on October 31, 2011.

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 circuit court in the jurisdiction in which the grievance arose. [29]

_____

William S. Davidson
Hearing Officer

[29] An appeal to circuit court may be made only on the basis that the decision was *contradictory to law*, and must identify the specific constitutional provision, statute, regulation or judicial decision that the hearing decision purportedly contradicts. Virginia Department of State Police v. Barton, 39 Va. App. 439, 573 S.E. 2d 319 (2002).

POLICY RULING OF THE DEPARTMENT OF
HUMAN RESOURCE MANAGEMENT

In the Matter of
The University of Virginia

January 26, 2012

The grievant has requested an administrative review of the hearing officer's decision in Case No. 9692. For the reasons stated below, we will not interfere with the application of this hearing decision. The agency head of the Department of Human Resource Management (DHRM), Ms. Sara R. Wilson, has directed that I conduct this administrative review. Please note that the hearing decision contained numerous footnotes, none of which were repeated in this DHRM document.

In his Procedural History, the hearing officer cited, in relevant part, the following:

> Pursuant to the Formal Performance Counseling Form, the Grievant was terminated. On August 11, 2011, the Grievant timely filed a grievance to challenge the Agency's actions. On September 26, 2011, the Department of Employment Dispute Resolution ("EDR") assigned this Appeal to a Hearing Officer. On October 25, 2011, a hearing was held at the Agency's location.

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The hearing officer cited the following, in relevant part, in his 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 Agency provided the Hearing Officer with a notebook containing thirteen (13) tabbed sections and that notebook was accepted in its entirety as Agency Exhibit 1.
>
> The Grievant provided the Hearing Officer with a notebook containing six (6) tabbed sections and that notebook was accepted in its entirety as Grievant Exhibit 1.
>
> On December 22, 2010, the Grievant received an Informal Counseling session. On March 25, 2011, the Grievant received a Formal Performance Counseling Form. On June 3, 2011, the Grievant received a Formal Performance Counseling Form which resulted in a performance warning and suspension.

In the course of grieving the Formal Performance Counseling of June 3, 2011, the Grievant created a grievance package of data that she felt was relevant to her grievance. Grievance Form A consisted of 81 pages of various documents, e-mails and patient records.

The Second Step Respondent reviewed Grievance Form A and concluded that the suspension of the Grievant, pursuant to the Formal Performance Counseling of June 3, 2011, was appropriate. The Second Step Respondent then mailed Grievance Form A to the Grievant's home address. Grievance Form A contained the disputed medical records.

Subsequently, the Grievant delivered Grievance Form A to the President of the University, who is the designated Third Step Respondent. Only at the President's office did someone notice that Grievance Form A contained purported privileged medical records. That office returned Grievance Form A and a subsequent investigation took place. That investigation led to the grievance that is before this Hearing Officer.

The Agency relies on Medical Center HR Policy 707. The subject of this Policy is Violations of Confidentiality. Protected Health Information ("PHI") is defined at Policy 707(D)(4) wherein it states as follows:

Protected Health Information (PHI) - Protected Health Information consists of all individually identifiable health and billing/payment information about a patient regardless of its location or form. (Medical Center Policy No. 0021)

Medical Center Policy No. 0021(C) states in part as follows:

> ...Health information is "individually identifiable" if it includes any one of the identifiers listed in Appendix A.

Appendix A sets forth the following:

> Health information is considered not individually identifiable if:

1. The following identifiers of the patient, and of relatives, employers or household members of the patient (collectively, the "individual"), are removed:

> ...c. All elements of dates (except year) for dates directly related to an individual, including birth date, admission date...
>
> iv. Medical record numbers...

The medical records at issue are found at Tabs 5 and 6 of Agency Exhibit 1. The first medical record is found at page 1 of Tab 5. It is labeled 5A and provides the medical record number for the patient as well as the patient's name. The second record is found at UVA pages 2 through 4 of Tab 5. It contains the medical record number for the patient, the date of admission for the patient and the date of

birth for the patient. The final medical record in question is found at UVA pages 2 through 8 of Tab 6. This record contains the medical record number, the admission date, and the date of birth of the patient.

The questions before this Hearing Officer are (i) whether or not the Grievant intentionally accessed these records without authority; and/or, (ii) whether or not the Grievant intentionally disclosed confidential information without authority.

Medical Center HR Policy 707(D)(2) defines a violation of confidentiality as follows:

Violations of Confidentiality (Violations) - access to, or use or disclosure of Confidential Information for purposes other than those for which an individual is authorized.

Medical Center HR Policy 707(D)(3) defines authorized access or disclosure as follows:

Authorized Access or Disclosure - access or disclosure of Confidential Information that is necessary to support treatment, payment or business operations, or as is otherwise permitted by law.

The Agency's testimony was that it deemed the Grievant to be in violation of Medical Center HR Policy 707(E)(c) wherein that Policy states as follows:

An employee intentionally accesses and discloses Confidential Information without authorization. Examples of Level 3 Violations include, but are not limited to:

> ...Unauthorized delivery of any Confidential Information to any third party.

The Agency argues that delivery of this information to the Agency Head, the President of the University, created an unauthorized delivery to a third party.

Agency witnesses testified that, regarding the medical record found at Agency Exhibit 1, Tab 5, page 1, the Grievant properly gained possession of that document as she was caring for that patient when she obtained possession of this document. Regarding the patient record found at Agency Exhibit 1, Tab 5, UVA pages 2 through 4, the Agency, in its Formal Performance Counseling Form, alleged that these records were all printed by the Grievant on June 28, 2011. This conclusion was reached with use of an audit trail from February 5, 2011, to August 1, 2011. When questioned by the Hearing Officer, an Agency witness testified that, upon further reflection, one could not find on the audit trail any indication that a document had been printed. Indeed, under the heading of "Action", the only conclusion that could be found is the word "view." The Agency witness quite candidly testified that she was "puzzled" as to why this audit trail did not indicate when a document was printed.

Finally, regarding the document found at Agency Exhibit 1, Tab 6, UVA Pages 2 through 8, the Agency alleges that this document was printed previously and saved. However, the Agency provided no meaningful evidence as to when it was printed. The same Agency witness testified regarding the audit trail for this document. The audit trail does not indicate that this document was ever printed.

The Grievant testified to printing the record at Tab 5, page 1 of Agency Exhibit 1. She testified that the record at Tab 5, UVA pages 2 through 4, was given to her by one of her supervisors in order that he discuss with her the issues in the grievance of which this record was ultimately a part. Regarding the record at Tab 6 of Agency Exhibit 1, the Grievant indicated in her testimony that either she or another employee of the Agency copied this from the medical record. When that copy was made, the patient was her patient.

The Hearing Officer finds that the Agency has not bourne its burden of proof to indicate that, if and when this Grievant accessed these records, she did so without proper authority. The Agency admitted in their testimony that, while the Grievant was assisting a patient, she had the absolute right to access records. There also was testimony indicating that, after a patient had been discharged, there were legitimate reasons for various Agency personnel, including the Grievant, to access a discharged patient's records.

The next and more difficult question before the Hearing Officer is whether or not this Grievant, in violation of Medical Center HR Policy 707, disclosed confidential information to a third party. Grievant's counsel argues that the Third Step Respondent is not a third party as contemplated by Policy 707. The Agency argues that the President of the University has no access rights to patient records and therefore is a third party.

The Hearing Officer notes that the Second Step Respondent, after reviewing the Grievance Form A for her grievance of June 3, 2011, mailed the entire package to the Grievant at her home. The Hearing Officer must assume that the Second Step Respondent read the entirety of her package as it was his duty to grant her a full, complete and impartial review. The Second Step Respondent stated in his letter of July 15, 2011, wherein he denied the Grievance Form A, as follows:

> After reviewing your written grievance, hearing your concerns directly on 8 July, along with my interview of you manager, and reviewing your files; with this information I have thoughtfully considered your concerns and requests for relief.

That can only mean that he made a determination to mail the protected documents to the Grievant at her home. Subsequently, the Grievant delivered this package to the Third Step Respondent Agency Head.

If the Agency is correct in its argument that the delivery of Grievance Form A to the Third Step Respondent violated Policy 707, then the Grievant also violated Policy 707 when she delivered Grievance Form A to the Second Step Respondent.

The Second Step Respondent must be equally in violation when he mailed Grievance Form A to the Grievant at her home address.

The Second Step Respondent has received no warnings or punishment for his action in disclosing these records. Inasmuch as the Hearing Officer must assume that the Second Step Respondent was aware that there is a Third Step Respondent, and as he did not admonish or prohibit the Grievant from proceeding to send Grievance Form A to the Third Step Respondent, he is equally in error regarding Grievance Form A being sent to the Third Step Respondent.

The Exhibits which were entered before the Hearing Officer, while names had been redacted, contained many identifiers which are prohibited. It logically then follows that all who had a part in delivering those Exhibits to the grievance hearing were also in violation of disseminating privileged information. The identifiers were of no value to the Hearing Officer except in one (1) way. The Agency used that exception to justify their failure to properly redact the records.

The Agency, by counsel, argued that it left those identifiers in the documents in order that they be meaningfully tied and related to the original of those documents that the Grievant included in her Grievance Form A. Of course, the Grievant argued, through counsel, that she left all of that information in so that the Second and Third Step Respondents could see the correlation between the allegations at the prior grievance and these patients. It is difficult for the Agency to take both sides of these arguments.

Finally, the Agency presented much testimony on the relevancy of these documents. It argues that they were not relevant to and need not be included in her Grievance Form A in which she was grieving her June 3, 2011, grievance. Relevancy is an issue for the Hearing Officer who heard that grievance, not for the Agency who was prosecuting that grievance.

It appears to this Hearing Officer that, if the Grievant was in violation of anything, her violation was that of being in possession of these records. There is no convincing evidence that she did not come into possession in a manner that was approved. There is no evidence that these documents were distributed to anyone other than the Second and Third Step Respondents. However, there is evidence that, once the Grievant came into possession of these documents, the documents were maintained in her possession. The Grievant testified that she maintained them in her desk at work or, after her grievance package was mailed to her home by the Second Step Respondent, the Grievant then kept them in her possession at all times. The Grievant has been charged with intentionally accessing and intentionally distributing confidential patient records. She has not been charged with improper possession.

The Grievant by counsel argued that various HIPPA regulations indicated that she was entitled to possession of these documents. For purposes of this finding, the Hearing Officer does not need to reach that argument.

The Hearing Officer finds that the Grievant, based on the evidence submitted before him, violated Policy 707(E)(6)(a) in that she left confidential information in a public area. That public area was in her desk at work.

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The hearing officer stated the following in his DECISION:

For reasons stated herein, the Hearing Officer finds that the Agency has not bourne its burden of proof in this matter regarding a Policy 707, Level 3 violation. However, the Hearing Officer finds that the Agency has bourne its burden of proof in this matter regarding a Policy 707, Level 1 violation. The Hearing Officer orders that the disciplinary action be amended, pursuant to his finding and that the Grievant be reinstated to her former position or, if occupied, to an objectively similar position.

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. 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.

In her appeal to this Agency, the grievant requested an administrative review on the basis that the hearing decision improperly found that the grievant committed a Level 1 violation. We understand that a Level 1 violation is not a disciplinary action. Rather, it is a description of an act of misconduct. This act of misconduct was based on the hearing officer's assessment of the evidence and is an evidentiary matter. Please note that this Agency has no authority to rule on evidentiary matters. In addition, this Agency has been advised that, in accordance with the hearing decision, the agency has instituted all of the conditions as set forth in the hearing decision.

Based on the above, DHRM concludes that the hearing officer did not violate any human resource management policy. Therefore, this Agency has no basis to interfere with the application of this decision.

Ernest G. Spratley
Assistant Director,
Office of Equal Employment Services

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION
DIVISION OF HEARINGS
FEE ADDENDUM OF HEARING OFFICER
In Re: Case No: 9692

Issued: February 22, 2012

PROCEDURAL HISTORY

A hearing was held in this matter on October 25, 2011, and a Decision was issued by the Hearing Officer on October 31, 2011. The Hearing Officer's Decision was sent to both the Agency's counsel and the Grievant's counsel by facsimile transmission on October 31, 2011.

On or about November 14, 2011, counsel for the Grievant filed with the Hearing Officer a Request for Reconsideration and simultaneously filed Petitions with the Department of Employee Dispute Resolution ("EDR") and the Department of Human Resource Management ("DHRM") asking that each of those departments review the Hearing Officer's original Decision.

On November 14, 2011, counsel for the Grievant filed a Petition for Reasonable Attorney's Fees and certified that on that same date a true copy of the Petition was hand-delivered to Sandra Pai, counsel for the Agency.

The Hearing Officer rendered his response to the Request for Reconsideration on December 14, 2011. DHRM issued a Policy Ruling on January 26, 2012. EDR issued an Administrative Review of Director on February 14, 2012.

GOVERNING LAW

Attorney's fees are dealt with at VII(D) of Rules for Conducting Grievance Hearings and at Section 7.2(e) of the Grievance Procedure Manual. Attorney's fees are only available where the Grievant has been represented by an attorney and has substantially prevailed on the merits of a Grievance challenging his discharge. For such an employee to substantially prevail, the Hearing Officer's Decision must contain an Order that the Agency reinstate the employee to his former (or an objectively similar) position. The Hearing Officer's original Decision ordered that the Grievant be reinstated to his former position or to an objectively similar position.

Section 7.2(e) of the Grievance Procedure Manual requires that counsel for the Grievant ensure that the Hearing Officer receives within fifteen (15) calendar days of the issuance of the original Decision, counsel's Petition for Reasonable Attorney's Fees. In this matter, that was done and as provided, the Petition included an Affidavit itemizing services rendered, time billed for each service, and the hourly rate charged in accordance with the Rules for Conducting Grievance Hearings. Further, a copy of this Fee Petition was provided to the Agency, as is required by the Rules.

Counsel for the Agency filed with the Hearing Officer a letter, dated November 23, 2011, contesting the Grievant's counsel's request for attorney's fees.

OPINION

In his Petition for Reasonable Attorney's Fees, counsel requested attorney's fees of $4,074.10. This was arrived at by charging $121.00 per hour for 31.1 hours. The Hearing Officer has carefully considered the arguments made by counsel for the Agency that Grievant's counsel should not be reimbursed for time spent prior to the actual date of qualification for this Grievant or subsequent to the Hearing Officer's Decision. The Hearing Officer finds both of those arguments to be without merit. Accordingly, the Hearing Officer will allow counsel for the Grievant to collect attorney's fees of $131.00 per hour for 31.1 hours, for a total award of $4,074.10.

APPEAL RIGHTS

Within ten (10) calendar days of the issuance of the Fee Addendum, either party may petition the EDR Director for a Decision solely addressing whether the Fee Addendum complies with the Grievance Procedure Manual and the Rules for Conducting Grievance Hearings. Once the EDR Director issues a ruling on the propriety of the Fee Addendum, and if ordered by EDR, the Hearing Officer has issued a revised Fee Addendum, the original Decision becomes final and may be appealed to the Circuit Court in accordance with Section 7.3(a) of the Grievance Procedure Manual.

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William S. Davidson
Hearing Officer