

Issue: Step 4 Performance Improvement Counseling Form with Termination (HIPAA violation); Hearing Date: 02/07/14; Decision Issued: 02/10/14; Agency: UVA Medical Center; AHO: Carl Wilson Schmidt, Esq.; Case No. 10260; Outcome: No Relief – Agency Upheld.



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 10260

Hearing Date: February 7, 2014
Decision Issued: February 10, 2014

PROCEDURAL HISTORY

On December 15, 2013, Grievant was issued a Step 4 Formal Performance Counseling Form with removal for accessing medical records contrary to policy.

On December 15, 2013, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On January 14, 2014, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On February 7, 2014, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Agency Party Designee
Agency Representative
Witnesses

ISSUES

1. Whether Grievant engaged in the behavior described in the Formal Performance Counseling Form?
2. Whether the behavior constituted misconduct?

3. Whether the Agency's discipline was consistent with law (e.g., free of unlawful discrimination) and policy?
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 a Registered Nurse in one of the Medical Units at the Facility. She began working for the Agency in August 2004. No evidence of prior active disciplinary action was introduced during the hearing.

The Agency maintains a database containing patient electronic medical records (EMR). When Agency employees provide medical services and treatment to patients, the employees may access and read patient EMRs. If a patient wishes to access his or her own medical records held by the Agency, a patient may access an application called MyChart. Some of the information in patient EMRs is used to populate the MyChart application. A patient may authorize others to access his or her medical information in MyChart.

Grievant received annual training regarding the Agency's policies governing access to patient EMR. She received an email on July 24, 2012 explaining the difference between EMR and MyChart. This email stated, in part:

Employees may not access (or disclose) any patient's electronic medical record (EMR) in Epic or our other electronic data systems, unless such access is necessary to perform job-related functions. Employees may not view the electronic records of minor children, adult children, spouse, or any other family member.

Employee's Own EMR. Employees with authorized access can view their own EMR in Epic. Employees can also view and obtain copies of their own EMR through Health Information Services (HIS), or can sign up for MyChart to obtain online access to their own health information.

Health Records of Spouses, Adult Children, other Family Members, Friends, Neighbors, etc.: Employees with current legal authority to view and obtain copies of the health records of their adult children, spouses, other family members, friends, neighbors, etc. may only do so by:

Using MyChart with a proxy access
Viewing and obtaining copies of the EMR at Health Information Services.

The Agency provided Grievant and other employees with annual training regarding its policies governing access to confidential patient medical records. Included in that training was a slide stating, in part:

Employees:

- Should only access a patient's EMR with a work-related need.
- Can access their own electronic medical record (EMR) if their role provides access.
- May not access a family member's EMR, even with the family member's permission¹

Grievant's Husband suffered from an illness that sometimes causes him to forget how to properly manage his medication and treatment. He and his doctors asked Grievant to provide assistance and oversight. He authorized Grievant to access his medical information.² The Husband was not a patient of the Unit where Grievant worked. Grievant would not have a reason related to her work activities to access the Husband's medical records through the EMR.

On October 29, 2013, November 4, 2013, and November 7, 2013, Grievant accessed the Agency's EMR to view the protected healthcare information of her Husband. She did so without permission from the Agency and contrary to the Agency's policies.

¹ Agency Exhibit 5.

² The Husband did not have any authority to override the Agency's policies and permit Grievant to access his information through the EMR database.

The Agency conducted an audit of access to its EMR database and recognized that Grievant may have accessed her Husband's information. The Agency conducted an investigation and confronted Grievant. Grievant admitted to using the EMR database to access her Husband's records.

CONCLUSIONS OF POLICY

Medical Center Human Resource Policy 701 governs Employee Standards of Performance and Conduct. Under this policy, Serious Misconduct refers to acts or omissions having a significant impact on patient care or business operations. Examples of serious misconduct include:

Intentionally accessing [Patient Health Information] without authorization (See Medical Center Human Resources Policy No. 707 "Violations of Confidentiality").

Medical Center Policy 707 governs Violations of Confidentiality. This policy defines:

Access – to obtain, open, retrieve, or otherwise handle a patient's Protected Health Information, regardless of its format ("Access").

A Single Access is Accessing a single patient's record within a single twenty-four hour period.

A Multiple Access is:

Accessing the records of two or more patients, regardless of the time frame within which the Access occurs; or

Accessing the same patient's record on a more than one occasion within two or more twenty-four hour periods (as measured from the time of the first access).

The policy defines "Violations of Confidentiality ('Violations')" as, "Access to, or use or Disclosure of, Confidential Information for purposes other than those for which an individual is authorized."

The type of disciplinary action taken depends on the level of the violation. A Level 2 violation, "occurs when an employee intentionally Accesses Confidential Information without authorization." An example of a Level 2 violation includes, "[i]ntentional, unauthorized Access to a friend's, relative's (including minor child, adult child, spouse, or any other family member), co-worker's, public personality's, or any other individual's PHI."

Policy 707 provides for corrective measures as follows:

A Level 2 Violation 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 (3) 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.

Grievant committed a Level 2 violation on October 29, 2013 when she intentionally accessed the confidential electronic medical records of her Husband. Her access was not work-related because her Husband was not a patient of the Unit where she worked. Her access was not authorized or permitted by the Agency. Grievant committed a second Level 2 violation on November 4, 2013 when she accessed again her Husband's confidential electronic medical records. She committed a third Level 2 violation on November 7, 2013. Grievant had "multiple Level 2 violations" thereby justifying the Agency's decision to remove her from employment.³

Grievant argued that she had a business reason to access her Husband's medical records. The evidence showed that the Husband was not a patient of the Unit where Grievant worked. She would not have been performing her work duties when she accessed her Husband's medical records because he was not a patient at that Unit.

Grievant argued that she was attempting to access MyChart instead of her Husband's EMR. This argument fails. Grievant had a unique log on identification and password to enable her to access patient EMR. To access her Husband's MyChart, she would have had to utilize her Husband's log on identification and password and not her log on identification and password for accessing the EMR database.

Grievant points out that if the Agency had identified her improper access after the first access instead of after her third access, the disciplinary action would have been a three day suspension without removal. Although it is unfortunate that the Agency did not conduct its audit sooner, the Agency conducted its audit in accordance with its customary practices and did not delay for any improper purpose.

Grievant objected to the Agency's decision that she be deemed ineligible for rehire in her Unit and with the Agency. Although the Agency's Standards of Conduct do not authorize the Agency to include as a form of punishment a rehire prohibition, the Agency's error is harmless. Eligibility for rehire addresses a time in the future when a

³ The Agency characterized Grievant's behavior as Multiple Access under Policy 707. Although Grievant's behavior is better characterized as three instances of a Single Access, the distinction does not affect the outcome of this case. If Grievant's behavior was Multiple Access, the policy can be interpreted to support the conclusion that Grievant engaged in multiple Level 2 violations thereby supporting removal. The policy does not establish separate or lesser disciplinary actions for Multiple Access than for Single Access. The distinction Single and Multiple Access appears to be of little significance.

position of interest may open for recruitment. Although the Hearing Officer could order the Agency to refrain from making a current determination of eligibility for rehiring, the Agency could send Grievant a separate letter notifying her of her ineligibility for rehire or not send her any notification but maintain an internal database listing Grievant as ineligible for rehire.

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 Human Resource Management”⁴ Under the *Rules for Conducting Grievance Hearings*, “[a] hearing officer must give deference to the agency’s consideration and assessment of any mitigating and aggravating circumstances. Thus, a hearing officer may mitigate the agency’s discipline only if, under the record evidence, the agency’s discipline exceeds the limits of reasonableness. If the hearing officer mitigates the agency’s discipline, the hearing officer shall state in the hearing decision the basis for mitigation.” A non-exclusive list of examples includes whether (1) the employee received adequate notice of the existence of the rule that the employee is accused of violating, (2) the agency has consistently applied disciplinary action among similarly situated employees, and (3) the disciplinary action was free of improper motive.

Grievant argued that she has suffered extreme hardship as the result of the Agency’s action. Grievant’s loss of employment has clearly severely affected her and her family. The Hearing Officer has not been given equity power to consider the hardship on an employee when considering an employee’s grievance. In addition, the Hearing Officer is obligated to give deference to the Agency’s application of disciplinary action unless mitigating circumstances exist. The hardship on an employee resulting from removal is not recognized by EDR as a mitigating circumstance.

Grievant argued that the discipline was too harsh. She presented letters from prominent members of the Agency who expressed displeasure with the Agency’s treatment of her. Although the discipline issued to Grievant exceeds what would be necessary to correct her behavior if she remained employed by the Agency, the Hearing Officer does not have the authority to substitute his opinion regarding what would be the most appropriate discipline once the Agency has met its burden of proof and there are no mitigating circumstances as defined under EDR Rules.

In light of the standard set forth in the Rules, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

DECISION

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

⁴ Va. Code § 2.2-3005.

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.⁵

⁵ Agencies must request and receive prior approval from EDR before filing a notice of appeal.

[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