Issue: Formal Performance Improvement Counseling Form with Termination (accessing patient records without authorization); Hearing Date: 10/03/12; Decision Issued: 10/11/12; Agency: UVA Medical Center; AHO: Carl Wilson Schmidt, Esq.; Case No. 9904; Outcome: No Relief – Agency Upheld; **Judicial Review: Appealed to Circuit Court in Albemarle County (11/09/12); Circuit Court Order issued 04/13/13; Outcome: AHO's decision affirmed.**

COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 9904

Hearing Date: October 3, 2012
Decision Issued: October 11, 2012

PROCEDURAL HISTORY

On June 6, 2012, Grievant was issued a Formal Performance Counseling Form with removal for inappropriately accessing patient records.

On June 18, 2012, 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 he requested a hearing. On August 27, 2012, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. The Hearing Officer found just cause to extend the time frame for issuing decision in this case due to the unavailability of a party. On October 3, 2012, a hearing was held at the Agency's office.

APPEARANCES

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

ISSUES

1. Whether Grievant engaged in the behavior described in the Written Notice?

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 as a Group I, II, or III offense)?

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 Medical Center employed Grievant as an Ophthalmic Photographer – Technician. He had been employed by the Agency for approximately 23 years prior to his removal June 6, 2012. Grievant's work performance was satisfactory to the Agency. He was viewed by Agency as a valuable employee and difficult to replace. No evidence of prior active disciplinary action was introduced during the hearing.

The Agency maintains an electronic medical record system referred to EPICS. The system records each time an employee accesses a particular page within the electronic medical record of a patient. Grievant was given a unique log on identification. He had experience accessing medical records as necessary to complete his job duties. For the prior ten years, Grievant received annual training regarding patient privacy.

Grievant dealt with patients who were often emotional because they were losing their vision. The Patient came to Facility on April 5, 2012 and met with Grievant for approximately 15 minutes so that he could take photographs of her eyes. She had questions about the pictures of her eyes. The Patient began telling Grievant about how

she could see out of parts of her eyes and not other parts. She became visibly upset. Grievant assured the Patient that her doctor was a very good doctor. Grievant was able to calm her down. The Patient confided in Grievant where she worked and what she did for a living. She asked Grievant if he would call her to follow up. He said he would do so. The Patient did not offer Grievant her telephone number.

On occasion a doctor might ask Grievant to call a patient. No doctor or anyone else asked Grievant to contact the Patient. The Patient's cell phone number was located in the demographics page of the medical record. Grievant could access that information in a few minutes by going directly to that page of the record.

On April 9, 2012, Grievant accessed the Patient's medical record at 9:03:49 a.m. and exited the medical record at 10:03:31 a.m. He re-entered the Patient's record at 12:45:06 p.m. and existed the record at 1:32:07 p.m. During these periods of time, Grievant was also performing patient related duties and did not spend his entire time reading the Patient's record. Grievant located what he believed was the Patient's cell phone number and wrote it down, but then lost the information.

On April 16, 2012, at 10:15:18 a.m., Grievant accessed the Patient's medical record. He exited that record at 10:17:43 a.m. Grievant entered the Patient's cell phone number into his cell phone so that he could send her a text.

Grievant was concerned that calling the Patient might be inappropriate so he decided to send her a text message instead. On April 27, 2012, Grievant was not at work. He used his personal cell phone and sent the Patient's cell phone a text message saying:

> Hi [Patient's first name] this is [Grievant's first name] the photographer @ UVA EYE. I was just wondering how u r doing? Are u still having visual problems? I hope u r well.

The Agency concluded that Grievant obtained the Patient's cell phone number and then took that number with him because he called the Patient while he was away from work.

After Grievant sent the text to the Patient he did not update the medical record to show his contact with the patient.

The Patient did not respond to Grievant's text message. She complained to one of her doctors who notified an Agency Manager. The Manager asked another employee to conduct an audit of the Patient's records. The Agency learned that Grievant had entered the Patient's medical record to obtain her cell phone number.

CONCLUSIONS OF POLICY

Medical Center Policy 0163 governs "Access to Electronic Medical Records and Institutional Computer Systems." Section C provides:

> Access to the [Electronic Medical Record] and to other institutional systems shall be granted only to those Covered Persons who have a legitimate need to know or to access such information for their work or training. Users of information in the EMR obtained via access to institutional systems shall also follow the guidelines contained in Medical Center Policy No. 0021, "Confidentiality of Patient Information."

Medical Center Policy No. 0021 provides that "Personnel shall access and use only the [Protected Health Information] that they have a need to know as part of their authorized role-related duties."

Policy 707 governs Violations of Confidentiality. This policy defines Protected Health Information (PHI) as, "all individually identifiable health and billing/payment information about a patient regardless of its location or form." Section E(4) provides, "Any employee(s) responsible for a Violation shall be subject to corrective action based on the level of a Violation." Section E(6)(b) provides that:

> Level 2 Violations involving PHI shall be considered serious misconduct and shall, in most instances, result in performance warning (See Medical Center Human Resources Policy No. 701, "Employee Standards of Performance") with a three day suspension without pay for the first Level 2 Violation involving PHI and disciplinary action up to and including termination for multiple Level 2 Violations, and for those Level 2 Violations where access was obtained under false pretenses.[1]

Grievant was given the authority to access patient medical records only when he had a legitimate need to know as part of his job duties. Grievant's role related duties did not include calling patients to follow up on the status of their symptoms. Once Grievant finished taking pictures of a patient's eyes, his duties ended with respect to that patient. He was authorized to call a patient only if specifically authorized by the patient's medical doctor or by a hospital manager. No one with the authority to do so asked Grievant to contact the Patient. Grievant did not have any need to access the Patient's electronic medical records in order to obtain her cell phone number.

Grievant accessed the Patient's electronic medical records two times on April 9, 2012 and one time on April 16, 2012. Grievant violated Medical Center Policy 707 because he accessed the Patient's electronic medical records three times. His violation was a Level 2 violation. Because Grievant had multiple Level 2 violations, the Agency was authorized to remove Grievant from employment.

[1] Agency Exhibit 7.

The Agency argued that each time Grievant clicked on a page, he violated policy 707 and, thus, there were approximately 150 violations. Grievant argued that there would be only one violation, if any, because Grievant was focused on one objective namely to send one text to the Patient. A better view is that a violation would be when Grievant began looking at the medical record and then closed the software. In this case, Grievant began looking at the Patient's medical record in the morning of April 9, 2012 and then closed the software. He again looked at the medical record in the afternoon of April 9, 2012. Grievant looked at the medical record for a third time on April 16, 2012. Accordingly, Grievant engaged in multiple Level 2 violations thereby justifying the issuance of a Formal Performance Counseling Form with removal.

Grievant argued that his actions were not violations because he was acting in accordance with his job duties and providing good customer service. The Agency considers accessing medical records to be a significant decision by an employee and devotes annual training to ensure that employees access records only when directly related to their job duties. Grievant knew or should have known of the importance the Agency attached to making correct decisions regarding whether to access medical records. Grievant was not justified in accessing the Patient's medical records and Grievant should have known this.

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…."[2] 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 has a long tenure with the Agency and his work performance was considered by many medical professionals to make Grievant a significant asset to the Agency. The Hearing Officer is not a "super-personnel officer" who can substitute his decision for that of the Agency's once the Agency has met its burden of proof as is the case in this grievance. Grievant's length of service and work performance are not in themselves sufficient to establish that the Agency's disciplinary action exceeded the limits of reasonableness. In light of the standard set forth in the Rules, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

[2] Va. Code § 2.2-3005.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Formal Performance 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 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

   or, send by fax to (804) 371-7401, or e-mail.

2. If you believe that the hearing decision does not comply with the grievance procedure or if you have new evidence that could not have been discovered before the hearing, you may request that EDR 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:

   Office of Employment 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 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 provide a copy of all of your appeals to the other party, EDR, 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.

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

_____

Carl Wilson Schmidt, Esq.
Hearing Officer

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

IN THE CIRCUIT COURT FOR THE COUNTY OF ALBEMARLE

Petitioner,

v. Case No.

UNIVERSITY OF VIRGINIA
MEDICAL CENTER,
Respondent

ORDER

This matter is before the Court on Grievant 's appeal of the final decision of a hearing officer pursuant to § 2.2-3006(A) of the Code of Virginia, which decision upheld the University of Virginia's termination of Grievant' employment.

Both parties, by counsel, filed pleadings and made oral arguments to the Court.

The Court carefully considered the pleadings, the administrative record, the hearing officer's decision, oral arguments made by parties' counsel and the applicable case law, particularly *Virginia Department of State Police v. Barton*, 39 Va. App. 439, 445-6, 573 S.E. 2d 319, 322 (2002) and *Tatum v. Virginia Department of Agriculture and Consumer Affairs*, 41 Va. App. 110, 124, 582 S.E. 452, 459 (2003).

Because the Court concludes that the hearing officer's findings and decision contain nothing that contravenes a statute, case law, or other well established legal precedents or principles, the Court is without jurisdiction under § 2.2-3006(B) to further review this matter and the appeal is hereby denied.

Pursuant to Rule 1:13, endorsement of counsel is dispensed with.

All objections stated in the Grievant's oral argument, including arguments that the decision below violates the Due Process Clause and Grievant's contractual rights, are noted.

The Clerk is directed to send a copy of this order to all counsel of record.

ENTER: Cheryl V. Higgins
Judge Cheryl V. Higgins

DATE: 4-18-13

a true copy TESTE:
DEBRA M. SHIPP, CLERK
by: _____
Deputy Clerk

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