IN THE MATTER OF ARBITRATION BETWEEN ] DECISION AND AWARD ]
MINNESOTA NURSES ASSOCIATION ] OF ]
(UNION) ] ARBITRATOR ]
and ]

ARBITRATOR: EUGENE C. JENSEN

DATE AND LOCATION OF HEARING: MAY 13, 2013
Federal Mediation and Conciliation Service’s Office
1300 Godward Street Northeast – Suite 3950
Minneapolis, Minnesota 55413

DATE OF FINAL SUBMISSIONS: June 14, 2013

DATE OF AWARD: July 15, 2013

ADVOCATES:
For the Employer
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GRIEVANT: Cynthia Dikmen
 ISSUE

Did the Employer have “just cause” to terminate the Grievant’s employment effective December 11, 2012, and, if not, what shall the remedy be?

 JURISDICTION

In accordance with the National Labor Relations Act and the December 1, 2010 – November 30, 2013, Collective Bargaining Agreement between the parties, the grievance is properly before the Arbitrator.

 PERTINENT CONTRACT LANGUAGE

5. DISCIPLINE AND TERMINATION OF EMPLOYMENT

5.1 No employee shall be disciplined except for just cause. The parties agree that the principles of just cause will be applied where there is a need to take disciplinary action. Except in cases where immediate termination is appropriate, the Hospital will utilize a system of progressive discipline. . . . The seven tests of just cause will be applied as follows:

 Just Cause is defined by the following test:

• 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 evenhandedly and without discrimination?

Was the degree of discipline imposed reasonably related to the seriousness of the offense? . . .

An employee participating in an investigatory meeting that could reasonably lead to disciplinary action shall be advised in advance of such meeting and of its purpose. The employee shall be advised of the right to request and be granted Minnesota Nurses Association representation during the meeting. Further, at any meeting where discipline is to be issued, the Hospital will advise the employee of the right to have Minnesota Nurses Association representation at such meeting. . . .

The Hospital will give an employee two (2) weeks written notice (exclusive of terminal leave) prior to termination of employment or suspension unless said termination or suspension is for misconduct. The Minnesota Nurses Association will be given written notice of any written warning, termination, or suspension at the same time the affected employee is given written notice.
14. **GRIEVANCE PROCEDURE**

14.1 Grievance – Any dispute by an employee relating to the interpretation of or adherence to the terms and provisions of this Agreement shall be handled as follows:

. . . .

Step 3.

If the grievance is not resolved in Step 2, either party may refer the matter to arbitration. . . .

The arbitration will be heard by a Board of Arbitrators consisting of one member selected by the Hospital and one member selected by the Association. In the event this Arbitration Board cannot agree to an adjustment of the dispute or grievance within five (5) working days after their first discussion of the grievance, the two so selected shall select a third member who shall serve as an impartial chairman, but if said arbitrators are unable to agree upon the selection of an impartial chairman within five (5) working days, then either party may request a list of seven (7) neutral arbitrators to be submitted to the parties by the Federal Mediation and Conciliation Services. The parties shall flip a coin and alternately delete names from the list and the last name shall be the neutral arbitrator. . . .

14.2 **Time Limitations**

The time limitations set forth herein relating to the time for filing a grievance as well as the demand for arbitration are mandatory. Failure to follow said time limitations shall
result in the grievance being waived, and it shall not be submitted to arbitration. The time limitations provided herein may be extended by mutual written agreement of the Hospital and the Association.

14.3 The authority of the Board of Arbitrators shall be limited to making an award relating to the interpretation of or adherence to the written provisions of this Agreement and the arbitrators 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 Board of Arbitrators shall be confined to the issues raised in the written grievance and the arbitrators shall have no power to decide any other issues. By mutual agreement, the parties may waive the Board and submit the issues to the neutral arbitrator.¹

A majority decision of the Board of Arbitration will be final and binding upon the Minnesota Nurses Association, the Hospital, and the employee. The decision shall be made within thirty (30) working days following the close of the hearing. The fees and expenses of the neutral arbitrator shall be divided equally between the Hospital and the Association.

SEXUAL ASSAULT NURSE EXAMINERS (SANE)

LETTER OF UNDERSTANDING
Revised: May 16, 2006
Revised: December 1, 2010

St. Francis Regional Medical Center and the Association have agreed to the following:

¹ Arbitrator’s Note: As per Article 14, Section 3, the Parties chose to waive the arbitration panel procedure, and a single FMCS Panel arbitrator was selected to hear the case and to write the award.
To support the SANE program at St. Francis Regional Medical Center.

- The program will have a goal of ten (10) Registered Nurses, however; due to the infrequency of SANE training; this number may not always be attainable.

These Registered Nurses will be responsible for the exams at St. Francis. A commitment of two (2) years is expected.

**MISSION**

The primary mission of a SANE program is to meet the needs of the sexual assault victim by providing immediate, compassionate, culturally sensitive, and comprehensive forensic evaluation and treatment by trained, professional nurse experts within the parameters of the Nurse Practice Act, the SANE standards of the IAFN, and hospital policies and procedures.

**BACKGROUND**

The Employer is Saint Francis Regional Medical Center in Shakopee, Minnesota, which is a part of Allina Health. The Grievant was a highly regarded registered nurse who was also trained as a “Sexual Assault Nurse Examiner” (SANE). The Minnesota Nurses Association (MNA) represents the Grievant in this hearing. On July 17, 2012, the Grievant was called in to perform a SANE examination on a minor female patient. A determination was made by the Grievant that the minor female had not been sexually assaulted and did not require a sexual assault examination. Instead, the minor child agreed to a screening for sexually transmitted diseases (STDs), and to medications for the same. Three days later, July 20, 2012, the Grievant accessed the minor child’s medical file and announced to coworkers present that the minor child had tested positive for STDs. One of the employees present that day reported this
incident to a supervisor and the Employer conducted an investigation. Following that investigation, the Employer chose to terminate the Grievant from her employment effective September 20, 2012.

The Minnesota Nurses Association (MNA) filed a grievance on behalf of the Grievant, and that grievance was processed through various steps leading up to grievance arbitration. It is the arbitration of this grievance that is at issue in this award.

EMPLOYER’S EXHIBITS

1. a. September 7, 2012, email from Laura Nielson to Gregory Jones and Jamie Stolee. The memo covers her recollections about events that occurred on July 17 and July 20, 2012. Each of these events relate to a minor female and the Grievant.

b. September 20, 2012, grievance filed by the Union on behalf of the Grievant.


2. a. August 22, 2012, email from Michelle Weiss, Allina Health Information Manager (HIM), to Jamie Stolee, Gregory Jones, Anita Nystrom and Megan Szlachtowski. Ms. Weiss summarizes what she knows about the incidents that occurred on July 17 and 20, 2012, and then directs staff to conduct an investigation.

3. a. Two August 28, 2012, emails: One from Gregory Jones to Michelle Weiss et al in which he asks her for access information on other SANE RN’s. The other from Michelle Weiss to Gregory Jones et al which included the information he requested.

b., c., d., & e. These documents are the actual “Access Audit Report, Patient Access” information that was collected on the other SANE RN’s.

4. a. Twenty-one documents related to the investigation. These documents were referred to while the Employer’s advocate questioned Gregory Jones, and they included: a summary of the investigation, questionnaires regarding Excellian access, HIPPA Follow UP Report, an ED Nursing Sexual Assault Exam Report, etc.

b. Various investigative documents that were referred to by the Employer’s advocate while he questioned Jamie Stolee.

c. Documents to assist Anita Nystrom in answering questions about the Employer’s investigation of the Grievant.

5. a. Two emails: one from Greg Jones to Michelle Wiess, dated August 31, 2012, in which he requests information on the Grievant’s record of accessing SANE case files; and the other, dated September 4, 2012, to Gregory Jones from Michelle Wiess in which she states: “. . . only two had [the Grievant] down with access. The other MRN #’s you gave me did not have any listed visits since 2011 with no access from [the Grievant].”

6. A completed “Violation of Confidentiality Investigation Form” relating to the Grievant’s behavior in the case of the “minor female.” It summarizes the investigation and includes the following recommendation: Termination. Anita Nystrom, Senior Human Resources Generalist, prepared the document.

7. Several emails related to the internal investigation of the alleged HIPPA violation.

8. September 20, 2012, “Corrective Action/Performance Improvement Plan”. In essence, this is the termination notice to the Grievant.


10. Nineteen pages of hospital records related to the SANE examination given by the Grievant to the minor female on July 17, 2012.

11. b. This is a 25 page power point presentation given to all appropriate Allina personnel, and it is entitled: “Facts About Patient Privacy”.
12. a. A document entitled: “ED Clinical Development Days 2012” highlighting a “60 minute HIPAA/Patient Privacy/Confidentiality Overview.” Various dates were scheduled for this training: May, 14, 16, & 31, 2012.

b. “ED All Staff Meeting” scheduled for April 12 and April 21st, 2010. Jamie Stolee is listed as the leader for this training. Page 5 highlights HIPPA Overview/Opt Out Policy. . .
   . Accessing patient health information is only appropriate if the information is necessary to perform your job responsibilities and functions.”

c. “ED All Staff Meeting” scheduled for October 11th & 20th, 2010. Page 8 highlights HIPPA privacy and security walk-through findings: [In essence: talk quietly, close doors to prevent eaves dropping, take other precautions as necessary to minimize any breach of confidentiality and/or privacy]

d. 12:55 PM, July 2, 2012, email from the Grievant to Jamie Stolee, in which the Grievant apologizes for forgetting a “SANE mandatory education” meeting on that same day. Also, an 11:42 AM, July 2, 2012, email from Stolee to the Grievant, in which she asks the Grievant if she had forgotten the SANE mandatory education that morning.

e. A nineteen page Allina Hospitals and Clinics document entitled: “Professional Transcript”. This specific transcript is for the Grievant.

b. SANE Checklist [2 pages], Sexual Assault Exam Report [11 pages], and Treatment/Follow-up (Recommendations for Victims of Sexual Assault) [2 pages].

c.  

d. Culture Follow-up in the Emergency Department and Shakopee Urgent Care.

“The purpose of this policy is to ensure that all patients with positive culture results receive appropriate follow-up care in a timely manner. All patients (or guardian for minors) with positive culture results will be notified by the Care physician or physician extender and treatment is initiated as appropriate.”

e. Confidentiality of Patient Information (Effective date 9-15-2011). “Overview. Allina Hospitals & Clinics expects you to keep all patient health information confidential. For detailed information regarding Allina’s policies regarding the privacy and security of patient health information, refer to Allina’s HIPAA Privacy and Security policies and procedures.”

f. Managing Violation of Confidentiality of Patient Medical Information. This document spells out the policy and procedures to be followed when investigating alleged violations of patient confidentiality.

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2 Arbitrator’s note: Tab c. in my booklet is a repeat of the “Treatment/Follow-up” sub-tab in 13.b above. This form is intended to be a summary of the treatments received and recommendations for follow-up by the sexual assault victim’s primary physician.

3 A section was highlighted by the Employer: “provider accessing PHI for a patient who provider has cared for, after patient has transferred to other area of the Hospital to see how patient is doing, and not in connection with ongoing treatment.”
UNION’S EXHIBITS


Prior to the actual hearing, the Union gave the Arbitrator a booklet of exhibits that were sequentially numbered. Many of those exhibits were entered and received into the record while the Employer presented its case. As a result, the numbering system for the Union’s exhibits is not perfectly sequential.


17. Three “Annual Performance Review Performance Feedback Form[s]” prepared by co-workers. [no dates listed]


24. International Association of Forensic Nurses (IAFN) newsletter listing the Grievant as the Minnesota Chapter’s secretary.

25. Corrective Action/Performance Improvement Plan dated April 27, 2012, for another registered nurse. A three day suspension was issued for accessing his mother’s medical record, editing the medication section, and sent a note to the physician, via the chart, requesting the physician to give him a call. This employee had received previous verbal and written warnings for unrelated issues.
26. Corrective Action/Performance Improvement Plan dated April 23, 2012, for another registered nurse. A written warning was issued for accessing his wife’s medical record without a written authorization on file.

27. Corrective Action/Performance Improvement Plan dated March 27, 2012, for another registered nurse. A written warning was issued for giving a prescription to a patient that was for another patient. “Information on the prescription contained name, date of birth, physician, type of medication. The name and date of birth resulted in inappropriate disclosure of PHI (protected health information).”

28. Corrective Action/Performance Improvement Plan dated May 6, 2011, for a nurse liaison. A formal verbal warning was issued for sharing a patient’s HIV status with other employees.


EMPLOYER’S WITNESSES

- Laura Nielson - Registered Nurse. She witnessed the Grievant and Shannon Huber discussing the minor patient on July 17, 2012, and the Grievant’s declaration to coworkers on July 20, 2012.
• **Sara Peterson** - Emergency Room Technician. She also witnessed the events described by Laura Nielson above.

• **Gregory Jones** - Emergency Department Manager and long-time supervisor of the Grievant. He participated in the investigation that led up to the termination of the Grievant.

• **Jamie Stolee** - Patient Care Manager and Gregory Jones’ supervisor. In addition, she manages the SANE program, and she also participated in the investigation.

• **Anita Nystrom** - Senior Human Resources Generalist. She also participated in the investigation.

• **Michelle Weiss** - Patient Privacy and Security Lead and Health Information Manager, since October, 2011. She is at St. Francis Hospital every other week. She generated the reports regarding the Grievant’s medical record access of the minor child and her phone usage.

• **Megan Szlachtowski** - Compliance Manager. Majority of her work is about patient privacy. She assists in privacy investigations, including the Grievant’s.

**UNION’S WITNESSES**

• **Cynthia Dikmen** - Grievant.
• Debra Reynolds – Charge nurse in the emergency room at St. Francis Hospital.

EMPLOYER’S ARGUMENT

ARBITRATOR’S NOTE: THE FOLLOWING EXCERPTS ARE FROM THE EMPLOYER’S POST-HEARING BRIEF:

The Grievant committed two Level 3 breaches of patient confidentiality by accessing the medical records of an ED [Emergency Department] patient without a business reason to do so and then disclosing the patient’s test results to others, again without any legitimate business reason.5

The Hospital places the highest priority on maintaining patient confidentiality and on complying with federal and state laws regulating patients’ PHI [Protected Health Information]. The Hospital instituted policies to uphold patients’ trust and ensure compliance with the law. Patients share highly personal and sensitive information with health care providers every day in order to obtain the best possible patient care. Providers, in turn, are expected to hold this information in confidence and to use it only for the purpose of administering care.6

In the wake of the HITECH Act [Health Information Technology for Economic and Clinical Health] and recent amendments to the Minnesota Health Records Act, it is beyond

5 Employer’s Post-Hearing Brief (EPHB), page 22
6 EPHB, 23
question that health care providers, including St. Francis and this Grievant, must take any and all steps necessary to prevent and respond to breaches in patient confidentiality. Consequently, the Hospital’s policy of prohibiting its employees from accessing patient medical records without a business reason is unquestionably reasonable.\(^7\)

The Grievant had notice of the Hospital's expectations regarding her limited right to access patient PHI. Every year of her employment, the Grievant completed the Hospital’s annual compliance training on patient privacy . . . \(^8\)

The Hospital conducted a thorough investigation into whether the Grievant violated Hospital policy before imposing discipline on the Grievant. Although the Hospital strived to find a legitimate business reason for the Grievant’s access, all of the reasons proffered by the Grievant proved implausible and could not overcome the evidence of her improper access and shockingly inappropriate disclosure.\(^9\)

The Hospital investigated the report of a privacy breach by the Grievant fairly and objectively. . . . The Grievant had union representation at her investigatory meetings and had an opportunity to explain her conduct or provide a legitimate business reason for the access and disclosure. . . . The Hospital then followed up by meeting with the Grievant again and providing her the opportunity to explain.\(^10\)

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\(^7\) EPHB, 25-6
\(^8\) EPHB, 26
\(^9\) EPHB, 26-7
\(^10\) EPHB, 27
Ultimately, the Hospital’s investigation yielded substantial evidence that the Grievant accessed the ED patient’s medical records and made intentional disclosures without a permitted business reason.\textsuperscript{11}

The Grievant’s Misconduct Was Serious and Warranted Termination. . . . Arbitrators recognize the seriousness of a breach of patient confidentiality and have repeatedly upheld resulting discharge decisions, both by Allina Hospitals and others.\textsuperscript{12}

\section*{UNION’S ARGUMENT}

\section*{ARBITRATOR’S NOTE: THE FOLLOWING EXCERPTS ARE FROM THE UNION’S POST-HEARING BRIEF:}

THE EMPLOYER LACKED JUST CAUSE TO DISCHARGE THE GRIEVANT.\textsuperscript{13}

[T]he Employer’s discharge decision did not adequately take account of [the Grievant’s] superb employment record. . . . At the hearing Mr. Jones gave [the Grievant] perhaps the highest possible compliment about her performance, stating that if his own son needed emergency care he would want [the Grievant] to be his nurse. . . . In short, in deciding to terminate [the Grievant] the Employer did not give adequate weight to her excellent performance history and absence of any prior discipline.\textsuperscript{14}

\textsuperscript{11} EPHB, 28
\textsuperscript{12} EPHB, 31-2
\textsuperscript{13} Union’s Post-Hearing Brief (UPHB), page 8
\textsuperscript{14} UPHB, 9-10
The Employer’s discharge decision was disproportionate to the conduct that [the Grievant] engaged in. The Employer terminated [the Grievant] for accessing a patient’s medical record while making an extra effort to follow up with the patient. [The Grievant] testified that she accessed the patient’s medical record to find out the patient’s lab results and to obtain contact information for purposes of getting in touch with the patient to let her know the results and make sure she was safe and receiving the proper treatment. This is a legitimate patient care purpose, and therefore did not breach the Employer’s patient confidentiality policy. . . . Her purpose in accessing the medical records was to provide patient care, not to invade the patient’s privacy as the Employer alleges. [The Grievant’s] account of the events in question matches up to the Access Audit Report submitted into evidence as Employer Exhibit 2B. On July 20, 2012 at about 8:13 p.m., as promised to the patient [the Grievant] accessed the patient’s test results on her medical record, which were positive for an STD. She then spoke with an Emergency Room Doctor to determine whether the medication that had been prescribed was the correct one for the condition in question. After that, she tried to call the patient as she said she would. After realizing she had written down an incorrect telephone number, she looked up the patient’s telephone number in the demographic portion of her medical record at about 8:33 p.m.15

The Employer’s reliance on internal telephone records to attempt to contradict [the Grievant’s] testimony is unavailing. The Employer failed to offer any competent witness

15 UPHB, 11-12
who could testify how the records were generated and who could provide satisfactory assurances that they were complete.\textsuperscript{16}

[The Grievant] made a comment to Mr. Huber after reviewing the patient’s test results along the lines of “see, you don’t need to do a sexual assault exam to see if someone is sexually active, the patient tested positive for an STD.” This comment did not identify the patient in any respect.\textsuperscript{17}

The CBA and the case law require that discipline must be imposed evenhandedly. . . . In this case the Employer recently imposed lighter discipline on employees accused of similar or more serious infractions of the patient confidentiality policy.\textsuperscript{18}

The Employer’s Discharge of [the Grievant] Violated The Contractual Mandate Of Progressive Discipline. . . . Here the Employer admittedly did not follow progressive discipline because [the Grievant’s] first discipline that she ever received was a termination. . . . [The] Employer cannot bypass the progressive discipline requirement on the theory that immediate termination is appropriate.\textsuperscript{19}

\begin{center}
DISCUSSION
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\textsuperscript{16} UPHB, 13
\textsuperscript{17} UPHB, 13
\textsuperscript{18} UPHB, 14
\textsuperscript{19} UPHB, 16
Most collective bargaining agreements (CBAs) contain the words “just cause” in their disciplinary articles, and just cause is a term that has meaning to labor relations professionals. The CBA at issue in this arbitration (Union Exhibit #1) actually defines the seven tests of just cause the Employer must use in properly disciplining represented employees. The Arbitrator will look at each of the seven tests to determine if just cause existed at the time of the Grievant’s termination.

I. Was the rule or order reasonably related to the Employer’s business interests and performance expected of the employee?

The importance of Protected Health Information is spelled out clearly in both federal (Health Insurance Portability and Accountability Act [HIPAA]) and State statutes. The Hospital’s policies mirror the intent and seriousness of said laws. The continued enterprise of the Hospital would be severely hampered absent strict adherence to confidentiality when either accessing or sharing patient information. Bad publicity in this area could realistically limit potential patient contact.

The Union did not challenge the policies of the Employer, nor did it argue that confidentiality was an unreasonable expectation of the Grievant.

II. Did the Employer give the employee notice of the rule and the consequences of their failure to obey the rule?
The Employer offered more than ample evidence, through documents\textsuperscript{20} and testimony, that the Grievant was fully aware of the rules and the consequences for breaking them. The rule notification was not a one-time event; it was covered in meetings and documents each and every year of the Grievant’s tenure.

The Union did not attempt to refute the Employer’s claim that the Grievant should have known the importance of confidentiality.

III. Did the Employer investigate the matter before administering discipline?

The record shows that the matter was thoroughly investigated by several managerial staff members. The employer spent significant time and resources in investigating the issues surrounding the alleged breach of confidentiality policies by the Grievant. The Employer gathered evidence from co-workers who were present on July 17 and 20, 2012, when the alleged misconducts took place. The Employer then contacted the Grievant and scheduled an investigative meeting. The meeting occurred and the Grievant had Union representation. Following the initial meeting, the Employer researched several issues that the Grievant brought to their attention. A second investigative meeting with the Grievant was conducted, and, again a Union representative was present.

\textsuperscript{20} Employer Exhibits: 11A&B, 12A,B,C,D&E
IV. Was the investigation fair and objective?

The Arbitrator concludes that the Employer conducted a fair and objective investigation. As stated above, the Grievant and her Union were given two opportunities to tell her version of what happened during the two nights at issue in this matter. The employer involved several people in the investigation and in the decision to terminate the Grievant. The record is replete with diligence by the Employer in attempting to get the facts in an unbiased manner.

V. Did the Employer obtain substantial evidence of guilt in the investigation?

Two questions need to be answered to ascertain “guilt” in this matter:

1. Did the Grievant access the minor patient’s PHI improperly?

The Grievant asserts that she promised the minor child that she would call her with the results of her STD test and to “see how it was going.” There was no record of this in the minor patient’s chart. The Grievant indicated during the investigation that she had some concerns about the minor patient’s home environment; once again, there was no reference to this in the minor patient’s chart. One can only speculate about the Grievant’s intent in accessing the minor patient’s PHI. Was it to follow-up on a promise to the minor child, or was it for some other reason? Either way, the Grievant broke the rules when she accessed the information. Hospital rules and policies specifically forbid such access once a patient is discharged from the Emergency Department.
2. Did the Grievant improperly share information from the minor patient’s PHI?

The testimony of two witnesses corroborated that the Grievant made a loud comment about the results of the minor patient’s STD testing. It is not so important whether the statement made was as unprofessional as one characterization given by a witness, or the other more generalized statement from another, but it is important that there was unrebutted testimony that the Grievant disclosed to other employees that the minor patient had tested positive for STDs. It is also important to note that there was no testimony doubting the identity of the patient, even though the minor patient’s name was never mentioned. The Grievant did not deny that she disclosed the outcome of the STD testing to other employees. During the first investigatory meeting, she said the disclosure was for educational reasons, and later, during her second investigatory meeting, she suggested that she might have been “thinking out loud.” Once again, one can only speculate as to the reason for the declaration. No matter the reason, the Grievant’s behavior was a significant violation of the privacy policies.

The Arbitrator concludes that the Employer proved beyond a reasonable doubt that the Grievant improperly accessed and disclosed information from the minor patient’s PHI.

VI. Has the Employer applied the rules and discipline evenhandedly and without discrimination?

Discrimination, from the standpoint of a “protected class” was not an issue brought forth at the hearing. Evenhandedly administering discipline was an issue that the Union pursued. Several documents were introduced in an attempt to show that the Employer had given lesser disciplines to employees that had committed equal or more egregious violations of the Employer’s confidentiality policies. Union Exhibit #s 25 through 28 were entered into the record over the objection of the Employer’s advocate.
(irrelevant). The Arbitrator finds these documents to be relevant to the level of discipline given the Grievant: the documents, however, support rather than challenge the level of discipline that the Grievant received. The Grievant’s actions were potentially much more damning to the Employer. Union Exhibit #25 contained evidence of a rather serious breach of patient confidentiality. The employee involved accessed his mother’s PHI without written permission. In addition, he updated the record and asked that the physician involved to contact him about his mother. The employee received a three day suspension from the Employer. This was the first issue of confidentiality that had been alleged against the employee, and most importantly the employee did not disclose the information to others. In Union Exhibit #26 an employee was given a written warning for accessing his wife’s medical record with her verbal permission, and at her request, to look up medication information. In Union Exhibit #27 an employee was given a written warning for mistakenly giving patient information to another patient on an improperly handled prescription. The information was limited to the other patient’s name, date of birth, physician and type of medication. In Union Exhibit #28 an employee was given a verbal reprimand for warning lab staff that a specific patient had tested positive for HIV.

VII. Was the degree of discipline imposed reasonably related to the seriousness of the offense?

This Arbitrator does not ignore the level of discipline given after an employer has proven that an employee is guilty of a rule violation or some other wrong doing. The level or degree of discipline is a significant aspect of just cause. If an employee is given a harsher discipline than the situation warrants, it is imperative that the arbitrator lessen that discipline. Without that ability, represented employees could be subjected to unfair decisions that are many times made in the heat of the moment.
The discipline given in this matter was not made in the heat of the moment, nor was it unfair. The Employer, to its credit, exercised an almost textbook response to the actions of the Grievant. By the end of the hearing, it was well established that the rules were clear and understood, the Grievant violated the rules, the Grievant denied any wrong doing, despite clear evidence to the contrary, and the Employer was correct in its decision to discipline.

Employer Exhibit #13F defines the levels of violation when dealing with breaches in patient confidentiality. The most serious violations are listed as level 3 violations:

Intentional use, disclosure, or access, without a permitted business reason such as, curiosity, personal gain, ill will, intent to harm a patient or others. [Examples are given]:

- Accessing PHI regarding celebrity or high profile case out of curiosity.
- Accessing PHI of [a] co-worker to see why the co-worker was in the hospital/clinic.
- Disclosing family member’s PHI to [an]other family member (not in connection with treatment of the patient) with knowledge that patient would object to disclosure, even though employee does not intend the disclosure to be harmful.
- Accessing PHI of a family member, an acquaintance or neighbor without consent or a permitted business or care-related purpose.
- Teasing a co-worker about medical information pertaining to family member.
- Sharing patient information for employee gain.\(^{21}\)

The Arbitrator agrees with the Employer’s judgment: the Grievant’s decisions to access and disclose the minor patient’s PHI both fall within the scope of Level 3 violations. The Grievant’s stated reasons for her actions were not supported by the evidence.

The document goes on to describe other factors when determining the level of discipline that is appropriate. One of which is:

> Whether the workforce member understands the seriousness of the offense and agrees not to engage in any further violations.\(^{22}\) [underlined for emphasis]

The Grievant, when asked at the end of the hearing about her culpability in this matter, answered: “I feel I did not do anything wrong.” If in her mind she didn’t do anything wrong, what would preclude her from using her declared dedication to patients as a reason to do the same in the future.

It is very sad to see a competent and dedicated health professional lose her employment. It is a loss for all parties involved. The Arbitrator can honestly say that he has never seen performance reviews that were as glorifying as those Mr. Jones gave the Grievant. And yet, as highly touted as she was, the Grievant made some serious errors in judgment.

\(^{21}\) This document was prepared by Anita Nystrom and is entitled: Managing Violation of Confidentiality of Patient Medical Information, no date.

\(^{22}\) Ibid.
AWARD

The Arbitrator, after careful examination of the exhibits and testimonies, concurs with the Employer’s decision to terminate the Grievant.

The grievance is denied.

Respectfully submitted this 15th day of July, 2013

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Eugene C. Jensen
Neutral Arbitrator