

The Arbitrator, Richard J. Miller, was selected by the Employer and Union (collectively referred to as the "Parties") from a panel submitted by the Minnesota Bureau of Mediation Services. A hearing in the matter convened on June 15, 2009, at 8:30 a.m. at the McNamara Alumni Center, 200 Oak Street Southeast, Minneapolis, Minnesota. The hearing was tape recorded with the Arbitrator retaining the tapes for his personal records. The Parties were afforded full and ample opportunity to present evidence and arguments in support of their respective positions. The Parties elected to file post hearing briefs with an agreed-upon submission date of July 22, 2009. The post hearing briefs were submitted in accordance with those timelines and received by the Arbitrator by e-mail attachment, after which the record was considered closed.

The Parties agreed that the grievance is a decorous matter within the purview of the Arbitrator, and made no procedural or substantive arbitrability claims.

ISSUES AS STIPULATED TO BY THE PARTIES

Was there just cause to discharge the Grievant? If not, what is the appropriate remedy?

STATEMENT OF THE FACTS

Boynton Health Services ("Boynton") is a clinic operated by the University primarily intended to provide health care to

students. It is located at 410 Church Street SE, Minneapolis, Minnesota.

The Grievant, Patricia Pals, has worked at Boynton for 23 years as a certified medical assistant ("CMA"). Her last assignment was assisting Dr. Jeannette Risdahl, a doctor at Boynton. As a CMA, her duties include helping to schedule patients and prepare them for visits with Dr. Risdahl. The Grievant also routinely handled interactions with pharmacists related to prescriptions for Dr. Risdahl's patients.

Dr. Risdahl has been a physician since 1991, working at Boynton principally in internal medicine. She described the Grievant as a hard working and detail-oriented assistant.

There is no significant discipline in the Grievant's work history. While the Grievant did receive a written reprimand in 2006, the Collective Bargaining Agreement states in Article 20, Discipline, Section 3, Corrective Disciplinary Procedure, that "[i]f no disciplinary action is taken against an employee for one (1) work year following an oral or written reprimand, all records of past disciplinary action shall be removed from the employee's personnel file and destroyed."

Article 20 further states in Section 8, Presentation of Evidence, that "[e]ach employee shall have only (1) official Human Resources Department file. No written documentation of

prior disciplinary action or written allegations of improper behavior shall be used as the basis for disciplinary action unless it has been entered into the employee's official Human Resources Department file."

Because this written reprimand was properly removed from the Grievant's Human Resources Department file, it cannot be used by the Employer in this case as a basis for further discipline against her, nor can the Arbitrator consider it in his deliberations.

On Friday, March 28, 2008, Dr. Risdahl began seeing Erik Allen Nordstrom as a patient. Mr. Nordstrom was seeking treatment for anxiety and Dr. Risdahl prescribed clonazepam, a narcotic drug. (Union Exhibits 16-1, 16-2).

On Monday, March 31, 2008, Dr. Risdahl was informed by staff in the Boynton pharmacy that they had only been able to provide 70 of the 90 clonazepam pills she had prescribed for Mr. Nordstrom. Further, the pharmacy staff indicated that Mr. Nordstrom had called repeatedly over the weekend attempting to get the additional pills. Pharmacy staff also told Dr. Risdahl that Mr. Nordstrom had attempted to impersonate her over the weekend at the pharmacy and other local pharmacies by attempting to obtain the drug by using Dr. Risdahl's Drug Enforcement Agency ("DEA") registration/authorization number. The Grievant was

notified of this information and it was documented in her phone notes. (Union Exhibit #16-3).

The Grievant testified that Mr. Nordstrom had called more than ten times between 8:30-9:00 a.m. the morning of March 31st. Both Dr. Risdahl and the Grievant testified that Mr. Nordstrom sounded intoxicated in a number of his phone messages.

The Grievant wrote in her notes that the patient asked for a larger dose of clonazepam, that he became "angry and defensive" and that he would have to come in to be seen because providers would be reluctant to grant his request over the phone. (Union Exhibit #16-3). At one point, the Grievant testified, another doctor standing beside the Grievant heard Mr. Nordstrom screaming into the phone. The Grievant said the doctor signaled to her that he did not want to talk to the patient, and that the patient must come into Boynton.

Finally, around 11 a.m., the Grievant transferred Mr. Nordstrom to her supervisor, Margaret Dahl, because he would not stop calling. The Grievant told Ms. Dahl about what had occurred with Mr. Nordstrom and Ms. Dahl set up an appointment for the patient to come in and see Dr. Risdahl late in the morning of the following day.

In her notes regarding that visit, Dr. Risdahl wrote that the patient was "extremely anxious, very argumentative and at

times hostile." Mr. Nordstrom denied impersonating Dr. Risdahl and blamed neighbors for the attempted subterfuge. Dr. Risdahl decided to stop prescribing controlled substances to Mr. Nordstrom in that meeting. (Union Exhibits 16-4 - 16-6).

The Grievant testified that she was also working that day. She said that Mr. Nordstrom's argument with Dr. Risdahl was loud enough to be heard down the hall. The Grievant said she was worried about the safety of Dr. Risdahl because Mr. Nordstrom had Dr. Risdahl "cornered" in her office and that she did not want Dr. Risdahl to be "trapped." Dr. Risdahl testified that she started to worry as well because the patient would not leave.

The Grievant then got another co-worker, Carl. The Grievant testified that Carl talked to Mr. Nordstrom for about 45 minutes in a failed attempt to calm him down before finally escorting him from Boynton.

The next day, Wednesday, April 2, 2008, the Grievant was picking up a prescription in the afternoon when one of the pharmacy staff told her to talk to pharmacist Mike Forte. The Grievant was told by Mr. Forte that Mr. Nordstrom had been arrested, and to expect a call from a City of Minneapolis Police Officer Hokanson. Mr. Forte told the Grievant that the Police Officer would be calling to confirm information that the Police

Officer had already been provided. Later that day, the Grievant received the following telephone message on her Boynton voice mail:

Hi Patty, officer (Hokanson), Minneapolis Police. This is in regard to [Mr. Nordstrom]. We have him in custody for ah, forging a ah, calling in a forged prescription on your ah, Dr. Risdahl's name. If you could give me a call at 612-919-9116 I would appreciate it. Thank you. Bye.

(University Exhibit #6).

The Grievant's testified that she believed the situation was clearly an emergency. Mr. Nordstrom had behaved in a chaotic and potentially threatening way toward her co-worker only the previous day. She had learned of repeated attempts by Mr. Nordstrom to criminally impersonate Dr. Risdahl in order to obtain powerful controlled drugs - both through Boynton and other pharmacies. She was also told by Mr. Forte, a well-respected and professional pharmacist, to expect a phone call from the police in order to confirm details of the situation. According to the Grievant, Mr. Forte told her to talk to the police officer to confirm details regarding Mr. Nordstrom's situation.

As a result of the Grievant believing that this situation was an emergency, she returned the call to Police Officer Hokanson. The Grievant provided Police Officer Hokanson with patient health information regarding Mr. Nordstrom, including the date when Mr. Nordstrom first visited Boynton; the condition for

which Mr. Nordstrom sought treatment; the names of the drugs Dr. Risdahl prescribed for Mr. Nordstrom; instructions and information given to Mr. Nordstrom by Boynton regarding his prescriptions; and information regarding the filling of the prescriptions. The Grievant prepared a written summary of the call. (University Exhibit #7; Union Exhibit #18).

In his supplemental statement in the police report on the incident, Police Officer Hokanson wrote that he and his partner went to the Dahl Pharmacy to response to an alleged forgery in progress. The report states that Mr. Nordstrom attempted to have the prescription given by Dr. Risdahl refilled at the Dahl Pharmacy. Those pharmacists called Boynton to check on the legitimacy of the prescription. When they learned that Mr. Nordstrom's attempts to fill the prescription were not legitimate the Dahl pharmacy staff contacted police. (Union Exhibit #17-4).

Police Officer Hokanson also spoke to Mr. Forte and Mr. Forte confirmed that Mr. Nordstrom had received a prescription for Clonazepam. The Grievant confirmed this information to Police Officer Hokanson, and further stated that the patient had made repeated telephone calls in order to obtain the drug over the weekend, and that on April 1, 2008, the prescription was taken away due to Mr. Nordstrom's "abnormal behavior." (Union Exhibit #17-4).

The police report further indicates that on April 3, 2008, Police Sergeant Hudok spoke to Mr. Forte, who referred him to another Boynton pharmacist, Kenzie Harder. According to the report, Ms. Harder confirmed various details of the story to Sergeant Hudok that attempts for refills were called in to Target and Walgreens over the weekend, that Mr. Nordstrom had called Boynton several times for refills and that Dr. Risdahl canceled the prescription so that no refills could be given. (Union Exhibits #17-5, 17-6).

There is no evidence that either Mr. Forte or Ms. Harder were disciplined by the Employer for their cooperation in the police investigation. This is because pharmacists are allowed to discuss confidential patient health information with the police, without patient authorization, pursuant to Minn. Stat. § 151.213.

A criminal complaint based on these circumstances was filed against Mr. Nordstrom in Hennepin County District Court. (Union Exhibit #19). Mr. Nordstrom was later found guilty, convicted and sentenced for Controlled Substance Crime Drug Possession - 5th degree. (Union Exhibit #20).

The Grievant testified that she did not discuss the police inquiry with her supervisor, Ms. Dahl, because she had no questions about the situation. The Grievant was told by Mr. Forte to expect a call from the police and cooperate with the

police. She thought the situation was an emergency, that criminal activity had been attempted on the premises and she was assisting the police to identify a subject. The Grievant felt confident that her decision to discuss this matter without consulting her supervisor or anyone else in management was a correct one.

Several days after the Grievant spoke with Police Officer Hokanson, Ms. Dahl read the Grievant's summary of the call while reviewing files. Ms. Dahl was immediately concerned that the Grievant had disclosed confidential patient health information, without authorization, in violation of University and Boynton policy. She began an investigation of the matter.

As part of her investigation, Ms. Dahl spoke with the Grievant. The Grievant confirmed that she had provided the information to Police Officer Hokanson as reflected in her written summary. The Grievant confirmed that she had not received authorization from Mr. Nordstrom or anyone else before providing the information. When reminded of University policy governing the confidentiality of patient health information, Ms. Dahl testified that the Grievant was indignant. According to Ms. Dahl, the Grievant asserted that she had done nothing wrong because the information was requested by a police officer and because it was an "emergency" situation.

Ms. Dahl discussed the matter with other Boynton administrators. She also consulted Ross Janssen, the University's Privacy and Security Officer. Mr. Janssen is ultimately responsible for the development and enforcement of University policy regarding the confidentiality of patient health information.

Ms. Dahl and the other Boynton administrators confirmed that the Grievant had received training and instruction regarding the confidentiality of patient health information, and that she aware of University policy regarding the release of confidential patient health information. They found the information the Grievant released regarding Mr. Nordstrom was confidential patient health information covered by University and Boynton policy. They found the Grievant released Mr. Nordstrom's patient health information without proper authorization in violation of University policy. They found no indication that the situation was an "emergency" so as to justify the release of this information by the Grievant. They found the release was not justified merely because it came from a police officer. In consultation with Mr. Janssen, they found that the Grievant had exposed the University to liability under state and federal law because of the unauthorized release of confidential patient health information.

Based upon the University's position that the Grievant violated Boynton and University policy, in consultation with Boynton's administration, and in accordance with the provisions of the Collective Bargaining Agreement, Ms. Dahl made the decision to first suspend the Grievant for five days without pay pursuant to Article 20, Discipline, Section 4, Discharge, of the Collective Bargaining Agreement. (University Exhibit #8). Ms. Dahl then decided to terminate the Grievant's employment with the University. Ms. Dahl notified the Grievant of her termination decision by letter dated April 30, 2008. (University Exhibit #9; Union Exhibit #2).

On May 14, 2008, the Union, on behalf of the Grievant, submitted a written grievance protesting the Grievant's termination. (Union Exhibit #12; University Exhibit #2). The Employer denied the grievance on June 2, 2008. (University Exhibit #3; Union Exhibit #3). The Union appealed the grievance to final and binding arbitration on July 16, 2008, pursuant to the final step in the contractual grievance procedure. (Union Exhibit #4; University Exhibits #4-5).

UNION POSITION

The Grievant, is a 23-year employee with a clean track record. She has been unfailingly honest throughout this entire, difficult experience. In fact, the sole source of evidence used

in the discharge decision were phone notes which she typed herself into the medical record; notes which she has never contradicted or denied.

The Grievant made a fierce commitment to the well-being of her co-workers and her Employer. She deserves better than to hang from the noose of her own honesty and suffer discharge.

An unstable, drug-addicted criminal walks into a University clinic looking for easy pickings - a place to scam drugs. He causes chaos, brings fear to the workplace and tarnishes the good name of the organization. This was the situation confronting the Grievant in the events that resulted in her discharge. And when confronted with the situation, she did what many would hope a good employee would do - she stood up, she was pro-active, she protected her co-worker and the organization.

In the middle of a difficult and crazy situation, with the reputation of her co-workers and her organization threatened, the Grievant was guided by her experience, knowledge and principles to do what she believed to be the right thing - cooperate with the police in apprehending a criminal. The Grievant legitimately believed her actions were supported by federal and state law, University policy and the needs of the organization. She deserves better than to be discharged for this decision. Many would commend her.

It is easy in hindsight to second-guess decisions like these made during a crisis, but that is unfair. Just as it is unfair to discharge the Grievant for the decisions she made that day while discussing this matter with a police officer.

The Grievant acted at the request of a trusted professional colleague - a professional pharmacist who told her to talk to a police officer to confirm details regarding a patient's care.

The University applies great weight to compliance with HIPAA. Yet, their training is incomplete and contradictory, their policies ambiguous and ill-defined and their grasp of the embracing statutes limited. While the University's system of HIPAA compliance may be well-adapted to avoiding legal liability for HIPAA violations, it is ill-suited to the goal of maintaining justice at the workplace.

The Grievant had never been trained on the policies and procedures which she was fired for allegedly violating. No one in management had ever counseled her - or the doctor who was her immediate co-worker - about how to respond to a police inquiry.

The Employer alleges that the Grievant violated HIPAA, MN Statute Section 144.335 and University and Boynton policy. The record shows that she violated no statutes, and that the various University policies generally support the actions she took in this case rather than prohibit them.

The Employer argues that discipline is progressive in this case, but it is not. The Employer is basing the discharge decision on prior discipline that they are contractually barred from considering.

It is unfair to discipline someone for making a judgment call in the middle of a crisis that brings no harm to the organization. It is unfair to discipline someone for violating complicated rules they have never been trained to follow. It is unfair to discipline someone for carrying out what they logically believe is their duty by law and policy. It is simply unfair to discipline the Grievant.

The criminal antics of Mr. Nordstrom have done enough damage. The Arbitrator should use his authority to repair this last, final, painful side-effect of his actions.

The Union requests, and the record supports, that the Arbitrator sustain the grievance and make the Grievant whole in all ways - with reinstatement, with back pay, with the restoration of her accruals, seniority, FMLA eligibility and with retroactive contributions to her pension.

UNIVERSITY POSITION

The University terminated the Grievant's employment because she violated University and Boynton policy prohibiting the unauthorized release of confidential patient health information.

The evidence established that the Grievant knew of the policy and was trained on the policy. In fact, she received additional training regarding the handling of patient health information as a result of a prior incident in 2006.

Despite the fact that the Grievant knew about the University and Boynton policies, and despite the fact that her conduct clearly violated those policies, Ms. Dahl testified that the Grievant never acknowledged that she had done anything wrong, accepted responsibility for her actions or otherwise expressed any remorse over her unauthorized disclosure of Mr. Nordstrom's patient health information. Ms. Dahl testified that, when questioned about the matter, the Grievant was indignant and defiant. The Grievant asserted that she had a right to release the information. She refused to acknowledge the concerns raised by Ms. Dahl. She refused to acknowledge her obligations under the University and Boynton policy. At hearing, the Grievant testified that she still does not believe she did anything wrong in this case.

Mr. Janssen testified that the Grievant's conduct was the most egregious violation of University policy he had seen. The Grievant consciously and deliberately released the information. The release was not simply the result of an inadvertent oversight or mistake. Mr. Janssen also testified about the liability

arising from the unauthorized disclosure of patient health information, including criminal and civil penalties under state and federal law. The Grievant was notified of the potential for such liability in the training she received on the University policies. The Union has not and cannot dispute that the University has been exposed to liability as a result of the Grievant's unauthorized release of Mr. Nordstrom's patient health information.

Ms. Dahl testified that, given the Grievant's response to the situation, Ms. Dahl was extremely concerned that the Grievant would act the same way if a similar situation arose in the future. Given the serious nature of the violation, the Grievant's indignation and defiance when questioned about the matter, the Grievant's failure to recognize or acknowledge her obligations under University and Boynton policy and the Grievant's failure to take responsibility for her actions, Ms. Dahl testified that she and other Boynton managers felt they had no choice but to discharge the Grievant from her employment at the University.

The Collective Bargaining Agreement specifically allowed for immediate discharge for the violations committed by the Grievant. The evidence presented at hearing established the existence of just cause for the termination of the Grievant's employment. The

discharge decision was reasonable and supported by the evidence. It should be affirmed and the grievance be denied.

ANALYSIS OF THE EVIDENCE

Article 20, Discipline, Section 1, Purpose, of the Collective Bargaining Agreement provides that "[d]isciplinary action and discharge shall be taken only for job related and only for just cause." This "just cause" requirement means that the Employer must act in a reasonable, fair manner and cannot act in an arbitrary or capricious manner. The Employer's discharge of the Grievant must therefore meet the standard of fairness and reasonableness.

Termination from employment is, to use a common expression, "capital punishment" for the Grievant, as it involves her livelihood, reputation, employee rights and future job opportunities. In this discharge case, therefore, a significant quantum of proof is required to show not only that the Grievant did the act alleged, but also that the act justifies the "extreme industrial penalty" of discharge. In other words, if actual wrongdoing by the Grievant is established by the evidence, is the propriety of the discharge penalty assessed by the Employer fair and equitable under the circumstances of this case. A heavy burden is clearly on the Employer to support its action in this case.

The grounds set forth by the University for the discharge of the Grievant includes an allegation that the Grievant disclosed confidential patient health information, without patient authorization, in violation of University and Boynton policy. The Union claims that the Grievant was authorized to release the patient information because it was requested by a police officer and it was an emergency situation. The Grievant also alleges that she was never generally trained on any policy pertaining to the release of patient information and, specifically, was never trained on any policy pertaining to the release of patient information if requested by a police officer or if an emergency arose.

The University is mandated by state and federal law to protect the confidentiality of patient health information. There are both University-wide and department policy that apply to all University employees with access to confidential patient health information. In the instant matter, there is University and Boynton policy that pertain to the release of confidential patient information that governs the resolution of the pending grievance.

According to the University policy titled "Protection of Individual Health Information by U Health Care Components (HIPAA),"

Health care components of the University that provide health service to individuals are obligated to protect the privacy of individual health information in accordance with the applicable law and all University and health care component level policies and procedures related to privacy and security of individual health information. All health care components designated by the University must be aware of and adhere to these obligations...

University health care components will not use or disclose individual health information without written authorization ...except where permitted or required by state and federal law.

(University Exhibit #13, p. 1).

According to the University policy titled "Disclosing Individual Health Information for Public Purposes,"

Individual health information may be used or disclosed without the individual's written authorization and without notifying the individual in certain situations...

For each category of uses and disclosures, the health care component must determine if the use or disclosure is allowed. When the health care component is uncertain of whether a use or disclosure is permitted, consultation with the Privacy Office is encouraged...

Authorized disclosures for public purposes include:...

6. Law Enforcement Purposes.

Minnesota law has more stringent requirements than HIPAA for disclosing individual health information for law enforcement purposes. Consistent with Minnesota law, individual health information maintained by the health care component of the University generally may be disclosed for law enforcement purposes only with individual written authorization or pursuant to a court order valid in Minnesota, including a court ordered warrant. However, there are law enforcement situations where individual health information may be released without individual authorization or a court order. These include suspicious injuries (where reporting is required for gunshot wounds, burns and perpetrators of

crimes), medical examiner investigations, emergency situations, and child abuse investigations.

(University Exhibit #14, pp. 1-2).

Boynton Policy Number 343 establishes the general rule: "Patient health information shall be released only upon written authorization signed by the patient..." (University Exhibit #11).

Pursuant to Boynton Policy Number 419,

A Boynton Human Resources representative will give each new employee the following documents: 1) Code of Conduct and 2) Confidentiality of Medical Records and Information. Employees will be asked to sign each document at the time of hire. Employees will re-affirm their commitment to Boynton's Code of Conduct and Confidentiality of Medical Records and Information policy by signing the documents annually.

(University Exhibit #12).

The "Code of Conduct" includes the following provision, "confidentiality: [Boynton] employees and others providing services through Boynton will treat information of a private or confidential nature in a manner as defined by the University of Minnesota, [Boynton] policy and applicable law." (Id.)

Boynton's "Confidentiality of Medical Records and Information" policy provides specific guidance regarding the handling and release of patient health information, including procedures directly applicable to the circumstances of this matter. Pursuant to that policy,

Medical records maintained by [Boynton] are private. Access to these records is permitted only according to the following guidelines:

- A. Only authorized [Boynton] Personnel may release medical records...
- E. A patient may authorize the release of medical records to outside parties (e.g., another physician, parents, interpreter, etc.) after providing a valid written authorization...
- F. Release of medical records without a patient's authorization is limited to the following circumstances:
 - 1. If an emergency exists (e.g., the patient's life is in danger), the medical director of designee may approve (in writing) the release of the medical records...
 - 3. Medical records will be released pursuant to a valid court order...
 - 5. Medical records will be released as required by law (e.g., reporting obligations concerning gunshot wounds, child or vulnerable adult abuse, venereal or other communicable diseases, workers compensation or unemployment hearings, etc.)...

(Id.)

The policy further states that,

Verbal communication of medical information without the consent of the patient is limited to the following:...

- 2. If an emergency exists (e.g., the patient's life is in danger or the patient has specifically threatened to harm another person), the medical director or designee may approve the release of medical information...

(Id.)

In all other circumstances under Boynton's "Confidentiality of Medical Records and Information" policy, "an expressed written authorization executed by the patient is required before medical information will be communicated to individuals other than patient." (Id.)

It is well-recognized in arbitration that before employees can be disciplined for just cause for a breach of an employer's rules, regulations and/or policies, the employees must have knowledge of their existence. Such knowledge is gained through the publication by the employer of the rules, regulations and/or policies.

In this case, the evidence clearly establishes that the Grievant knew of the numerous University and Boynton policies and procedures regarding the confidentiality of patient health information as they were published by the Employer and then read by the Grievant. On December 15, 2006, the Grievant signed an "Employee Commitment to Follow Confidentiality of Medical Information Policy" that included the following statement,

I, the undersigned, have read and understood the policy regarding the confidentiality of Boynton Health Service medical information; I agree to conduct myself in accordance with these regulations; I understand that compliance with these regulations is a condition of my employment.

(Id.)

The Grievant signed a re-affirmation of the commitment on October 9, 2007. (Id.) In addition, Ms. Dahl testified that the issue of confidentiality of patient health information was regularly addressed during staff meetings, which were attended by the Grievant on a regular basis, and that she had specifically addressed the issue with the Grievant prior to the instant matter regarding Mr. Nordstrom.

The Grievant's allegation that she was not properly trained on any University or Boynton policy pertaining to the confidentiality of patient health information is without merit. The unrefuted testimony of Mr. Janssen indicates that all University employees with access to patient health information receive mandatory training regarding the University and Boynton policies, and the proper handling of patient health information. The training materials include the following information:

Can there be Releases without Consent, Authorization or Knowledge?

There are special circumstances under HIPAA in which [Personal Health Information] can be disclosed without the patient's consent, authorization or knowledge:

- Public health activities
- Victims of abuse, neglect or domestic violence
- Judicial and administrative proceedings
- Law enforcement
- Workers' compensation
- Threats to health and safety/specialized government functions.

However, state law may also affect whether disclosures can be made in these circumstances. See the applicable policies and consult with the Privacy Officer if you have questions about requests of this type.

(University Exhibit #19).

The record establishes that the Grievant had received the mandatory training regarding the University and Boynton policies and regulations pertaining to the proper handling of confidential patient health information. In fact, the Grievant was required to attend additional training on this subject matter as the result of an incident that occurred in 2006.

It is the Employer's burden of proof to establish that the Grievant released confidential patient health information pertaining to Mr. Nordstrom. The record patently establishes that the Grievant released confidential patient health information regarding Mr. Nordstrom. The Grievant communicated the information verbally, by telephone, in response to a verbal request by Police Officer Hokanson. While Mr. Forte, a Boynton pharmacist, may have encouraged the Grievant to discuss this matter with Police Officer Hokanson, Mr. Forte did not order the Grievant to do so. In fact, there is no evidence that Mr. Forte could have even ordered the Grievant to discuss this matter with the police officer since Ms. Dahl is the Grievant's supervisor and not Mr. Forte.

It is clear that the Grievant acted independently and decided to discuss this matter with Police Officer Hokanson, without authorization or consent, to the release of the confidential health information by Mr. Nordstrom. Under Boynton policy, verbal communication of confidential patient health information, without the patient's consent, is allowed in the event of an emergency, and then only with the authorization of the medical director or designee.

It is undisputed that the Grievant did not seek nor receive authorization from the medical director or designee before verbally releasing Mr. Nordstrom's confidential patient health information. The Grievant does not dispute Ms. Dahl's testimony that Ms. Dahl, Colleen Jahnel, Boynton's designated Medical Records Custodian and Privacy Officer, and various other Boynton administrators were present and available for consultation prior to her discussing this matter with Police Officer Hokanson. The Grievant instead decided to make the decision to discuss this matter with Police Officer Hokanson on her own without consultation from anyone in authority.

The Grievant claims that the release of this confidential health information to Police Officer Hokanson was allowable since this situation constitutes an emergency, an exception to the release rule.

The record establishes that there was no emergency. According to the Boynton policy, emergencies include situations where the patient's life is in danger or where the patient has specifically threatened to harm another person. Nothing in the voice mail message left by Police Officer Hokanson for the Grievant remotely suggested the existence of an emergency. Moreover, the Grievant did not perceive the voice mail message as an emergency since she returned several other calls before responding to Police Officer Hokanson's voice mail message.

The Grievant asserts that she was justified in making the confidential medical release because the release came from a law enforcement officer.

The University policy "Disclosing Individual Health Information for Public Purposes" addresses the release of personal health information to law enforcement. (University Exhibit #14). Generally, such information may be released to law enforcement only with the patient's written authorization or pursuant to a court order or warrant. However, there are certain law enforcement situations where the patient information may be released without an authorization, court order, or warrant, including "suspicious injuries (where reporting is required for gunshot wounds, burns and perpetrators of crimes), medical examiner investigations, emergency situations, and child abuse

investigations." None of these situations was present in this case.

In the final analysis, the Grievant's conduct violated Boynton and University policy regarding the release of confidential patient health information. The Grievant's release of confidential patient health information was not authorized by "HIPAA Notice of Privacy Practices" provided to patients at Boynton (Union Exhibit #8), Minn. Stat. § 151.213 (Union Exhibit 9) or Minn. Stat. § 144.335 (Union Exhibit #10). A plain reading of those documents reveal no support for the Grievant's assertion that she was required or authorized to ignore University and Boynton policy and release Mr. Nordstrom's confidential patient health information to a police officer. The Grievant's assertions that the release policy was not clear, and/or that she was otherwise authorized to release the confidential patient health information were not supported by the evidence.

Since the Arbitrator has concluded from the evidence that the Grievant released confidential patient health information, without authorization, in violation of University and Boynton policy, there only remains the Arbitrator's determination of an appropriate remedy.

A factor traditionally considered by arbitrators when determining whether just cause exists is whether the penalty is

reasonably related to the employee's record and the gravity of the alleged offense. Enterprise Wire Co., 46 LA 359 (1966); IBEW, Local 97 v. Niagara Mohawk Power Corp., 143 F.3d 704, 710 (1998) (citing Elkouri & Elkouri, How Arbitration Works, 670-86 (4th ed. 1985)). "Some consideration generally is given to the past record of any disciplined or discharged employee. An offense may be mitigated by a good past record and it may be aggravated by a poor one. Indeed, the employee's past record often is a major factor in the determination of the proper penalty for the offense. Elkouri & Elkouri, How Arbitration Works, 983 (6th ed. 2003).

The Grievant has been a dedicated worker for the Employer for 23 years with a spotless discipline record. The Grievant testified that she is a "good" employee that values her job. This sentiment was also conveyed by Dr. Risdahl who works with the Grievant on a regular basis. After 23 years, the Grievant was terminated for an unfortunate mistake in judgment by releasing confidential patient health information to a police officer. However, the University suffered no averse impact from the Grievant's mistake in judgment. The patient in question signed a voluntary release of information form and his entire medical record was shared with police. He was later found guilty, convicted and sentenced for a felony drug crime. There

was no harm done to the University or Boynton. No one suffered because of the Grievant's actions except her.

Under direct testimony, the Grievant's supervisor (Ms. Dahl) was asked why she thought the Grievant would not learn from lesser discipline and correct her behavior regarding HIPAA in the future. Ms. Dahl said that the Grievant had a defiant attitude - specifically, in her choice to wear perfume. This begs the question: how can defiance be linked to wearing perfume? This testimony shows that the relationship between the Grievant and Ms. Dahl was strained before Ms. Dahl made the decision to terminate the Grievant rather than give her a lesser discipline for violating University and Boynton policy pertaining to the release of confidential patient health information.

Given the Grievant's length of service, spotless discipline history and good work record, a termination is not the appropriate discipline. Instead, the Grievant deserves a suspension without pay.

While arbitrators often speak of discharge as part of a disciplinary progression--a penalty which is a step above lesser penalties--the perception is flawed.

Discharge and suspension are separate and distinct penalties. Suspensions are corrective measures designed to rehabilitate... Discharge on the other hand is the severance of an employment relationship. An employer has no legitimate interest in whether or not a discharged employee ever achieves rehabilitation. Its sole purpose is to unburden the work force of an individual whose conduct has

become intolerable. In other words, discharge is designed to abolish the employment relationship; disciplinary suspension is designed to improve it.

Red Cross Blood Serv. and Mobile Unit Assistants Ass'n, 90 LA
393, 397 (1988).

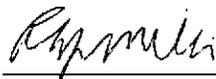
Clearly, the Grievant's actions cannot be condoned by the Arbitrator but, at the same time, the University's punishment of discharge is unwarranted. To discharge the Grievant in light of the unique facts and circumstances surrounding this case would be "excessive." It would represent an overkill on the part of the Employer. The appropriate remedy is reinstatement with no back pay. The degree of penalty assessed by the Arbitrator in the instant grievance is commensurate with the seriousness of the offense committed by the Grievant and her overall personnel and work records.

AWARD

Based upon the foregoing and the entire record, the grievance is sustained in part. Within 20 business days of the receipt of this Award, the University shall reinstate the Grievant, Patricia Pals, to her former CMA position at Boynton without any back pay.

The effective date of the Grievant's termination to her date of reinstatement shall be construed as a disciplinary suspension without any back pay. The Employer shall credit the Grievant

with all contractual benefits that are accorded an employee who has served a disciplinary suspension without pay.



Richard John Miller

Dated August 5, 2009, at Maple Grove, Minnesota.