

OPINION AND AWARD

OF

DAVID S. PAULL

In the Matter of the Arbitration Between

St. MICHAEL'S HOSPITAL AND NURSING HOME

AND

**SERVICE EMPLOYEES INTERNATIONAL UNION
HEALTHCARE MINNESOTA, Local Union 113**

(Mary L. Bertrand, Grievant)

Date Issued: July 9, 2011

MN Bureau of Mediation Services No. 11 HA 0639

OPINION

Preliminary Matters

The Arbitrator was selected from a list prepared and submitted by the Minnesota Bureau of Mediation Services. On May 25, 2011, a hearing was conducted in Minneapolis, Minnesota. St. Michael's Hospital and Nursing Home (Hospital or Employer) was represented by Richard A. Ross. The Service Employees International Union Healthcare Minnesota, Local Union No. 113 (Union) was represented by Kelly A. Jeanetta. Mr. Ross and Ms. Jeanetta are Minneapolis lawyers.

At the hearing, the testimony of witnesses was taken under oath and the parties presented documentary evidence. No stenographer was present at the hearing.

After the witnesses were heard and the exhibits were presented, the parties agreed to present simultaneous final arguments in writing, postmarked on or before June 10, 2011. The final briefs were received in a timely manner.

An additional submission was received from Mr. Ross on behalf of the Hospital on June 23, 2011. The Hospital requested that a recent case, issued by the Minnesota Court of Appeals on June 13, 2011, be considered. On behalf of the Union, Ms. Jeanetta responded, also on June 13, 2011, stating the Union's position. There was no objection and both the additional case and the response were accepted. Thereafter, the case was deemed submitted and the record was closed.

Issue

The parties agreed on a statement of the issue in this matter:

Did the Hospital terminate the employment of Mary L. Bertrand for just cause on October 21, 2010, and if not, what is the appropriate remedy?

Neither party presented any procedural issues for consideration.

Relevant Contract Provisions

Article 10 – Discharge – Quits

(A) No Discharges Without Just Cause

The Employer shall not discharge or suspend an employee without just cause.

(B) Discharge – Suspension Notices – Copies to Union

A written notice of any discharge, suspension or written disciplinary warning shall be give the employee and a copy thereof shall be sent to the Union. The employee and/or the Union may file a written grievance relating to such discharge or suspension.

(C) Employee Quit Notices

Any employee who wishes to quit shall give the Employer thirty (30) calendar days notice. Failure to give such notice shall result in a partial forfeiture of vacation benefits as provided in Article 8 (C).

Article 3 – Management Rights

The management of the Employer and the direction of the working forces shall be vested solely and exclusively in the Employer, except as specifically limited by the express written provisions of this Agreement. This provision shall include, but is not limited to the right to determine the quality and quantity of work performed; to determine the number of employees to be employed; to assign and delegate work; to require observance of reasonable Employer rules, regulations, retirement and other policies; to schedule work and determine the number of hours to be worked; and to determine the methods and equipment to be utilized and the type of service to be provided.

Provided however; it is understood that a bargaining unit employee will be replaced by another bargain unit employee unless no bargain unit employee is available.

Article 2 – Grievance Procedure

(C) Authority of the Arbitrator

The authority of the arbitrator shall be limited to making an award relating to the interpretation of or adherence to the written provisions of this Agreement and the

arbitrator shall have no authority to add to, subtract from or modify in any manner the terms and provisions of this Agreement. The award of the arbitrator shall be confined to the issues raised in the written grievance as may be amended by the Union, and the arbitrator shall have no power to decide any other issues.

Pertinent Facts

The Parties

The Hospital is an acute care medical and nursing home facility located in Sauk Centre, Minnesota. The Union is a labor organization representing certain of the Hospital's employees, including Ms. Bertrand.

The parties are signatory to a collective bargaining agreement effective for the period beginning July 1, 2008 and ending September 30, 2011 (CBA). The parties have agreed that the CBA applies to the questions presented by this grievance dispute.

Ms. Bertrand worked for the Hospital as an acute care nurse for 11 years. Prior to her discharge on October 21, 2010, there is evidence that Ms. Bertrand was disciplined on five occasions.

On August 22, 2003, Ms. Bertrand received a verbal reprimand for destroying a patient consent form. On March 17, 2004, Ms. Bertrand received a verbal reprimand for disclosing to an interpreter that a patient had been in a car accident, did not speak English and was waiting for the results of a medical test. On October 8, 2004, Ms. Bertrand received a verbal reprimand for giving improper directions to a fellow nurse. On September 22, 2006, Ms. Bertrand received a verbal reprimand for rudeness to "patients, visitors and co-workers." Finally, on July 11, 2007, Ms. Bertrand was given a written reprimand for acting "very rude" to a patient and "lacking in compassion."

There was also evidence that Ms. Bertrand generally provided satisfactory service to the Hospital. The evaluations received into evidence indicate that Ms. Bertrand had consistently met or exceeded work performance expectations.

Access of Personal Records

Ms. Bertrand was charged with violating the Hospital's confidentiality policy on two occasions – October 1 and 3, 2010. The evidence clearly establishes, and Ms. Bertrand does not deny, that on October 1, 2010, she accessed her own personal medical record. Ms. Bertrand had recently received a physical examination and completed some related lab work in preparation for surgery. She testified that she wanted to know the results of the tests and was unable to obtain the information from the provider.

Ms. Bertrand testified that she was not aware that it was against Hospital policy for her to access her own electronic medical records. Ten days after Ms. Bertrand accessed her own personal medical records, the subject arose at the nurses' station. Renee Willhite, the Hospital's Patient Care Coordinator, testified that Ms. Bertrand and her former supervisor, Mary Rasmussen, discussed at that time the question of whether or not it was acceptable under Hospital policy to access one's own personal medical records.

During the investigation of this event, Ms. Bertrand told Ms. Willhite that Ms. Rasmussen, who had functioned as Ms. Bertrand's direct supervisor for ten years until she was replaced by Ms. Willhite, told her that it was acceptable for staff to access their own electronically stored health information. She recalled that this conversation took place in the presence of several other nurses.

Ms. Willhite was not personally present for that exchange. However, in the context of her duty to investigate the allegation, Ms. Willhite called Ms. Rasmussen, who confirmed to her that the conversation had taken place. Ms. Rasmussen recalled that she had stated that she believed it was proper for staff to access their own medical records. She also told the group of nurses that she was not sure and that she intended to "double check" to make sure. Ms.

Rasmussen further told Ms. Willhite that when she did check, she determined that Hospital policy did not permit this activity and returned to the nursing station to report the information. Ms. Rasmussen was not sure, however, whether Ms. Bertrand was present when the subject was discussed the second time.

On October 14, 2010, Vicki Olson, the Hospital's Health Information Management Director and Privacy Officer, signed a Privacy/Security Complaint form in connection with the October 3 incident. In the box marked "For St. Michaels's Use Only," Ms. Olson indicated that policies and procedures needed to be created concerning "access to patients [sic] record if patient is an employee."

After Ms. Bertrand was terminated, the Hospital issued a document entitled "Confidentiality Q & A," relating in part to the question of whether policy permitted staff to access their own personal medical records. The document stated that staff could access their own medical record, but only after "completing a release of information form and viewing it in the direct supervision of a Medical Records Staff Member."

Ms. Bertrand accessed her personal medical records, although she not need to do so in order to perform her duties.

Access of Ms. Blaske's Medical Records

On October 3, 2010, Ms. Bertrand accessed the Hospital's electronic medical record and obtained the name of Mary Blaske's husband. Ms. Blaske is the Hospital's Director of Nursing. Ms. Bertrand testified that she knew of another person who had what she thought was the same name and she was "curious" about whether they were in fact one and the same.

Ms. Bertrand testified that she entered Ms. Blaske's name in the Hospital's electronic medical storage and then clicked on "Summary and Demographics." When this screen appeared, she clicked on "contacts." After she viewed the name, she clicked out of the system. There is no evidence to show that Ms. Bertrand accessed any other information concerning Ms. Blaske's medical status, including diagnoses, insurance, abstract, vital signs, medication, medical history or any other available data. She did not disclose any such information and did not print out any materials. At the hearing, Ms. Olson confirmed that Ms. Bertrand accessed the system for less than one minute.

As was the case with regard to the incident relating to her own medical records, Ms. Bertrand did not need to view these materials in order to perform her duties.

Hospital's Disciplinary Decision

During a routine audit, Ms. Olson discovered that Ms. Bertrand had accessed her own records and those of Ms. Blaske. She immediately contacted Ms. Blaske to inquire if she had given Ms. Bertrand permission to examine her medical records. Finding that she had not, Ms. Olson contacted Hospital Administrator Del Christianson. Mr. Christianson met with Ms. Blaske on Monday, October 18, 2010, and with Ms. Olson on Tuesday, October 19, 2010.

Sharon Whalen, Assistant director of Nursing, Rene Willhite, and an administrative assistant discussed the matter at the October 19th meeting. Ms. Bertrand's prior record of discipline was considered. The same parties met the next day. At this meeting, it was decided that, given what those present considered the seriousness of the recent violations of the confidentiality policy and her past breach of the policy and her cumulative disciplinary record, that termination was an appropriate action.

Ms. Bertrand was thereafter contacted and asked to meet. After she was given a chance to be heard, Ms. Bertrand was informed that she would be discharged. In her report, Ms. Olson explained that “under HIPAA we are only to access the information we need to do our job, and if you need an employee husbands [sic] name you need to ask the employee. It was felt that the severity of this breach be placed as a critical breach and that the patients’ [sic] privacy had been violated.”

Hospital’s Confidentiality Policy

Patient confidentiality is rooted in federal and state law. The Health Insurance Portability and Accountability Act (HIPAA) 42 U.S.C. Sections 1320d-1-1320-9 (2010) specifically requires medical entities to maintain the privacy of patient medical information. *See also, M.S. 144.651.*

Hospital Policy No. 04.13 prohibits employees from having patient information unless they have a “need to know.” Hospital Policy Number 42.2 provides that “It is the obligation of each employee, volunteer, student, member of the Medical Staff and Administration to protect the confidentiality of any private information which may be acquired from a patient, employee or from any source, and in any form (such as paper, talking, computers). The policy also calls on employees to promise that “I will not show, tell, copy, give, sell, review, change or trash any confidential information unless it is part of my job. If it is part of my job to do any of these tasks, I will follow the correct department procedure (such as shredding confidential papers before throwing them away).”

The Hospital trains its employees by referring to the HIPAA definition of the term protected health information as “any information that can identify the patient and is related to a

person's past, present, or future physical [or] mental health condition, and anything associated with health care services or treatment . . . [including] the fact that a patient is at the facility in the first place. Then patient you see while walking down the hall may not want anyone to know they are here.”

Hospital's Disciplinary Procedures

Hospital policy provides that all employees should be informed of the standards of conduct expected of them. The policy also provides that all employees should be treated “fairly and uniformly if they violate the standards of conduct.” The policy also provides that “Discipline shall be administered on a progressive and corrective basis.”

Confidentiality offenses are divided into three categories – minor, major and critical. A minor offense is defined as “unintentional or careless access, review or release of patient information. A major offense includes “curious or concerned” breaches of confidentiality, breaches of medical staff confidentiality or professional ethics, or using Hospital facilities to communicate confidential information. A critical offense occurs when an employee fails to report a breach, copies or distributes confidential information without authorization or is motivated by “personal gain or malice.”

These terms are defined in more detail in a specific “confidentiality” policy dated March 24, 2003. “Carelessness,” a minor infraction, is defined as that which occurs when an employee unintentionally or carelessly accesses, reviews, or reveals patient information to him or herself or others without legitimate need to know. Examples of this level of infraction include leaving patient information in a public area, leaving a computer work station unsecured or discussing patient information in a public area.

“Curiosity or concern,” deemed a major infraction, occurs when an employee accesses, reviews or discusses patient information for purposes other than the care of the patient such as when an employee looks up birth dates or addresses of friends and relatives or accesses the medical records of famous people.

“Personal Gain or Malice,” an element of a critical infraction, is reserved for those occurrences where the disclosure is improperly motivated, such as when an employee reviews a patient record in order to obtain information for harassment, to compile a mailing list for sale or some other personal use. Critical infractions may also occur when an employee fails to report a breach of confidentiality or copies or distributes, without authority, any hospital records.

For a minor offense, the progression is (1) an oral reprimand, (2) a written reprimand, (3) a final written reprimand or suspension and (4) termination. For major offenses, there is a three step process, begin with the written reprimand as the first step. For a critical offense, discharge may be imposed immediately.

The policy also provides that “discipline may be initiated at the level appropriate to the facts in each specific case and steps may be skipped based on the facts of each specific case. Any minor discipline that is more than 24 months old may not be used as an offense in determining the appropriate level of discipline.

Positions of the Parties

The Hospital

The Hospital begins by noting that maintaining medical record confidentiality is important. It is the law, the Hospital notes, and Ms. Bertrand's conduct placed it in "jeopardy of civil and criminal penalties."

To sustain their burden of proof, the Hospital maintains, they must first show that their actions were reasonable and fair, not arbitrary or capricious. To show compliance with this standard, the Hospital refers to the administrative actions taken. The Hospital notes that Ms. Olson followed procedure when she discovered that Ms. Bertrand had accessed her own records and those of Ms. Blaske. She inquired as to whether consent was given and met with Mr. Christianson soon thereafter. The two administrative meetings are noted. The decision to terminate Ms. Bertrand was based, the Hospital asserts, on the "seriousness of the recent violations of the confidentiality policy and her past breach of the policy and her cumulative disciplinary record."

The Hospital notes that it met with Ms. Bertrand and considered her defenses. "Because she was adequately represented at the meeting by the Union and was given an opportunity to explain her behavior, the Hospital contends, "there can be no real issue that St. Michael's, in fact, acted reasonably fair, and not arbitrary or capriciously."

Additionally, the Hospital asserts that the accessing of the medical records and the violation of the confidentiality policy are not disputed. Ms. Bertrand admitted accessing the records.

The CBA requires that the Hospital's rules be "reasonable." The Hospital takes the position that its rules regarding discipline and patient confidentiality meet this requirement. The CBA, the Hospital contends, contains no provision that "limit St. Michael's right to establish and apply disciplinary rules." The disciplinary policy does generally provide for progressive discipline, the Hospital notes, although there is no specification as to whether warnings must be regarded as verbal or written.

Additionally, the Hospital asserts, the disciplinary policy does not positively state which offenses are "major" and which are "minor." The undisputed testimony, the Hospital maintains, is that the prior disciplines received by Ms. Bertrand were "major" in nature. The policy specifically provides, states the Hospital, that corrective discipline may be initiated at any appropriate level and some steps may be skipped, depending on the facts of each case.

"Since the disciplinary rule is reasonable on its face," the Hospital argues, "including the provision that disciplinary steps may be skipped, St. Michaels' has the sole and exclusive right to determine which level of discipline is appropriate." The only issue, maintains the Hospital, is cause.

The Hospital addresses the Union's anticipated position that the Rasmussen comment to Ms. Bertrand, indicating that she thought it was "okay" to access your own records," is significant. This comment was made ten days after the records were accessed, the Hospital argues, and "could not be a basis for her defense of accessing her own records." Regardless, the Hospital asserts, Ms. Bertrand "repeatedly signed acknowledgements of the policy . . . any claim by the Union that she was unaware of the policy as it related to her accessing her own records is without merit."

In addition, the Hospital anticipates the Union's position that demographic information was not covered by the confidentiality policy, in Ms. Bertrand's view. Again, the Hospital refers to Ms. Bertrand's signed acknowledgements of the policy as "her admission that she did not need to look at Blaske's records to do her job." The Hospital refers to that part of the confidentiality policy that includes all patient records, whether medical, financial or social in nature."

The Hospital anticipates the Union's position that the policy on progressive discipline was not followed in the case, because the October 1st and October 3rd violations did not rise to the level of "critical" offenses. In this regard, the Hospital reasserts its previously stated position that the disciplinary policy permits it to "skip any of the steps in the policy."

The Union's position in this regard, the Hospital maintains, is further based on an improper construction of the policy. Specifically, the Hospital states, the Union claims that the 2007 violation was a "major" infraction. Such a reading ignores the Hospital's right, pursuant to the policy, to add other examples "at any time."

Ms. Bertrand's stated reason for accessing the name of Ms. Blaske's spouse in violation of law and policy, adds the Hospital, "simply does not warrant credibility." In this regard, the Hospital notes that Ms. Bertrand admitted that she wanted to know if Ms. Blaske's husband was the person of the same name, but "never explained why."

Finally, the Hospital cites to two prior arbitration awards. In *Norton Community Hospital*, 106 LA 970 (Hart, 1996), the employee accessed her supervisor's entire medical record. In *Doctors Hospital of Manteca*, 98 LA 1019 (Riker, 1992), a registered nurse disclosed the medical condition of a patient in a statement to the press.

The Union

The Union generally takes the position that the just cause standard was not met in this case, because “Ms. Bertrand was denied the benefit of its policy of progressive discipline” and “the penalty imposed is not in keeping with the seriousness of the offense.”

Citing from a well known treatise in support, the Union suggests that work-related offenses are of two classes – those extremely serious offenses such as stealing, striking a foreman and persistent refusal to obey a legitimate order, which usually justify discharge without the application of progressive discipline and less serious offenses which call more corrective remediation. The citations further state that in the less serious offenses, arbitrators are likely to change or modify discipline if it is excessive, punitive rather than corrective or if mitigating circumstances were ignored by management’s analysis.

With regard to the access of her own records, the Union argues, Ms. Bertrand “should be given the benefit of the doubt” because the Hospital’s policy was “unclear.” In support of this position, the Union contends that Ms. Bertrand’s ten year supervisor, Mary Rasmussen, “thought it was okay for employees to access their own electronic medical records until she did some digging and concluded it was not okay.” The Union also refers to evidence indicating that “[o]thers were unsure as well (evidenced by the fact that there was a discussion among nurses about the issue at the nurses’ station). The Union concedes that the conversation at the nurses’ station occurred after Ms. Bertrand had already accessed her own medical records. The point, the Union asserts, is that the policy was unclear.

In further support of the contention that the policy was not clearly understood by the staff, the Union contends that Ms. Olson noted, on the complaint form filed in connection with the access of Ms. Blaske’s medical information, checked the sentencing indicating that “policies

and procedures need to be created.” After Ms. Bertrand was discharged, the Union asserts, the Hospital developed an additional “question and answer” document “making it clear that employees may not access their own electronic medical records.

“Ms. Bertrand,” the Union contends, “should not be penalized for accessing her own medical record give the lack of clear policy around it, let alone terminated.”

The Union takes the position that Ms. Bertrand’s termination was not justified because she was “denied the benefit of the Hospital’s progressive discipline policy.” In support of this contention, the Union asserts that Ms. Bertrand was terminated on the basis of the Hospital’s determination that Ms. Bertrand had committed a “critical” breach of the privacy policy. However, the Union maintains, there is no evidence that Ms. Bertrand was motivated by personal gain or malice, an element the Union argues is required by Hospital policy.

HIPPA, the Union contends, was designed to prevent disclosure of information that identifies a patient and connects to medical information. Ms. Bertrand, the Union argues, never accessed any of Ms. Blaske’s medical information and did not disclose any such information. HIPPA cannot be violated, according to the Union, simply by obtaining the name of Ms. Blaske’s husband. “If that were true,” the Union asserts, “then she would be precluded from using the internet or a telephone book to get that same information.

Ms. Bertrand, the Union suggests, accessed Ms. Blaske’s information out of pure curiosity, not for any prohibited purpose. This, the Union contends, “is no worse than looking up birth dates or addresses of friends and relatives, or accessing the medical record of famous people. The Hospital’s disciplinary policy, the Union maintains, describes misconduct motivated by curiosity as a “major” offense, not a “critical” one.

Additionally, the Union argues that the “6.5 year old alleged privacy violation” in 2004 should not be used against Ms. Bertrand, as its “shelf life” has expired. Hospital policy, the Union suggests, prohibits the use of minor discipline after 24 months.

Finally, the Union takes the position that the Hospital did not properly consider Ms. Bertrand’s length of service and performance record. Excluding the current matters, the Union argues that Ms. Bertrand received no discipline after 2007 and has “benefited from clear messages and corrected her mistakes.”

“Ms. Bertrand” the Union concludes, “deserves the benefit of the Hospital’s mandatory policy of progressive discipline, and deserves to have her job back, with back pay and benefits.”

Opinion

Applicable Standards

In accordance with Article 10 of the CBA, the Hospital may not discharge or suspend an employee covered by the parties' agreement, unless just cause exists. The CBA contains a substantial management rights provision, specifically reserving to the Hospital the right to direct the "working forces . . . except as specifically limited by the express written provision" of the CBA.

The CBA does not contain any provisions relating to discipline, other than what is contained in Article 10. However, the Hospital has adopted disciplinary policies which generally and specifically relate to the failure to adhere to the rules on confidentiality. Read together, these policies provide that discipline "shall be administered on a progressive and corrective basis."

The Hospital's general disciplinary policy divides offenses into three categories – minor, major and critical. For a minor infraction, a first offense is identified with an "Oral reprimand." Discipline for a major infraction begins with a "Written Reprimand." A critical offense is identified by the most seriousness of discipline, suspension or discharge.

However, there is an important limitation on the progressive system. Prior minor discipline "that is more than 24 months old" may not be used in the progressive process.

The Hospital takes the position that, although their policies mandate the application of progressive discipline, the nature of the progression itself is a management determination. Specifically, the policy provides that "Progressive and corrective discipline may be initiated at the level appropriate to the facts in each specific case and step may be skipped based on the facts

of each specific case.” The Hospital contends that this provision gives it the “sole and exclusive right to determine which level of discipline is appropriate.” The only issue, contends the Hospital, is whether or not just cause exists for discipline.

The Hospital is correct in its view that the language used in the policy provides it the flexibility to decide where to begin the disciplinary progressive process. The contention that this decision is not part of the just cause review process is not sustainable in this case, however, based on CBA that the parties agree is applicable to this dispute. Like most collective bargaining agreements, the CBA that governs this dispute does not address the power of an arbitrator to review the issue of whether or not the discipline imposed is consistent with the just cause standard. There are no specific provisions in the CBA which mandate that a certain type of misconduct requires a particular type of discipline.

Where a contract fails to specifically address this issue, as this CBA does, it is generally held that an arbitrator has the inherent power to specify a proper remedy and, in the process, review the remedy imposed by the employing authority. *International Harvester Co.*, 9 LA 894 (Wirtz, 1947); *Air Line Pilots Ass’n and Northwest Airlines*, ALPA Case No. CHI-60-73-F (Eaton, 1975); *Children’s Hospital, Inc. v. MNA*, 265 N.W.2d 649 (Minn. 1978).

A review of the Hospital’s actions in this case discloses no due process or similar procedural errors. There is nothing unreasonable about the Hospital’s policy on employee treatment of confidential patient information. The policy is a direct response to the enactment of HIPAA, the federal law which requires that patient health information be kept confidential and is enforced by a significant range of administrative penalties. The training provided by the Hospital on the business need and the consequences of breaching patient confidentiality provide

sufficient general notice to all employees regarding what is expected and how allegations of non-compliance will be treated. The investigation appeared to be satisfactory.

Violation of Patient Privacy Policy

The Hospital proved with sufficient evidence that Ms. Bertrand accessed her own personal medical records on October 1, 2010. She did so without having the “need to know” justification required by the confidentiality policy. Ms. Bertrand admitted doing so at the hearing.

There is really no challenge to the proposition that Ms. Bertrand’s conduct on October 1 failed to comply with Hospital policy on the confidentiality of records. The policy prohibits accessing all “patient information.” There is no exception or exclusion for one’s own personal medical records.

Unless inconsistent with law or the collective bargain agreement, policies or rules which are clearly and unambiguously enunciated, and which reasonably relate to a legitimate managerial goal, must be observed in the workplace. *Industrial Finishing Co.* 40 LA 670, 671 (Daugherty, 1963); *Joy Manufacturing Co.*, 6 LA 430, 434 (Healy, 1946); *Robert-Shaw Controls Co.* 55 LA 283, 286 (Block, 1970).

On this record the issue is not the reasonableness of the rule, however, but whether the prohibition of accessing one’s own medical records was clearly and unambiguously enunciated. The evidence in this case shows that not only Ms. Bertrand, but her former supervisor Ms. Rasmussen, had reason to question the applicability of the policy to personal medical records. Ms. Rasmussen could not immediately respond to Ms. Bertrand’s question regarding whether the policy prohibited accessing such information. She could not answer that question without

checking further. There is no evidence that any of the other nurses and staff present at that time could knowledgeably respond.

A review of the confidentiality policies placed in evidence discloses the reason for Ms. Rasmussen's hesitation. The examples contained in the policy included accessing information about "friends or relatives," as well as information about "famous" or "public" persons. However, no specific language addresses whether a staff member may access their own medical records and there is no example covering that particular circumstance.

The Hospital's omission in this regard is unfortunate. An example covering the accessing of one's own personal medical information would have been helpful to staff members in general and to Ms. Bertrand and Ms. Rasmussen in particular. Although the general language of the policy does technically apply, it is only natural for a staff member to question whether the confidentiality rule includes information that is personal only to them. It would not be unreasonable for nursing staff to assume that accessing their own personal records was permitted, given the lack of specific language addressing this point. The existence of general confusion on this point, both by Ms. Rasmussen and the other staff members present that day, indicate a failure to sufficiently communicate.

In the context of the failure to address an issue which was sure to recur, it must be concluded that, at least as to this issue, the policy was not "clearly and unambiguously enunciated" within the meaning of the rule. Consequently, it cannot serve as the basis for discipline with regard to Ms. Bertrand's conduct on October 1, 2010.

In the context of this conclusion, the Hospital should not be faulted for the manner in which the policy was drafted, released or circulated. The policy states that the prohibited conduct

is not limited to the examples provided. However, the problem here occurred not with the precise language of the policy, but with how the staff perceived its practical application.

It must be conceded that, at least at first glance, the idea that a staff member is prohibited from accessing their own personal medical records is somewhat counter intuitive. It would not be fair or reasonable to require a managerial entity like the Hospital to endeavor to address every possible way in which the confidentiality policy might be implicated in any particular situation. In this case, however, sufficient doubt was generated over the question so as to initially puzzle Ms. Rasmussen. In recognition of the omission and the problems caused, the Hospital eventually directly addressed the question in the “Confidentiality Q & A” memo, conditioning all such disclosures on the completion of “a release of information form and turning it into the Medical Records Department.”

To the extent the discipline issued to Ms. Bertrand is related to the October 1 access of her own records, it cannot be sustained.

With regard to Ms. Bertrand’s conduct in obtaining the name of Ms. Blaske’s husband by accessing her medical records on October 3, 2010, there is no question as to the clarity of the policy. Ms. Bertrand, as she candidly admitted at the hearing, understood what was required but failed to comply. Ms. Bertrand was curious, as she testified, as to the identity of Ms. Blaske’s husband. This conduct is specifically referred to in the Hospital’s policy. The review of patient records “out of concern/curiosity” is specifically addressed.

Ms. Bertrand denies attempting to access any medical information or data which in any way related to Ms. Blaske’s medical status and there is no evidence that this occurred. She did not copy any information or preserve it in any other way. She did not disclose the data to anyone. She was in the system for less than a minute.

The Union argues that Ms. Bertrand did not violate HIPPA because, “[I]f that were true, then she would be precluded from using the internet or a telephone book to get information that is a matter of public record.”

However, the Union’s contention serves to extend the analyses too far. For the purpose of this dispute, it is sufficient that the Hospital’s policy prohibits access to information it has a legal and managerial interest in controlling, and that Ms. Bertrand actions violated that interest.

Propriety of the Corrective Action

The Hospital determined that Ms. Bertrand’s conduct constituted a “critical infraction.” As Mr. Christianson testified, the Hospital based this determination on the events of October 1 and 3, the 2004 breach of the confidentiality policy and Ms. Bertrand’s cumulative disciplinary record. This determination requires modification, in the context of the conclusion that the access of Ms. Bertrand’s own records on October 1 may not be considered. What is the appropriate remedy for the October 3 violation of the policy on confidentiality?

Pursuant to Hospital policy, any “minor disciplinary action that is more than 24 months old will not be used against the employee as part of the corrective discipline process.” This provision requires the following prior disciplinary events may not be considered in the appropriate remedy analysis because they were treated as minor discipline in excess of 24 months from the date Ms. Bertrand accessed Ms. Blaske’s private medical records:

Oral Warning for destroying medical records (August 22, 2003)

Oral Warning for violating the confidentiality Policy (March 17, 2004)

Oral Warning for exercising poor nursing judgment (October 8, 2004)

Oral Warning for rudeness (September 22, 2006)

The incident disciplined on July 11, 2007, must be considered in determining the proper remedy. The event resulted in a written reprimand for rudeness. According to the policy, any written discipline constitutes a “major” offense and is not subject to the 24 month limitation.

The remaining issue relates to the appropriate level of the October 3 violation. Relying on its ability to “skip” steps based on the facts of each case, the Hospital determined that Ms. Bertrand’s conduct was a “critical offense” within the meaning of the confidentiality policy, requiring her discharge. This conclusion was based not only on Ms. Bertrand’s conduct on October 1 and 3, 2010, but also on the previous discipline for violation of the confidentiality requirements and her cumulative disciplinary record.

The just cause standard cannot support this determination for two reasons. First, it appears that the Hospital considered Ms. Bertrand’s entire past disciplinary record, including those minor infractions that were acted upon in excess of 24 months from the date of the infractions. The inclusion of these expired matters in the Hospital’s disciplinary analysis is not permitted by the policy.

Second, there was no contention that Ms. Bertrand actions were motivated by “personal gain or malice.” Similarly, there is no evidence that Ms. Bertrand copied any information contained in the system or disclosed any such data. Rather, the only evidence establishes that Ms. Bertrand accessed this information due to mere curiosity or concern. As such, her actions on October 3 would not appear to fit into the definition of a “critical” offense.

The lack of any evidence that Ms. Bertrand was motivated by “personal gain or malice” or that she distributed any information, combined with the limits on the use of her prior record,

indicate that the determination that Ms. Bertrand's offense was "critical," requiring immediate discharge, is not justified.

It is both appropriate and reasonable for the Hospital to expect a member of its nursing staff function and work in a manner that complies with all appropriate work rules. It is clear from the Hospital's actions in this case that it places the highest priority on maintaining patient confidentiality and on compliance with all applicable federal and state laws regulating patient protected health information.

In this case, the parties are agreed that one of the arbitrators' duties is to decide an "appropriate remedy." Based on this record and the Hospital's policy, a discharge is not justified. The discipline in this case must be based on the nature of the violation and Ms. Bertrand's disciplinary history, to the extent its use is permitted under the policy.

For the reasons previously set forth, the accessing of Ms. Blaske's records is a "major" offense, not a "critical" one. Similarly, the 2007 disciplinary incident is a "major offense," since it resulted in a written reprimand. Pursuant to the policy, a second "major" offense results in either a "final written" reprimand or a discharge.

Ms. Bertrand's history as a Hospital employee is not perfect. There was sufficient evidence to establish that she is a capable nurse and appeared to be well respected by her peers and supervisors. When a deficiency has been pointed out to her in the past, she appears to make an effort to improve.

Finally, it was helpful to receive and review the unpublished case supplied by the Hospital, *Girdeen v. Fairview Red Wing Health Services et.al.* However, the case does appear to be distinguishable on the ground that it was not based on a just cause determination, but was decided with specific reference to Minnesota state unemployment law. There is a qualitative

difference between matters arising under a collective bargaining agreement and those cases generated by Minnesota unemployment laws.

Having carefully considered the testimony and the exhibits received into evidence, as well as the written closing arguments submitted by the parties, it is the Arbitrator's opinion that Ms. Bertrand's discharge was not supported by just cause. Based on the entire record in this case, it is appropriate to reduce the discipline to a "Final Written" reprimand. Ms. Bertrand must be immediately reinstated to the position she held prior to the discharge and should also be made whole for any loss of wages and benefits.

Accordingly, the grievance is SUSTAINED.

A W A R D

1. **IT IS THE OPINION AND AWARD** of the Arbitrator that St. Michael's Hospital and Nursing Home did not terminate the employment of Mary L. Bertrand for just cause and the grievance is therefore sustained. Based on the entire record in this case, it is appropriate to reduce the discipline to a final written reprimand.
2. **IT IS THE ORDER** of the Arbitrator that Mary L. Bertrand be immediately reinstated to her previous position and that she be made whole for any and all losses of wages and benefits.

July 9, 2011
St. Paul, Minnesota

David S. Paull, Arbitrator