Issue: Group II Written Notice with Suspension (failure to follow policy); Hearing Date: 01/28/13; Decision Issued: 02/01/13; Agency: UVA; AHO: William S. Davidson, Esq.; Case No. 9974; Outcome: No Relief – Agency Upheld; **Administrative Review: EDR Ruling Request received 02/19/13; EDR Ruling No. 2013-3541 issued on 03/06/13; Outcome: AHO's decision affirmed; Administrative Review: DHRM Ruling Request received 02/19/13; DHRM Ruling issued 03/08/13; AHO's decision affirmed.**

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF HUMAN RESOURCE MANAGEMENT
DIVISION OF HEARINGS
DECISION OF HEARING OFFICER
In Re: Case No: 9974

Hearing Date: January 28, 2013
Decision Issued: February 1, 2013

PROCEDURAL HISTORY

A Group II Written Notice was issued to the Grievant on September 17, 2012, for:

> On 7/26/12, [Grievant] accessed her (minor) daughter's EMR for purposes of court (child support hearing). Her daughter had been seen at UVA [clinic] in 2011 (one time visit). She accessed the records while on leave from UVA [department]. This access was discovered by the Compliance Office in September 2012. This access occurred off-site at the UVA facility at [location]. She used their computer to look up the EMR and also printed out the record. This access is a Level 2 violation of Policy No 1.431. During the predetermination meeting on 9/12/12, [Grievant] admitted to this violation but stated she thought she could access a minor child's record. [Grievant] takes annual retraining, last on 7/15/10 and 6/29/11. [1]

Pursuant to the Group II Written Notice, the Grievant was suspended for three (3) days on September 18, 2012. [2] On September 21, 2012, the Grievant timely filed a grievance to challenge the Agency's actions. [3] On November 28, 2012, the Office of Employment Dispute Resolution ("EDR") assigned this Appeal to a Hearing Officer. Due to a document request made by the Grievant to the Agency, scheduling for the hearing in this matter was delayed until the production of documents could be resolved. Accordingly, on January 28, 2012, a hearing was held at the Agency's location.

APPEARANCES

Attorney for Agency
Agency Party
Grievant
Witnesses

ISSUE

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

Did the Grievant commit a Level 2 Violation of Agency Policy 1.431?

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. By statute and under the grievance procedure, management is reserved the exclusive right to manage the affairs and operations of state government. [4] 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. Grievance Procedure Manual ("GPM") §5.8. The employee has the burden of proof for establishing any affirmative defenses to discipline such as retaliation, discrimination, hostile work environment and others, and any evidence of mitigating circumstances related to discipline. 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. 5 However, proof must go beyond conjecture. 6 In other words, there must be more than a possibility or a mere speculation. 7

FINDINGS OF FACT

[4] *See* Va. Code § 2.2-3004(B)
[5] *Ross Laboratories v. Barbour*, 13 Va. App. 373, 377, 412 S.E. 2d 205, 208 1991
[6] *Southall, Adm'r v. Reams, Inc.*, 198 Va. 545, 95 S.E. 2d 145 (1956)
[7] *Humphries v. N.N.S.B., Etc., Co.*, 183 Va. 466, 32 S.E. 2d 689 (1945)

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 nine (9) tabs and that notebook was accepted in its entirety as Agency Exhibit 1.

The Grievant provided the Hearing Officer with a notebook containing five (5) tabs and that notebook was accepted in its entirety as Grievant Exhibit 1.

The Agency and the Grievant entered into a joint stipulation before the Hearing Officer prior to his hearing testimony from witnesses. The stipulation was as follows:

> The Grievant stipulated that on or about July 26, 2012, she went to an off-site location of the Agency at [location]. At that location, she accessed the Agency's computer system to obtain medical records for her infant daughter. The Grievant stipulated that she now knew that such access was a violation of Agency policy but stated that she did not understand that it was a violation on or about July 26, 2012, when the access occurred.

Accordingly, the issue before the Hearing Officer is whether or not the Grievant knew or should have known that the access of her infant child's medical records on July 26, 2012, was a violation of Agency Policy No. 1.431. Further, if the Hearing Officer finds that the Grievant knew or should have known that a violation occurred, was she treated in a disparate fashion from other employees who committed violations of Policy No. 1.431?

The Grievant, in the course of her employment, took part in continuing education requirements, regarding patient privacy and confidentiality. On or about June 29, 2011, the Grievant took a course titled, "School of Medicine Retraining." [8] One of the questions in the testing protocol pursuant to that course was as follows:

> If I have job-related access to the electronic medical records system, hospital policy allows me to access:
>
> 1. my own PHI (Protected Health Information)
> 2. PHI of my family members
> 3. both of the above. [9]

The Grievant answered that question indicating that she only had access to her own PHI. That was the correct answer. Clearly, in answering this question, the Grievant acknowledged that she could not access the PHI of family members using her job-related access to the electronic medical records system of the Agency.

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[8] Agency Exhibit 1, Tab 5, Pages 3 and 4
[9] Agency Exhibit 1, Tab 5, Page 4

Similarly, on or about July 15, 2010, the Grievant took a retraining course titled, "Mandatory Retraining." [10] The testing protocol for this course set forth the following question:

> Which of these statements about accessing protected health information (PHI) is TRUE?
>
> 1. Every time I access a medical record from an electronic database with PHI, my access is permanently recorded.
> 2. Regular reviews are done that identify employee access to electronic medical records and other databases that contain PHI.
> 3. If I access PHI or a medical record without a work-related authorization to do so, it could result in disciplinary action, termination of employment (loss of my job), and reporting to a state licensing board for licensed professionals.
> 4. All of the above. [11]

The Grievant answered that question correctly by indicating all of the above are true. Further, on that same testing protocol, there was another question that set forth the following:

> If I have job-related access to the electronic medical record system, hospital policy allows me to also access:
>
> 1. my own PHI.
> 2. PHI of my family members.
> 3. both of the above. [12]

Again, the Grievant correctly answered that she could only access her personal PHI. It is clear from these questions, that the Grievant understood that she only could use her job-related access to the electronic medical system to access her own PHI and, if she accessed any other PHI, she would be subject to discipline.

The Grievant testified that she had to take these courses and these tests online during work hours and that she was not afforded the opportunity to continuously review this information. The Grievant would have the Hearing Officer believe that she had simply forgotten that there was a rule against using her employee status to access the PHI of anyone other than herself, or that the rules were too complex for her to comprehend. While the Hearing Officer concedes that patient privacy and confidentiality, as set forth in various laws and regulations is exceedingly complex, the concept that an employee cannot use his or her employee access to view the PHI of anyone other than themselves is not a complex concept. Further, the Hearing Officer does not believe that the Grievant forgot this rule.

Agency Policy No. 1.431 sets forth in part the following:

> Federal and Institutional guidelines and policies describe measures to safeguard protected health information (PHI). Unauthorized individuals

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[10] Agency Exhibit 1, Tab 5, Pages 11 through 14

[11] Agency Exhibit 1, Tab 5, Page 13

[12] Agency Exhibit 1, Tab 5, Page 13

> who access, use, and/or disclose PHI, attempt to access PHI, and/or assist others to access PHI when it is not authorized, will be sanctioned appropriately. As outlined in the procedures, a sanction may take the form of verbal counseling, written reprimand, or disciplinary action, including mandatory leave without pay and/or termination. [13]

Policy No. 1.431 defines a Level 2 Violation as follows:

> An employee intentionally accesses PHI without authorization. A Level 2 Violation shall be considered serious misconduct. Examples of Level 2 Violations include, but are not limited to:
>
> Intentional, unauthorized access to a friend's, relative's, co-worker's, public personality's, or any other individual's PHI (including searching for an address or phone number);
> Intentionally assisting another employee in gaining unauthorized access to PHI... [14]

The Grievant testified that she did not deem her actions to be intentional because they were only directed towards her infant daughter and that she did not share her daughter's PHI with anyone nor did she attempt to profit from it. This is clearly a specious argument as she intentionally drove to the off-site location, intentionally requested access to the computer system at that location, and intentionally accessed the records and printed them.

Finally, there is the issue of disparate treatment. The Grievant attempts to argue that she was treated disparately or that there was a conspiracy against her. The Grievant, in her testimony, several times said that there was a cabal against her. Accordingly, the Grievant testified of there being the intrigue of a group of persons secretly united in a plot against her. The Grievant offered no testimony as to this plot, other than the fact that she had previously spoken to her supervisors about "issues" within her work environment. The Grievant offered no other meaningful testimony regarding the so-called cabal.

The Agency provided an exhibit which set forth a list of similar offenses committed by employees from January 2010, through November 2012. [15] The Grievant is number 8 in that list. The closest analog to the case before this Hearing Officer is number 7. Employee 7 had worked for the Agency for many years, as has the Grievant in this matter. Employee 7 was deemed to have cooperated and was deemed to be honest in that cooperation. Agency witnesses testified in this matter that the Grievant was not deemed to be completely forthcoming when confronted with her access of her daughter's PHI.

The Grievant testified that she was accessing her daughter's PHI pursuant to a court appearance that she had to make. The Grievant had several weeks of notice of this court appearance. She testified that she previously obtained a copy of the needed records but only discovered that she could not find them in the day or two immediately prior to the court hearing.

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[13] Agency Exhibit 1, Tab 1, Page 3
[14] Agency Exhibit 1, Tab 1, Page 4
[15] Agency Exhibit 1, Tab 4, Pages 1 and 2

The Grievant testified that she had been in Charlottesville, the location of her place of employment, in the days immediately prior to her access at a satellite location. The Grievant testified that she could not come back to Charlottesville because of the cost of gasoline. The Grievant further testified that she either did not know that this access was a policy violation or that she had forgotten that it was a policy violation. The Grievant could have properly gotten the records from the Agency by identifying herself as the parent of her child and using Health Information Services.

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..." 16 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, (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.

While the Grievant has been an employee for this Agency for a number of years, longevity in and of itself is not a required reason to mitigate a clear policy violation. The Hearing Officer will not substitute his judgment for the Grievant's supervisors at the Agency who deemed that the Grievant was being less than fully-forthcoming in her answers regarding why she accessed her daughter's PHI using her employee access. The Hearing Officer finds no reason to mitigate a clear violation.

DECISION

For reasons stated herein, the Hearing Officer finds that the Agency has bourne its burden of proof in this matter and that suspension of the Grievant for three (3) days was appropriate.

APPEAL RIGHTS

You may file an administrative review request if any of the following apply:

[16] Va. Code § 2.2-3005

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. You may fax your request to 804-371-7401, or address your request to:

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

2. 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. You may fax your request to 804-786-1606, or address your request to:

Office of Employment Dispute Resolution
101 North 14th Street, 12th Floor
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 of the original hearing decision. A copy of all requests for administrative review must be provided 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 administrative requests for a review have been decided.

You may request a judicial review if you believe the decision is contradictory to law.17 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.18

[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]

William S. Davidson
Hearing Officer

[17] 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).

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

RULING OF THE DEPARTMENT OF
HUMAN RESOURCE MANAGEMENT

In the Matter of the
University of Virginia

March 8, 2013

The grievant has requested an administrative review of the hearing officer's decision in Case No. 9974. For the reason stated below, we will not interfere with the application of this decision. The agency head of the Department of Human Resource Management (DHRM), Ms. Sara R. Wilson, has directed that I conduct this administrative review.

The hearing officer, in part, listed the following in the PROCEDURAL HISTORY of this case:

A Group II Written Notice was issued to the Grievant on September 17, 2012, for:

> On 7/26/12, [Grievant] accessed her (minor) daughter's EMR for purposes of court (child support hearing). Her daughter had been seen at UVA [clinic] in 2011 (one time visit). She accessed the records while on leave from UVA [department]. This access was discovered by the Compliance Office in September 2012. This access occurred off-site at the UVA facility at [location]. She used their computer to look up the EMR and also printed out the record. This access is a Level 2 violation of Policy No 1.431. During the predetermination meeting on 9/12/12, [Grievant] admitted to this violation but stated she thought she could access a minor child's record. [Grievant] takes annual retraining, last on 7/15/10 and 6/29/11.

As a result of the allegations, the grievant was issued a Group II Written Notice with a two-day suspension.

ISSUE

Did the Grievant commit a Level 2 Violation of Agency Policy 1.431?

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 nine (9)

tabs and that notebook was accepted in its entirety as Agency Exhibit 1.

The Grievant provided the Hearing Officer with a notebook containing five (5) tabs and that notebook was accepted in its entirety as Grievant Exhibit 1.

The Agency and the Grievant entered into a joint stipulation before the Hearing Officer prior to his hearing testimony from witnesses. The stipulation was as follows:

The Grievant stipulated that on or about July 26, 2012, she went to an off-site location of the Agency at [location]. At that location, she accessed the Agency's computer system to obtain medical records for her infant daughter. The Grievant stipulated that she now knew that such access was a violation of Agency policy but stated that she did not understand that it was a violation on or about July 26, 2012, when the access occurred.

Accordingly, the issue before the Hearing Officer is whether or not the Grievant knew or should have known that the access of her infant child's medical records on July 26, 2012, was a violation of Agency Policy No. 1.431. Further, if the Hearing Officer finds that the Grievant knew or should have known that a violation occurred, was she treated in a disparate fashion from other employees who committed violations of Policy No. 1.431?

The Grievant, in the course of her employment, took part in continuing education requirements, regarding patient privacy and confidentiality. On or about June 29, 2011, the Grievant took a course titled, "School of Medicine Retraining." One of the questions in the testing protocol pursuant to that course was as follows:

If I have job-related access to the electronic medical records system, hospital policy allows me to access:

1. my own PHI (Protected Health Information)
2. PHI of my family members
3. both of the above.

The Grievant answered that question indicating that she only had access to her own PHI. That was the correct answer. Clearly, in answering this question, the Grievant acknowledged that she could not access the PHI of family members using her job-related access to the electronic medical records system of the Agency.

Similarly, on or about July 15, 2010, the Grievant took a retraining course titled, "Mandatory Retraining." The testing protocol for this course set forth the following question:

Which of these statements about accessing protected health information (PHI) is TRUE?

1. Every time I access a medical record from an electronic database with PHI, my access is permanently recorded.
2. Regular reviews are done that identify employee access to electronic medical

records and other databases that contain PHI.

3. If I access PHI or a medical record without a work-related authorization to do so, it could result in disciplinary action, termination of employment (loss of my job), and reporting to a state licensing board for licensed professionals.
4. All of the above.

The Grievant answered that question correctly by indicating all of the above are true. Further, on that same testing protocol, there was another question that set forth the following:

If I have job-related access to the electronic medical record system, hospital policy allows me to also access:

1. my own PHI.
2. PHI of my family members.
3. both of the above.

Again, the Grievant correctly answered that she could only access her personal PHI. It is clear from these questions, that the Grievant understood that she only could use her job-related access to the electronic medical system to access her own PHI and, if she accessed any other PHI, she would be subject to discipline.

The Grievant testified that she had to take these courses and these tests online during work hours and that she was not afforded the opportunity to continuously review this information. The Grievant would have the Hearing Officer believe that she had simply forgotten that there was a rule against using her employee status to access the PHI of anyone other than herself, or that the rules were too complex for her to comprehend. While the Hearing Officer concedes that patient privacy and confidentiality, as set forth in various laws and regulations is exceedingly complex, the concept that an employee cannot use his or her employee access to view the PHI of anyone other than themselves is not a complex concept. Further, the Hearing Officer does not believe that the Grievant forgot this rule.

Agency Policy No. 1.431 sets forth in part the following:

Federal and Institutional guidelines and policies describe measures to safeguard protected health information (PHI). Unauthorized individuals who access, use, and/or disclose PHI, attempt to access PHI, and/or assist others to access PHI when it is not authorized, will be sanctioned appropriately. As outlined in the procedures, a sanction may take the form of verbal counseling, written reprimand, or disciplinary action, including mandatory leave without pay and/or termination.

Policy No. 1.431 defines a Level 2 Violation as follows:

An employee intentionally accesses PHI without authorization. A Level 2 Violation shall be considered serious misconduct. Examples of Level 2 Violations include, but are not limited to:

Intentional, unauthorized access to a friend’s, relative's, coworker’s, public

personality's, or any other individual's PHI (including searching for an address or phone number);

Intentionally assisting another employee in gaining unauthorized access to PHI ...

The Grievant testified that she did not deem her actions to be intentional because they were only directed towards her infant daughter and that she did not share her daughter's PHI with anyone nor did she attempt to profit from it. This is clearly a specious argument as she intentionally drove to the off-site location, intentionally requested access to the computer system at that location, and intentionally accessed the records and printed them.

Finally, there is the issue of disparate treatment. The Grievant attempts to argue that she was treated disparately or that there was a conspiracy against her. The Grievant, in her testimony, several times said that there was a cabal against her. Accordingly, the Grievant testified of there being the intrigue of a group of persons secretly united in a plot against her. The Grievant offered no testimony as to this plot, other than the fact that she had previously spoken to her supervisors about "issues" within her work environment. The Grievant offered no other meaningful testimony regarding the so-called cabal.

The Agency provided an exhibit which set forth a list of similar offenses committed by employees from January 2010, through November 2012. The Grievant is number 8 in that list. The closest analog to the case before this Hearing Officer is number7. Employee 7 had worked for the Agency for many years, as has the Grievant in this matter. Employee7 was deemed to have cooperated and was deemed to be honest in that cooperation. Agency witnesses testified in this matter that the Grievant was not deemed to be completely forthcoming when confronted with her access of her daughter's PHI.

The Grievant testified that she was accessing her daughter's PHI pursuant to a court appearance that she had to make. The Grievant had several weeks of notice of this court appearance. She testified that she previously obtained a copy of the needed records but only discovered that she could not find them in the day or two immediately prior to the court hearing. The Grievant testified that she had been in Charlottesville, the location of her place of employment, in the days immediately prior to her access at a satellite location. The Grievant testified that she could not come back to Charlottesville because of the cost of gasoline. The Grievant further testified that she either did not know that this access was a policy violation or that she had forgotten that it was a policy violation. The Grievant could have properly gotten the records from the Agency by identifying herself as the parent of her child and using Health Information Services.

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 ..." 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, (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.

While the Grievant has been an employee for this Agency for a number of years, longevity in and of itself is not a required reason to mitigate a clear policy violation. The Hearing Officer will not substitute his judgment for the Grievant's supervisors at the Agency who deemed that the Grievant was being less than fully forthcoming in her answers regarding why she accessed her daughter's PHI using her employee access. The Hearing Officer finds no reason to mitigate a clear violation.

DECISION

For reasons stated herein, the Hearing Officer finds that the Agency has bourne its burden of proof in this matter and that suspension of the Grievant for three (3) days was appropriate.

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 only 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 each instance where a request is made to this Agency for an administrative review, the party making the request must identify with which human resource policy, either state or agency, the hearing decision is inconsistent or is misinterpreted. In her request for an administrative review, the grievant stated, "…I did not deliberately violate Policy #1.431; however, I did misinterpret and unintentionally violate the policy." She also stated, "I did not disclose personal health information and absolutely no harm was done to the individual or agency. Per the Standards of Conduct Policy #1.60, "Corrective and disciplinary actions must be administered through a prompt and fair process"…(D11) and that management should consider "The nature, severity and consequences of the offense", " How issues with similarly situated employees have been addressed," and "Mitigating

factors that would compel a reduction in the disciplinary action to promote the interests of fairness and objectivity."

Upon review of the grievant's concerns, it appears that the hearing officer addressed them in his decision. For example, regarding the grievant's concern that she was treated differently than other employees who had committed similar infractions, the hearing officer addressed that concern. In a similar manner, he considered mitigating circumstances in upholding the agency's disciplinary action.

Regarding the disciplinary action based on the grievant's violation, the hearing officer stated the following:

> The Grievant would have the Hearing Officer believe that she had simply forgotten that there was a rule against using her employee status to access the PHI of anyone other than herself, or that the rules were too complex for her to comprehend. While the Hearing Officer concedes that patient privacy and confidentiality, as set forth in various laws and regulations is exceedingly complex, the concept that an employee cannot use his or her employee access to view the PHI of anyone other than themselves is not a complex concept. Further, the Hearing Officer does not believe that the Grievant forgot this rule.

In the addition, the hearing officer stated:

> The Grievant testified that she did not deem her actions to be intentional because they were only directed towards her infant daughter and that she did not share her daughter's PHI with anyone nor did she attempt to profit from it. This is clearly a specious argument as she intentionally drove to the off-site location, intentionally requested access to the computer system at that location, and intentionally accessed the records and printed them.

Summarily, the hearing officer determined that the grievant's actions were in direct violation of agency policy, regardless of whether her action were intentional or unintentional. Given the hearing officer's determination, it appears that rather than demonstrating that the hearing decision is in violation of UVA or DHRM policy, the grievant is contesting the evidence the hearing officer considered, how he assessed that evidence, and the resulting decision. Thus, we have no authority to interfere with the application of this decision.

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Ernest G. Spratley
Assistant Director
Office of Equal Employment Services