

IN THE MATTER OF ARBITRATION BETWEEN

UNITED HOSPITAL, ALLINA HOSPITALS
AND CLINICS
(Employer)

and

DECISION
(Discharge Grievance)
FMCS Case No. 10-56376

MINNESOTA NURSES ASSOCIATION
(Union)

ARBITRATOR: Frank E. Kapsch, Jr.

DATE AND PLACE OF HEARING: January 18, 2011 at the offices of MN Bureau of Mediation Services and subsequently at the offices of MN Nurses Association in St. Paul, MN.

RECEIPT OF POST-HEARING BRIEFS: Both Parties submitted timely briefs as of March 5, 2011. The arbitrator closed the record on March 5, 2011, upon receipt of the briefs.

APPEARANCES

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JURISDICTION

The Parties stipulated that this Arbitrator has been properly selected to hear and resolve this dispute in accordance with the provisions of Article/Section 25 of the applicable labor agreement and thereby possesses the specific authorities and responsibilities set forth therein.

The Parties also agreed that they would each waive their contractual right to appoint additional representatives to the arbitration panel and, therefore, the

decision of this arbitrator shall constitute the final and binding decision in this matter.

THE ISSUE

The Parties stipulated that the Issue is; Did the Employer, on or about June 4, 2009, discharge Gail Bauer, an employee, with just cause? If not, what shall be the remedy?

THE EMPLOYER

Allina Hospitals & Clinics is a non-profit health care organization with headquarters located in Minneapolis MN. Allina operates eleven hospitals and some 85 clinics and related health care facilities throughout Minnesota and western Wisconsin. It employs some 30,000 people within its organizational system. One of its eleven acute care hospitals is United Hospital located in St. Paul MN and it is the specific locus involved in this matter.

THE UNION

The Minnesota Nurses Association (MNA) is a union of professional Registered Nurses (RNs). MNA traces its heritage and evolution back to the early part of the past century. Its purpose and mission is to advance the professional, economic and general well-being of RNs throughout the state of Minnesota. MNA's current membership is approximately 20,000. The MNA currently represents RNs in numerous collective bargaining units throughout the state of Minnesota, including a unit at Allina's United Hospital in St. Paul, MN.

COLLECTIVE BARGAINING HISTORY

The Employer, Allina/United Hospital and MNA, the Union, have had a continuing and on-going collective bargaining relationship dating back decades and this relationship has been reflected in a successive series of labor agreements during that period. The labor agreement; which the Parties agree is applicable to this matter, was effective June 1, 2007 and expired on or about May 31, 2010.

BACKGROUND

The subject and focus of this matter is Gail Bauer, the Grievant. Ms. Bauer commenced employment with the Employer at United Hospital in 1973 and worked thereafter as a Registered Nurse until her termination in June, 2009.

From approximately 2000 to her discharge, Ms. Bauer worked in the Same Day Interventional Unit (SDIU) at the hospital. SDIU is a pre- and post- procedure care unit for non-critical outpatients and some non-critical inpatients scheduled to undergo Cardiac Catheterization procedures in the adjoining Cardiac

Catheterization Laboratory (CV Lab). Because SDIU is neither equipped nor staffed to provide the level of care needed by critically ill patients, there are various types and classes of inpatients scheduled for catheterization procedures in the CV Lab who are never routed into or through SDIU.

Specifically, inpatients coming from the hospital's Intensive Care Unit (ICU) and scheduled for procedures in the CV Lab are never seen in or routed through SDIU; because they require constant critical care monitoring, which SDIU is not equipped to provide. Additionally, inpatients who are being ventilated and patients who are to undergo significant surgical procedures in the CV Lab that require the presence of a full surgical staff are not routed through SDIU. An example of such a surgical procedure would be the insertion of an intra-aortic balloon pump (IABP). Again, SDIU is not equipped or staffed to handle or deal with those types of critical care patients.

To facilitate effective and efficient care and treatment of both in- and out-patients utilizing its medical care and treatment services and facilities, Allina uses two separate computer programs for maintaining patient records and schedules.

The first system is called "Navicare". Navicare provides staff employees with limited information regarding a patient's status. The information displayed on a staff employee's computer screen, via Navicare, would include basic patient identification and current unit location. It may also display small icons to indicate what is currently happening with respect to the patient. For example, a small icon depicting a child's balloon next to the patient's name would indicate that patient is scheduled to or is engaged in a balloon pump procedure. The Hospital staff typically use the limited patient information available via the Navicare system to manage and facilitate the flow and movement of patients within the facility and to manage and monitor staffing needs. Navicare does not display a patient's detailed electronic medical record.

To access a patient's detailed electronic medical record and staff employee would utilize the second Allina program system which is called "Excellian". The Excellian program essentially contains the entire medical record for a patient in "electronic" form. Access to patient records in Excellian by staff employees is limited to only those employees who are directly involved in that patient's care or who have a business-related reason requiring such access.

How does Excellian work? When a staff employee initially logs into the program, s/he will encounter an opening page or screen referred to as "DAR". The DAR screen contains basic non-medical identification information as to what patients are currently in the "system". To access patients actual medical record, a staff employee would locate the patient's name on the DAR screen, right-click it and click again to open the patient's actual medical record. Once in the record, the employee is free to access all the various types of information and

documentation relating to the patient's medical history, tests, diagnoses, treatments, etc.

The requirement for health care organizations, such as Allina, to insure the safety, security and confidentiality of patients' medical information comes via a Federal statute known as the Health Insurance Portability and Accountability Act of 1996, commonly referred to as "HIPAA".¹ Among other purposes, HIPAA clearly established the concept that an individual's medical information is personal and private information that belongs to the individual; not the various health care providers from whom the individual may receive medical care and/or treatment. HIPAA also recognizes that in order to receive proper medical care, the individual must share his or her medical information with the selected providers. The statute also recognizes that due to the inherent nature of the health care system, the health care providers will retain the patient's medical information and record, long after care and treatment has been completed and the patient is gone.

Accordingly, HIPAA mandates that all health care providers maintain reasonable, prudent and necessary systems to insure that individual personal health information is properly secured, safeguarded and kept confidential. The statute refers to "Protected Health Information" (PHI) as "...*health information that identifies and individual or could create a reasonable basis to believe the information could be used to identify an individual.*" In compliance with the requirements of HIPAA in maintaining the security and confidentiality of PHI, Allina and its constituent operating entities, such as United Hospital, have adopted various policies, training programs, procedural rules and disciplinary procedures for all of its employees, including the RN staff.

Allina specifically educates and instructs each of its employees on the details of its policies and protocols with respect to HIPAA as part of an in-house training module referred to as "*Compliance Training*". This training module is available to employees as a computer driven, self-paced, interactive computer program. Newly hired employees receive the training as part of their initial employment orientation. Current employees are required to complete the Compliance training module annually as a refresher.

A relevant excerpt from the Compliance training module:

HIPAA Privacy. Continued
What is Allina's position on PHI?

Allina permits the access, use and disclosure of protected health information only for legitimate business reason. In determining whether

¹ In addition to the provisions of HIPAA, there are also Minnesota statutes and regulations that require the protection, privacy and confidentiality of individual medical records.

there is a legitimate business reason to access, use or disclose information, you must also consider whether it is the minimum necessary information to accomplish the intended purpose. All movements in Excellian and other Allina Electronic Medical Records leave an electronic trail or footprint. This trail helps to insure a high degree of accuracy in the care that we provide and ensure that confidentiality is maintained.

Violating Allina's policies or procedures relating to a patient's protected health information could result in termination. Allina has terminated employees every year since the Privacy Rule became effective for inappropriately accessing a patient's medical record, or disclosing information without the patient's consent. Allina takes these violations very seriously.

For more information on Allina's position regarding PHI, review the policy on Confidentiality of Patient Information in the Employee Policy Handbook in My Allina.com.

According to the Employer's records, Ms. Bauer completed her 2009 annual Compliance Training module on March 1, 2009.

On the evening of May 10, 2009, a former nurse employee at United Hospital (hereinafter referred to as Patient "PS") came into the hospital's Emergency Department. Patient "PS" was very sick and was routed to the CV Lab for a diagnostic workup and was subsequently admitted to the Intensive Care Unit (ICU). In the ICU she was placed on a ventilator and her physician subsequently scheduled her for an intra-aortic balloon pump procedure in the CV Lab the following afternoon, May 11, 2009.

On the morning of May 11, 2009, RN Bauer was routinely working in SDIU. She recalls that at about 9:30 AM Patient "PS's" daughter came into SDIU appearing somewhat distraught. The daughter also worked at United and had previously worked in SDIU as a Health Unit Coordinator and was acquainted with Ms. Bauer and other SDIU employees.

The daughter proceeded to inform Bauer and the other employees that her mom had been admitted to ICU the night before and was now on a ventilator and in critical condition. It was obvious to all present that the daughter was very concerned about her mother's medical condition. After briefing Bauer and the other SDIU employees present about her mother's medical status, the daughter left the area and did not return.

Bauer acknowledges that she was acquainted with Patient "PS" as a past co-worker at the hospital and noted that she had attended a bridal shower a few months earlier and "PS" had been present. However, she further acknowledged that she and "PS" were not close friends.

Patient "PS" was scheduled to undergo an intra-aortic balloon procedure (IABP) in the CV Lab at about 1:30 PM. As noted above, because she was coming from the ICU as 1) an inpatient, 2) a critical-care patient and 3) on a ventilator; she did not require any services in SDIU and was transported directly from ICU to the CV Lab for the balloon procedure.

At approximately 2:52 PM and, again, at 3:01 PM on May 11, 2009, RN Bauer used a computer in SDIU to access Patient "PS's" medical record via Excellian. According to the "trail or footprint", Bauer specifically looked at a report detailing her inpatient treatment, her "Kardex", which showed all of her past and current ailments and diagnoses, and, finally, Bauer reviewed the documentation covering the treatment that "PS" had received in the Emergency Department the night before.

Ms. Bauer admitted, in the hearing, that after she exited PS's medical record the second time she had turned to a nearby RN co-worker and said, "I think I may have just screwed up!" The other RN apparently quickly discerned what had just happened and said something to the effect, That's confidential, you don't do that, or other words to that effect.

For whatever reason, Ms. Bauer chose not to voluntarily report the incident to her supervisor or any other superior.

On May 28, 2009, an anonymous phone call was received on the Allina Integrity Reporting Line reporting that the caller believed that Ms. Bauer had improperly accessed a patient's medical record on May 11, 2009 without a valid business reason for doing so.

Management subsequently commenced an investigation into the Integrity Line allegation. A preliminary examination of Bauer's Excellian "trail or footprint" on May 11 disclosed the two access incidents involving Patient "PS's" medical record for which there was no readily discernable explanation.

Management met with Ms. Bauer and her Union Representative and Ms. Bauer confirmed that she had accessed "PS's" record on May 11, but she denied that her behavior violated the Allina PHI privacy policy. She initially contended that she accessed the record because she was a Charge Nurse in SDIU on the 11th and was responsible for monitoring current and potential "patient flow" through the unit that day to insure that there was sufficient staff available. She also contended that it was her "standard" personal practice and that of other RNs in SDIU to routinely access the records of ICU patients scheduled for the CV Lab to see if they might be routed to SDIU upon completion of their CV Lab procedure(s).

Management adjourned the meeting for the purpose of validating Ms. Bauer's assertions. The subsequent investigation disclosed that, 1) contrary to her assertion, she was not in the role of Charge Nurse in SDIU on May 11 and 2) a check of Excellian revealed that neither of the two RNs who were Charge Nurses in SDIU that day accessed Patient "PS's" record that day.

Management then attempted to confirm Ms. Bauer's assertion that it was her routine practice to check on ICU Patients coming to the CV Lab to determine if they might be coming to SDIU for post-procedure care. They looked at Bauer's Excellian record for March and April 2009 and found no other instances in which she had accessed the records of ICU patients undergoing CV Lab procedures. A follow-up audit back to January, 2009 also failed to disclose any instances where Bauer accessed the records of ICU patients undergoing CV Lab procedures.

Management went even further in their attempt to validate Bauer's assertions and explanations for accessing "PS's" medical record. Another audit of Excellian "trails and footprints" for the other RNs in SDIU as conducted to see if, indeed, as contended by Ms. Bauer, it was typical for the other SDIU RNs to routinely check the records of ICU patients undergoing CV Lab procedures. The audit found no instances where other SDIU RNs accessed such records.

Ultimately management concluded that none of Ms. Bauer's proffered explanations for accessing Patient "PS's" record on May 11, 2009 were valid and that she intentionally breached that patient's PHI privacy and confidentiality with no business-related justification. They further determined that her breach was sufficient to constitute a Level 3 violation under the Allina discipline policy and that termination was the appropriate resolution.

On June 4, 2009, Ms. Bauer, in the presence of the Union, was informed by management that she was being terminated, effective immediately, from employment at Allina United Hospital. The stated reason for termination was that "Gail accessed a past co-worker's medical records without a business need to do so. This is a serious HIPAA violation."

Relevant contract language; the following are excerpts from Allina's HR Administrative Procedure (January, 2007), Disciplinary Process: Breach of Confidentiality of Patient Medical Information.

Level 1: Breach due to carelessness

Examples:

- *Talking loudly about a patient, using a patient's name in a crowded elevator.*
- *Failing to log out of computer with access to PHI before leaving the work area, allowing others to access without separately logging in.*
- *Bringing file containing PHI home without permission and appropriate safeguards.*

- *Leaving pass codes in obvious locations where others can access.*
- *Sending fax PHI to an appropriate location , but without appropriate protections, such as a confidential cover sheet.*

Level 2: Intentional inappropriate use, disclosure or access (without a legitimate business reason), but without malice.

Examples:

- *Provider accessing PHI for patient who provider has cared for, after patient has transferred to another area of the Hospital o see how patient is doing, and not in connection with treatment.*
- *Accessing PHI regarding family member who has given employee permission, but has not signed authorizations.*
- *Giving access code to co-worker who has forgotten password to allow co-worker to complete assignment.*

Level 3: This is the most serious type of offense. Intentional use, access or disclosure with malice or with reckless disregard to consequences.

Examples:

- *Accessing PHI regarding celebrity out of curiosity.*
- *Teasing co-worker about medical information pertaining to a family member.*
- *Accessing PHI of co-worker to see why co-worker was in the hospital. [emphasis added]*
- *Disclosing family member's PHI to other family member (not in connection with treatment of patient) with knowledge that family member would object to disclosure, even though employee does not intend the disclosure to be harmful.*
- *Accessing PHI of neighbor without proper written consent or a proper business or care-related purpose.*

The document offers the following guideline regarding termination for the various Levels of offenses;

- *Repeated (more than 2) violations of Level 1.*
- *2 or more Level 2 offenses.*
- *One Level 3 breach.*

In addition, to considering the level of seriousness, management may consider the following factors when determining the appropriate level of discipline:

- *Length of employment*
- *History of corrective action*
- *Whether the workforce member has previously breached confidentiality; and*
- *Whether the workforce member understands the seriousness of the offense and agrees not to engage in any further breaches.*

THE GRIEVANCE

In accordance with the provisions of Article/Section 25 of the applicable labor agreement, Ms. Bauer and the Union subsequently filed a timely and proper Grievance in protest of her termination. The grievance contends that the Employer terminated Ms. Bauer's employment without Just Cause and thereby violates Article/Section 17 of the labor agreement.

Article/Section 25 of the contract defines a "grievance" "...as any controversy arising over the interpretation of or the adherence to the terms and provisions of this Agreement."

Article/Section 17 of the Agreement requires that, "No nurse shall be disciplined except for Just Cause." The same Article/Section goes on to state;

Just Cause is defined by the following test:²

- *Was the rule or order reasonably related to the Employer's business interests and performance expected of the employee?*
- *Did the Employer give the employee notice of the rule and the consequences of their failure to obey the rule?*
- *Did the Employer investigate the matter before administering discipline?*
- *Was the investigation fair and objective?*
- *Did the Employer obtain substantial evidence of guilt in the investigation?*
- *Has the Employer applied the rules and discipline even handedly and without discrimination?*
- *Was the degree of discipline imposed reasonably related to the seriousness of the offense?*

The Parties were obviously unsuccessful in their subsequent efforts to informally settle or resolve this matter and, ergo, the matter is now before me.

² This is one of the relatively rare occasions where the Parties have reached a clearly defined joint understanding as to the meaning of the term "Just Cause", as used in this agreement. They have obviously chosen to adopt what is essentially Arbitrator Carroll R. Daugherty's famous "Seven Questions" relating to Just Cause. This solves the usual challenge frequently faced by arbitrators where the Parties choose not to adopt their own definition of "Just Cause" and leave it to the arbitrator to define. Having this definition eliminates the dilemma articulated by one arbitrator who said something to the effect that, we arbitrators haven't been able to agree upon or reach consensus on a clear definition of exactly what constitutes Just Cause; but everyone of us knows it, if we see it.

POSITIONS OF THE PARTIES

The Employer:

The decision to terminate the employment of Ms. Bauer clearly meets and exceeds the standards set forth in the labor agreement as the Test of Just Cause.

- The Employer's policies on confidentiality and privacy of patient PHI are definitely reasonable. These policies and procedures are not a discretionary issue for the Employer, but are mandated and required by HIPAA and related state statutes and regulations. Failure to implement and properly enforce such policies would expose the Employer to severe administrative and civil penalties.
- The Grievant had recurring notice of the Employer's prohibition on accessing PHI without a valid business need and the consequences of violating that prohibition.

The annual Compliance training that Ms. Bauer completed on March 1, 2009 specifically contained a specific example of a violation of the prohibition where *"...an employee had accessed the medical record of a co-worker without a legitimate business purpose. The employee who inappropriately accessed the medical record of the co-worker was terminated. This is a very serious violation of the privacy rule as well as Allina's Code of Conduct."*

- The Employer investigated whether the Grievant had accessed a patient's medical record without legitimate business need before administering discipline.

Upon receiving the Integrity Line report of the breach, management was confident that Ms. Bauer would be able to provide a reasonable and legitimate reason for her behavior. While she readily admitted the specific accesses of Patient "PS's" medical records on May 11; she strenuously defended her actions and denied that she had violated that patient's privacy or confidentiality. She offered a series of different explanations and defenses in justification of her actions, but as management subsequently carefully investigated and checked each out, they all proved to be false and/or invalid.

- The Employer's investigation of the matter was fair and objective. Ms. Bauer was always afforded Union representation at every meeting with management regarding the matter. The Employer relied upon the undisputed "trail and footprint" data available from the Excellian program, rather than subjective estimates and recollections.
- The Employer obtained substantial evidence of the Grievant's guilt. The data from Excellian quickly confirmed that Ms. Bauer had accessed Patient "PS's" medical record on two (2) separate occasions on May 11, 2009 and Bauer readily acknowledged that fact. Ms. Bauer

then proceeded to offer a series of reasons and rationales to justify her access of “PS’s” record, but all subsequently turned out to be false or otherwise spurious upon additional investigation.

- The Employer follows its disciplinary policy for breaches of confidentiality to ensure that it applies discipline consistently.

Near the close of the hearing in this matter, the Union asserted that the Grievant in this matter must be reinstated because another RN at United Hospital was caught accessing a co-worker’s medical record, but was not discharged. A closer examination of the circumstances of that incident will demonstrate that it is distinguishable and that the Grievant in this matter was not subjected to discriminatory treatment.

The incident in question involved Susan Pittman, working in a Charge Nurse role, in the Surgical Department in November, 2009. At some point during the work shift, Pittman noted that one of her pregnant co-workers, “Jane Doe”, had not shown up for work and had not called in. Pittman’s role as Charge Nurse required that she assign a replacement nurse for a “no show/no call” scheduled nurse. In order to determine whether she should contact a replacement nurse, Pittman decided to check the Navicare list for the Labor & Delivery Ward to see if “Jane” had by chance been admitted to deliver her baby. Navicare indeed showed that “Jane” had been admitted and had delivered a baby boy. Pittman called for a replacement nurse to fill “Jane’s” position on the work schedule and in a subsequent morning Surgical Department staff report meeting announced that “Jane” had successfully delivered her baby, the baby’s gender and the time of delivery. Immediately following the meeting, Ms. Pittman reported her actions to her immediate supervisor. An anonymous Integrity Line report was also received concerning Pittman’s actions.

Management subsequently commenced a full investigation into Ms. Pittman’s patient privacy/breach situation. (note: the members of the management team who conducted the investigation were different individuals than those involved in this Grievant’s earlier investigation back in May/June, 2009) The investigation into Ms. Pittman’s actions revealed that unlike the Grievant, when Pittman realized she may have breached or infringed on “Jane Doe’s” patient privacy, she immediately self-reported her record access to her supervisor and prior to receipt of the Integrity Line report. The investigation further confirmed that Pittman had only accessed the limited information available in Navicare and had not accessed Excellian to view Jane “Doe’s” full medical record.

Upon consideration of the investigative findings, management concluded that Ms. Pittman did have a valid business reason for

accessing Jane Doe via the Navicare system, i.e. to determine if a replacement nurse should be contacted. It was further determined that her subsequent disclosure of Doe's delivery to other staff members constituted an arguable Level 1 breach, but it was determined that the breach was not malicious. Accordingly, management determined that the appropriate discipline would be a non-disciplinary counseling for Pittman.

Additionally, the Employer notes that, as pointed out in the hearing, the consistent disciplinary penalty for Level 3 breaches has been termination. In a related situation that went to arbitration in 2010, another arbitrator upheld Allina's termination of an RN with 30+ years of service for committing a Level 2 breach. Allina Hospitals d/b/a United Hospital (Cooper arb, 2010)

- The Grievant's misconduct was serious and warranted termination. The Employer treated Ms. Bauer's violation seriously and took all necessary steps to investigate and discuss appropriate discipline to impose upon her. It is well-settled that it is not the role of the arbitrator to second guess management decisions concerning the level of discipline imposed upon an employee, even in cases involving discharge.

In Modine Manufacturing Co, 60 LA 141, 146 (Talent, 1973), the arbitrator wrote:

"It is not for the Arbitrator to substitute his judgment for that of the Company in assessing the degree of penalty where the Company has not acted unreasonably, arbitrarily or capriciously. Reasonable men may differ and unless the penalty is unconscionable, it should not be disturbed."

Similarly, in Stockham Pipe Fittings, 1 LA 160, 162, (McCoy, 1945), the arbitrator stated:

"The only circumstances under which a penalty imposed by management can rightfully set aside by an arbitrator are those where discrimination, unfairness, or capricious and arbitrary action are proved—in other words, where there has been an abuse of discretion."

Additionally, the Union asserts that Ms. Bauer's length of service and unblemished disciplinary record persuasively argues for a lesser penalty than termination. As noted in the Employer's brief, there are numerous arbitral cases where the discharge of an employee has been

upheld for serious violations, in spite of a long and unblemished record of service.

- For all of the foregoing reasons, the Employer respectfully requests that the Union's grievance in this matter be denied in its entirety and that the termination of the Grievant be sustained.

The Union:

- The Employer is required by the contract language to meet the definition of Just Cause in order to sustain discipline/discharge situations. In this instance, the Employer alleges that Ms. Bauer recklessly violated a patient's right to confidentiality of her medical information; a charge that if sustained, would reflect poorly on her fitness to ever work again as a nurse. Accordingly, the Employer must demonstrate clearly and convincingly that Ms. Bauer is guilty as charged. In this instance, the Employer has failed to present even a preponderance of evidence to support its contention that she is, in fact, guilty of the charge against her.
- The Employer lacked Just Cause to terminate Ms. Bauer on June 4, 2009. It is the Union's position that the question of Just Cause in this matter turns critically on the question of Ms. Bauer's state of mind at the time she accessed "PS's" medical record on May 11, 2009.

Throughout the investigation, she firmly maintained that her only conscious intention was to see if that patient was no longer on a ventilator and ought to be coming to SDIU for care. The Excellian audit confirmed that Bauer initially accessed PS's medical record at 2:52 PM and clicked through two pages in a chart to reach a third page relating to a hospital encounter that PS had the previous day. At the hearing, management expressed concern about why she would have spent time studying the record of such an encounter, but the audit, itself, provides no evidence that she actually scrutinized this page at all because it doesn't record whether or when she clicked out of the chart between 2:52 PM and 3:01 PM. Therefore, the audit is consistent with Ms. Bauer's recollection that she didn't look at the third page she accessed at 2:52 PM long enough to register what it was before being interrupted by some other work duty and clicking out. The Excellian audit shows that Bauer again logged into PS's record at 3:01 PM, clicking through what appear to be the first two initial pages to a different third page. This information is again consistent with Bauer's testimony that she returned to the chart, clicked in, quickly found that PS was still on a ventilator, and immediately clicked out.

The Employer also presumed an improper motive to Bauer on the basis that, 1) they could find no evidence to support or confirm her

assertion that she and other SDIU nurses had a routine practice of checking the records of ICU patients undergoing CV Lab procedures to see if they would need SDIU services and 2) that Bauer had no business or care-related justification for accessing PS's medical record because the information she was seeking, was readily available through other sources not requiring access to the medical record.

It is the position of the Union that the Employer failed to use a large enough Excellian audit sample when seeking to determine whether Bauer and/or other nurses had an ongoing and/or routine practice of checking the medical records of ICU patients scheduled for CV Lab procedures to ascertain whether they might be subsequently coming to SDIU and that their limited samples probably overlooked a number of such instances.

The Union would also point out that management, during the course of their investigation, either misconstrued or failed to recognize the import of SDIU nurse Dimmick's access of an ICU patient's medical record for three minutes on May 13, 2009. Additionally, if management had conducted investigatory interviews beyond the sole interview with RN Colleen Gunderman, they would have learned that of the nine RNs working in SDIU, at least seven of them thought they were authorized and permitted to access the charts of ICU patients scheduled for procedures in the CV Lab; before such patients were assigned to the SDIU and occasionally did so to anticipate patient flow.

Management contends that Bauer could have obtained the information regarding PS's medical status on May 11, 2009 without accessing her Excellian record. Specifically, she could have looked at the Daily Activity Report that was posted in SDIU or from SDIU's Navicare page. Bauer acknowledges that she didn't check either of these alternative information sources, noting that the Daily Activity Report is typically used and maintained by the shift Charge Nurse and on May 11 that was Laura Anderson. Bauer indicated that she and the other SDIU nurses rarely checked the status of scheduled patients via the left side of the opening page of Excellian available in SDIU.

In sum, the preponderance of evidence establishes that Ms. Bauer accessed PS's Excellian record very briefly on May 11, 2009 and only for the limited purpose of determining whether she remained on a ventilator. It is also clear that Bauer believed at that time that it was a legitimate, care-related reason, consistent with established practice in SDIU, to access the chart in order to determine whether PS might be coming to the unit post-CV Lab procedure.

- The Employer failed to notify the Grievant of its expectations regarding access to the records of CV Lab patients not yet assigned to the SDIU.

Management points out that Bauer and other hospital personnel are regularly advised, that pursuant to HIPAA, they are only authorized to access a patient's PHI for care-related or business-related purposes. This general injunction is insufficient to place employees on notice that management also maintains more specific, unarticulated expectations regarding the boundaries of the concept "care-related" in the context of a unit's actual operations. The hearing record indicates that in mid-2009 many nurses in units throughout the hospital were unclear regarding the circumstances which would permit them to access the medical record of a patient who had not yet come to their unit. Managers Scott and Friederichs expected that the SDIU nurses would not access a CV Lab patient's chart until the patients was actually "assigned" to the SDIU. However, they didn't communicate that expectation to Bauer until the end of their second investigatory interview with her and then only in response to a question from her. Ms. Scott testified that she had no doubt that Bauer would have followed that directive, if it had been given.

Accordingly, it is obvious that if management had clearly communicated this expectation to Bauer and the other nurses working in the SDIU and given them a functional definition of the term "assigned", as it applies to patients going into the CV Lab from the ICU, there is every reason to believe that this situation would never have occurred.

- The Employer failed to apply progressive discipline. Even if the Employer could present persuasive evidence that Bauer accessed PS's medical record to satisfy her personal curiosity regarding her former co-worker's condition, the decision to immediately terminate her would be disproportionate to her offense.

The Grievant's 35 years of service to the hospital, her long and spotless disciplinary record and her admitted ability to correct her behavior; along with the actual significance of such an offense requires a lesser corrective discipline under both the Employer's Disciplinary Process and Article 17 of the labor agreement.

In considering this situation, management acknowledged that while Bauer's behavior was intentional and without a legitimate business justification, they also concluded that her actions were without malice. They went on to conclude that her conduct constituted a Level 3 violation, rather than a Level 2 because they felt that she had acted

with a “reckless disregard of the consequences” by ignoring the possibility that she would be terminated.

The Minnesota Supreme Court recently defined “reckless disregard” as follows:

“A person is said to act recklessly when he or she consciously disregards a substantial and unjustified risk of harm to others, or when his or her action is grossly heedless of consequences.” State v. Engel, 743 NW2d 592, at 594 (Minn. 2008) quoting C Tucia, Wharton’s Criminal Law §27 at pp. 167-168 (15th Ed., 1983)

The evidence is clear that Ms. Bauer did not act “recklessly” in this situation because she made only a limited and cursory examination of PS’s chart; which she consciously believed was for a legitimate business reason. Her conduct displayed no conscious or willful intent to disregard PS’s interest in maintaining the confidentiality of her medical record and information. In addition to lacking the requisite mental state for “reckless” conduct, her brief access to PS’s record posed no substantial risk to that confidentiality.

It is clear from the foregoing that Bauer did not act in “reckless disregard of the consequences” for patient confidentiality and, therefore, she cannot be fairly charged with a Level 3 infraction under the Employer’s Disciplinary Policy.

Management said that they did give full consideration of Bauer’s length of service and unblemished disciplinary record in weighing the discharge decision, but cited Bauer’s alleged refusal to acknowledge the seriousness of her offense as the critical factor in refusing to mitigate the penalty.

Accordingly, the Union urges this arbitrator to give full consideration to Ms. Bauer’s past lengthy and unblemished record of service in weighing the efficacy and appropriateness of the termination penalty.

- The Employer inconsistently imposes discipline for breaches of confidentiality.

In about November, 2009 Susan Pittman, an RN in the hospital’s Surgical Department accessed the Navicare file of the Labor & Delivery Department. She learned that a co-worker, who was absent from work had delivered a baby boy. She subsequently announced this information to the Surgical Department staff in the course of a subsequent morning department report meeting. During the course of an investigation of a possible breach of confidentiality, Pittman claimed

that she had a staffing-related reason access her colleague's Navicare information. Rather than admonishing Pittman for failing to realize the seriousness of what she had done, management accepted her explanation and went on to characterize her conduct as merely "careless", even though she had intentionally obtained and disseminated her co-worker's PHI. Management subsequently determined that Pittman committed a Level 1 violation for which she was given a non-disciplinary counseling.

The Union submits that Pittman's situation argues for a mitigation of Ms. Bauer's termination penalty based on the following considerations:

- Both incidents involved accessing patient PHI, without a valid business or care-related reason. The fact that Pittman accessed the information via Navicare in another department and Bauer accessed the information via an Excellian record is a distinction without a difference.
- Pittman had no authorization or authority to access the Navicare page in the Labor & Delivery Department and had at least the opportunity to access the health information of a great many other patients, besides her co-worker's.
- Unlike Ms. Bauer, Pittman subsequently disclosed the co-worker's PHI; which she had obtained via the Navicare record, to the rest of the staff in the Surgical Department.

The hospital management will no doubt argue that Pittman's penalty was properly mitigated by the fact that, after another nurse questioned her regarding the incident, she self-reported the matter to her immediate supervisor. While acknowledging the legitimacy of this distinction, the Union does not believe it is sufficiently substantial enough to make the difference between a termination and a non-disciplinary counseling. It should be noted that Ms. Pittman continues to claim a supposed legitimate business reason for her actions.

In the end, one is left with the impression that the decisive difference in the Employer's handling of the Pittman infraction and the treatment of Bauer lay in their respective supervisor's entirely subjective response to their conduct. For this reason alone, if no other, Bauer's termination was arbitrary and must be overturned.

- The appropriate Remedy.
Because the Employer has failed to prove Just Cause for its decision to terminate the Grievant, the grievance must be sustained. Because the record in this case supports no charge more serious than one that she acted carelessly in failing to realize that patient PS had received an intra-aortic Balloon Procedure in the CV Lab, before accessing equivalent information in PS's Excellian record, and, particularly in light

of the Employer's treatment of Pittman, the Grievant's termination should be reduced to non-disciplinary counseling and she should be reinstated to her former job position at the Hospital, with full back compensation and benefits.

- Accordingly, the Union respectfully requests that this arbitrator sustain the grievance and reinstate Ms. Bauer and make her whole for lost wages and benefits.

ANALYSIS, DISCUSSION AND FINDINGS

As an Arbitrator, I am keenly aware that discharge cases are among the most important situations that I am called upon to determine and I do not take that duty and responsibility lightly. Discharge decisions have significant psychological, economic and legal effects on all parties involved.

These cases come before me only after the Parties have exhausted all internal efforts to reach a mutually satisfactory resolution. Therefore, they are the cases that the Parties have found to be "impossible" to settle between themselves.

As noted previously in the Background section, Article/Section 17 of the applicable labor agreement specifically prohibits the Employer from disciplining or terminating a nurse employee except for Just Cause. Additionally, the Parties have agreed in the same Article/Section that the term "Just Cause" is defined by a "test" consisting of seven (7) questions.

1. Was the rule or order reasonably related to the Employer's business interests and performance expected of the employee? The Grievant herein was terminated for accessing the medical record and PHI (Protected Health Information) of a patient co-worker without a valid care-related or business-related reason for doing so.

The Employer is a health care provider who operates an extensive system and network of hospitals, clinics and related facilities that directly furnish a full range of medical treatment and care to members of the community. As a health care provider, the Employer is subject to the provisions and requirements of the Federal HIPAA statute (1996) and other related state statutes and regulations; all of which require that the Employer implement, maintain and enforce intra-organizational rules, regulations and systems to insure the security, safety, confidentiality and privacy of patients' PHI. Because of the nature of the relationship between health care providers and patients, it is incumbent upon the provider to insure that its employees strictly adhere to the safeguards for patient PHI. Violations of patient PHI privacy and confidentiality safeguards have numerous potential negative effects upon the provider, among them, 1) severe administrative and civil penalties, including substantial fines, 2) a negative public

image for the organization if the community becomes aware of prominent or extensive violations and 3) a lack of trust in the provider on the part of individual patients who become aware that their PHI has been compromised by the provider and/or its employees.

In furtherance of its legal and ethical responsibilities to safeguard patients' PHI, the record clearly shows that Allina maintains an ongoing training and education program (annual Compliance Training) for all of its employees, including RNs, to keep them informed as to the scope of their personal and individual duty and responsibility to safeguard the PHI of patients with whom they may interact or encounter during the course of their work duties.

In view of the foregoing, I find that, based on the record evidence and testimony, the answer to this Question is clearly "yes".

2. Did the Employer give the employee notice of the rule and the consequences of their failure to obey the rule? As previously noted, the record clearly shows that the Employer maintains an on-going and mandatory training requirement for all employees with respect to the requirements of HIPAA and their personal responsibilities relating to those requirements.

The following is a relevant excerpt from the 2009 Compliance Training module:

*HIPAA Privacy, continued
What is Allina's position on PHI?*

Allina permits the access, use or disclosure of protected health information only for a legitimate business reason. In determining whether there is a legitimate business reason to access, use or disclose the information, you must consider whether it is the minimum necessary information to accomplish the intended purpose. All movements in Excellian and other Allina Electronic Medical records leave an electronic trail or footprint. This trail helps to ensure a high degree of accuracy in the care that we provide and ensure that confidentiality is maintained.

Violating Allina's policies or procedures relating to a patient's protected health information could result in termination. Allina has terminated employees every year since the Privacy Rule became effective for inappropriately accessing a patient's medical record, or disclosing information without the patient's consent. Allina takes such violations very seriously.

For more information on Allina's position regarding PHI, review the policy on Confidentiality of Patient Information in the Employee Policy Handbook found in My.Allina.com.

The Training module also contained the following specific example of an inappropriate access situation:

In another situation, a manager learned that an employee had accessed the medical record of a co-worker without a legitimate business purpose. The employee who inappropriately accessed the medical record of the co-worker was terminated. This is a very serious violation of the privacy rule, as well as Allina's Code of Conduct. [emphasis applied]

The record indicates that Ms. Bauer completed the 2009 Compliance Training module containing the above information on March 1, 2009. I also note that Ms. Bauer was very likely aware, in about that same time period, that the hospital had terminated another RN, who had over 30 years of service, for a HIPAA violation.

Based upon the foregoing, I find that considering her extensive experience and training within the Allina system Ms. Bauer knew or reasonably should have known that if she accessed the medical record of a co-worker, without a valid care-related or business-related reason, she would in all probability be terminated.

Accordingly, the answer to Question 2 is "yes".

3. Did the employer investigate the matter before administering discipline?

The Employer met with Ms. Bauer and her Union representative on several separate occasions to give her a full opportunity to show that she had a legitimate care- or business-related justification for accessing Patient "PS's" medical record on May 11, 2009.

Accordingly, I find that the answer to Question 3 is "yes".

4. Was the investigation fair and objective? The record shows that the Employer gave Ms. Bauer repeated opportunities to explain and validate her access action of May 11. The managers responsible for the conduct of the investigation appear to have approached the situation on the basis that when the Integrity Line report triggered an examination of Ms. Bauer's Excellian "trail" on May 11 all they needed to know from her was what care- or business- related reason she had for accessing Patient "PS's" record? They subsequently dutifully checked out and conducted additional investigation on each of Ms. Bauer's proffered explanations to determine their validity, with Ms. Bauer providing little or no specific assistance to aid them in focusing their investigation. To wit:

- She contended that she was the Charge Nurse in SDIU on May 11 and checked "PS's" medical status to determine whether there was sufficient staffing available, if she was routed to SDIU upon completion of the CV Lab procedure. Upon further investigation, management

determined that Laura Anderson was the Charge Nurse in SDIU, not Ms. Bauer, on the date and time in question.

- Bauer contended that it was her routine practice and that of the other RNs in SDIU to check the Excellian records of ICU patient undergoing procedures in the CV Lab to determine if they might be routed to SDIU following completion of their procedures. Bauer apparently provided no specific details with respect to this practice (who, when, etc.), so management conducted some audits of the Excellian system to see if there were any past examples of such access by her or other SDIU RNs that would support her contention, but found no credible “trails or footprints”.

The Union alleges that management’s audits of Excellian weren’t sufficiently broad or extensive enough to detect the possible occasions where either Bauer or other RNs had, in fact, accessed the records of ICU patients undergoing CV Lab procedures, as contended by Bauer. It is well established case law that an employer is not obligated or required to conduct a disciplinary investigation to the standard of a criminal investigation where the standard of proof is “*beyond a reasonable doubt*”. The commonly accepted lower standard of proof for an employer is that of “*the preponderance of evidence*” or “*Is it more likely than not, that such and such happened*”.

Based upon the record evidence and testimony I find that the Employer did conduct a fair and objective investigation and the answer to Question 4 is “yes”

5. Did the Employer obtain substantial evidence of guilt in the investigation? The Integrity Line report to the Employer on May 28, 2009 triggered the Excellian audit of Ms. Bauer’s “trail/footprint” on May 11. That examination disclosed the two access incidents re: Patient PS at 2:52 and again at 3:01 PM. A review of PS’s medical status indicated no preliminarily discernable or obvious justification for those accesses by Ms. Bauer and that resulted in the investigation to determine what Bauer’s care- or business-related reason(s) were to justify her access of those records.

Ms. Bauer acknowledged that she had, in fact, accessed the records as indicated in the Excellian “trail”. Therefore, the subsequent investigation attempted to confirm and validate a series of different reasons and rationales offered by Ms. Bauer as justification, but none of them, upon additional investigation proved true or valid. That left management with no other alternative than to conclude she had accessed Patient “PS’s” medical record in violation of HIPAA and the Employer’s policies and rules regarding the privacy and confidentiality of patient PHI.

In view of the foregoing, I find that the answer to Question 5 is “yes”.

6. Has the Employer applied the rules and discipline even handedly and without discrimination? The record is clear and the Parties appear to be in agreement that the Employer has a consistent history of aggressively administering and enforcing its policies and rules concerning the privacy and confidentiality of patient PHI.

The Union didn't challenge the Employer's assertion that over the past years it has issued formal discipline, including numerous terminations, to a very significant number of its employees who have violated its HIPAA policies.

However the Union does offer one instance or example where it contends the Employer did impose a significantly lesser penalty to an RN who clearly violated the HIPAA policy in a manner similar to Ms. Bauer's alleged offense. Specifically, the Union, as noted in their Position above, points to the incident involving Susan Pittman, the Charge Nurse RN in the Surgical Department.

Having reviewed the facts and positions of both Parties with respect to the Pittman situation and comparing those to the Bauer situation, I find that the two incidents are neither similar nor comparable and, therefore, insufficient to support a disparate or discriminatory conclusion. I base that finding on the following observations:

- Pittman was the Charge Nurse on duty and was directly responsible for the staffing of her unit.
- When Pittman noticed that RN "Jane Doe" had not reported for her work shift and had not called, she knew that she had to make a decision as to whether she should wait awhile longer for Doe to report or call for a "replacement nurse". But what if she called for a replacement and Doe also reported?
- It appears clear from the circumstances that Pittman was well that Jane Doe was pregnant and was also aware of the general length of her term.
- Faced with this dilemma, Pittman decided to do a quick check of the Navicare page in the Labor & Delivery Department to see if, by chance, Doe was in there. If she was there, then Pittman needed to call out a replacement nurse. If Doe wasn't in Labor & Delivery, Pittman would have to make further decisions, i.e. call out a replacement nurse and/or try to find out what happened to Doe?
- Upon checking the Labor & Delivery Navicare page, Pittman saw that Jane was definitely there and she also noted that, according to Navicare, she had delivered a baby boy. Pittman exited the Navicare page and never accessed Doe's medical record in Excellian. The limited Navicare information was all that Pittman needed to know to quickly resolve the staffing question.
- Pittman, however, subsequently disclosed the fact that Jane Doe had delivered a bouncing baby boy to members of the staff of the Surgical Department in a subsequent morning Report Meeting.

- Apparently at some point after the meeting, a co-worker noted to Pittman that she had probably violated Jane's privacy by the meeting disclosure. Pittman reported her violation to her supervisor/manager.
- Upon investigation, management decided that in light of the totality of circumstances, Pittman's violation could be corrected via a non-disciplinary counseling.

In looking at the disclosure portion of the incident, it does not appear that Ms. Pittman revealed anything to the staff that Jane, herself, wouldn't have readily revealed to them if she had been able to be present at the Report Meeting. Pittman's premature disclosure did pre-empt Jane from subsequently sharing the news with her colleagues.

In view of the foregoing, I find no merit in the Union's argument that the Pittman situation is comparable or equivalent to the Bauer situation and indicates either disparate or discriminatory treatment. Accordingly the answer to Question 6 is "yes".

7. Was the degree of discipline imposed reasonably related to the seriousness of the offense? As I noted in Question 2, above, Ms. Bauer was clearly aware that accessing a co-worker's medical record without a care- or business-related justification would probably result in her termination.

The Union argues that Ms. Bauer offense, if it really is an offense, is that she acted "*...carelessly in failing to realize that patient "PS" had received a IABP, before accessing equivalent information in PS's Excellian record...*" and urges me to either, 1) set aside the Employer's termination decision, fully exonerate Ms. Bauer, order her reinstated to her former position and make her whole for any loss of wages or benefits she may have suffered, since her date of discharge or 2) mitigate and set aside the termination decision and reduce it to a disciplinary suspension, order her reinstated to an RN position where she wouldn't have access to Excellian and withhold all back pay by virtue of the suspension.

I am fully aware that Ms. Bauer is a long-serving, veteran RN with an unblemished disciplinary record dating back some 35 years and I'm confident that the Employer gave considerable weight and consideration to that record in determining the level of discipline to impose upon her for this offense. I obviously do not know what factors were used in that process or what weight was bestowed on each factor. All I know is that, in the Employer's view, the seriousness of her conduct was able to overcome her past record of service and that formal discipline was in order.

I find that I agree with the Employer's basic conclusion that Ms. Bauer's conduct warrants discipline; therefore, I will not exonerate her or declare her

innocent. That leaves me with the issue of mitigation; that is, do the circumstances warrant an alternative or lesser penalty?

In reviewing the totality of evidence and testimony and after lengthy consideration I find that the termination penalty, as imposed by the Employer is not unreasonable, arbitrary, capricious or unconscionable.

In reaching that finding I looked at the following factual items:

- Based on her admitted comment to her co-worker to the effect that “I think I just screwed up” and the co-worker’s response to the effect that “You shouldn’t be doing that”; I can only conclude that Bauer knowingly and willfully breached PS’s confidentiality by accessing her medical record and that she knew that her action was a violation of PS’s privacy under HIPAA.
- Even if I presume *arguendo* that Ms. Bauer truly accessed the record to determine if PS might be coming to SDIU; then she violated PS’s privacy by not using other alternative sources of information to make that determination, such as the Daily Activity report, the SDIU Navicare screen; each of which she knew or reasonably should have known would readily provide her with the information she was seeking, without violating PS’s medical record privacy.

I also wonder why, if Ms. Bauer was concerned about the staffing situation in SDIU on the afternoon of May 11, she didn’t communicate her concern to RN Anderson, the Charge Nurse, and see if she thought that PS’s status in the CV Lab should be checked, as Anderson, not Bauer, was directly responsible for insuring that SDIU was properly staffed.

- I also note that, unlike RN Pittman, when Bauer’s co-worker noted that she shouldn’t be accessing PS’s medical record, she did not immediately contact her supervisor/manager to self report a possible violation. Instead, Ms. Bauer consciously chose to “lay low” with the apparent hope that no one would notice. That was both an ethical violation and a very bad decision on her part. I note that the “anonymous” Integrity Report didn’t come in until May 28 or over two weeks after the actual incident. One can speculate that the anonymous reporter may have held off on dialing the Integrity Line while waiting for Bauer, herself, to do the ethical and proper thing and self-report the matter.
- I also believe that Ms. Bauer could have obtained a great deal of PS’s private medical information during her two accesses. With her training, experience and familiarity with the Excellian system, she knew exactly what information she wanted, exactly where it could be found and therefore, didn’t have to waste time looking at extraneous information. Obviously, we have no way of knowing how much information Ms. Bauer actually obtained, but I’m fairly sure that PS probably wouldn’t be very happy, if she actually found out.

- Finally, I note that at no time during the course of the investigation did Ms. Bauer ever concede to management that perhaps there was a “possibility” that she may have “screwed up” by accessing PS’s medical record. I can’t help but believe that if she had done so, she might have “mitigated” the situation herself and opened the way for corrective action, short of termination.

In view of the foregoing, I find that there is no reasonable argument or basis for mitigating the Employer’s termination decision and that the Employer’s decision is directly related to the very serious nature of the offense. Accordingly, the answer to Question 7 is “yes”.

CONCLUSION

In view of my analysis, discussion and findings above, I conclude that the Employer did have “just cause” to terminate employee/nurse Gail Bauer on June 4, 2009 and that the termination was in full conformance with the definition of Just Cause as set forth in Article/Section 17 of the applicable labor agreement.

DECISION

Having concluded that the Employer did not violate the applicable labor agreement, as alleged by the Union in its Grievance, concerning the termination of Gail Bauer, that grievance is hereby denied and dismissed. Concurrently, the Employer’s termination decision with respect to Ms. Bauer is hereby sustained.

Dated at Minneapolis, Minnesota, this 4th Day of April 2011.

Frank E. Kapsch, Jr.
Arbitrator

Note: I shall retain jurisdiction in this matter for a period of fourteen (14) calendar days from the issuance of this Decision to address any questions or problems related thereto.