

IN THE MATTER OF ARBITRATION

OPINION & AWARD

-between-

Grievance Arbitration

S.E.I.U. HEALTHCARE MINNESOTA

F.M.C.S. Case 08/58198

-and-

Re: Employee Discipline

**ALLINA HOSPITALS & CLINICS
BUFFALO, MINNESOTA**

**Before: Jay C. Fogelberg
Neutral Arbitrator**

Representation-

For the Company: Paul J. Zech, Attorney

For the Union: Brendan D. Cummins, Attorney

Statement of Jurisdiction-

The Collective Bargaining Agreement duly executed by the parties, provides, in Article 7, for an appeal to binding arbitration of those disputes that remain unresolved after being processed through the initial two steps of the grievance procedure. A formal complaint was submitted by the Union on behalf of the Grievant on or about May 21, 2009, and thereafter appealed to arbitration when the parties were unable to resolve this matter to their mutual satisfaction. The under-

signed was then selected as the Neutral Arbitrator from a panel provided to the parties by the Federal Mediation & Conciliation Service, Office of Arbitration, and a hearing convened on February 5, 2010 in Minneapolis, Minnesota. Following receipt of position statements, testimony and supportive documentation, each side indicated a preference for submitting written summary arguments. These documents were received by the Arbitrator on March 15, 2010, at which time the hearing was deemed officially closed. At the commencement of the proceedings, the parties stipulated that this matter was properly before the Arbitrator for resolution based upon its merits, and that the following represents a fair description of the issue.

The Issue-

Was the Grievant, Renae Branstad, terminated for just cause? If not, what shall the appropriate remedy be?

Preliminary Statement of the Facts-

The record developed during the course of the proceedings indicates that S.E.I.U. Healthcare Minnesota (hereafter "Union," or "SEIU") represents the hourly support staff working at approximately six hospitals

and various clinics owned and operated by Allina throughout the Twin Cities and surrounding areas. Included within this grouping is the acute health care facility located in Buffalo, Minnesota (“Employer,” “Hospital,” or “Administration”). Together, the parties have negotiated and entered into a collective bargaining agreement covering terms and conditions of employment.

Prior to her termination in May of last year, the Grievant worked at the Employer’s Buffalo Hospital for approximately five and one-half years as a Patient Registrar (“PR”). In that capacity she was responsible for gathering demographic information from the patient when they entered the hospital for treatment. This included such data as name, address, insurance carrier, social security number, etc.

All information received is entered into the Employer’s computer system by the Patient Registrar and recorded on an “Access Audit Report” (Hospital’s Ex. 7) which becomes part of the patient’s medical records. As such the information contained therein is protected and can be viewed, examined and utilized only for legitimate business reasons by the Administration.

On or about April 6, 2009 a patient (“Laura”) was admitted to the Hospital. She was also a “casual employee” at the facility. When she first

came in and registered as a patient, the Grievant was not yet at work. Subsequently, Laura left but later that same day was re-admitted. This time Ms. Branstad was at the reception desk and there is no dispute but that she performed her duties correctly; promptly closing out the record when finished and moved on to the next admission.

On that same day, the Registrar Manager at the Hospital, Lisa Winter, received a telephone call from another employee – a co-worker of Laura’s - who informed her that she (Laura) would not be at work the next day as she had been admitted to the Hospital. Ms. Winter testified that she thought this “strange,” wondering how the caller obtained this information. Winter in turn contacted the Employer’s Information Services Help Team who informed her that the records indicated Ms. Branstad had re-admitted Laura that same day. Winter then reviewed the Access Audit Report which notes each time a patient’s file is “opened” electronically.¹ It was discovered that the Grievant had accessed the patient’s medical record that day on three additional occasions. The Administration deemed this to be excessive when compared to other patients she had registered during that same shift, and when viewed along side one of Ms. Branstad’s peers. While two of the four occasions

¹ The reports register all entries into the patient’s record, down to the second.

were only for a second or two, it was believed that she had gone outside of the registration work flow.

A meeting was held with the Grievant and her Union representative, on April 9th at which time Management inquired as to why Ms. Branstad had gone into patient Laura's records an inordinate number of times three days earlier. According, to the Employer, the Grievant could not give them a definitive answer but could only speculate as to the reasons.²

Following further deliberations and meetings with members of the Hospital's Executive Committee, the Administration determined that Ms. Branstad had committed a "Level 3" breach of the Employer's Confidentiality of Patient Information Policy (Hospital's Ex. 12 *infra*), which generally mandates immediate termination. Accordingly, on April 19, 2009, Ms. Branstad was notified that she was being discharged for commission of a serious breach of patient privacy in connection with her repeated access to Laura's medical records "without legitimate business reasons" (Hospital's Ex. 13). Subsequently, a grievance was submitted on behalf of Ms. Branstad on May 21, 2009, alleging that the Administration's

² These included such tasks as printing labels, face sheets and QA reports.

actions were violative of the parties' collective bargaining agreement (SEIU Ex. 5).

Relevant Contractual & Policy Provisions-

From the Master Agreement:

Article 6
Corrective Action & Discharge

(A) Just Cause: The Employer shall not initiate corrective action, discharge or suspend an employee without just cause...

From the Employer's Code of Conduct:

* * *

Commitment 1.3 I respect the privacy of patients and families.

* * *

Each of us has a responsibility to respect patient privacy and should take extra care when discussing patient information with others....

From the Employer's Disciplinary Process (Breach of Patient Medical Information):

* * *

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

Position of the Parties-

The **HOSPITAL** takes the position in this matter that the discharge of Ms. Branstad was for just cause. In support, Management contends that although the Grievant was otherwise a very good employee, someone who commits a Level 3 breach of privacy is eligible for immediate termination under the published policies. Patient privacy is of paramount importance to any medical care facility and the Hospital has made a considerable effort to educate all of its employees regarding the importance of this; the potential consequence to the Employer should it be determined that a breach has occurred, and; the concomitant disciplinary ramifications to the employee. While the Hospital does not believe that the Grievant's actions were malicious, it doesn't matter as the policy (and relevant Federal and State law as well) consider reckless disregard of a patient's privacy to be just as serious. The Hospital argues that the Access Records for the time in question clearly indicate that the Grievant opened and viewed a patient's medical record all too frequently on the day in question, without the requisite attendant

legitimate business need. Further, they urge that Ms. Branstad had received ample training – both initially upon her being hired, and annually thereafter – in privacy matters and their importance to the Hospital. As she never offered any significant defense as to why she needed to access the patient’s file an additional three times on the day in question, it can only be concluded that she conducted herself with “reckless disregard” for their privacy rights. Accordingly, it is most appropriate that she be terminated and her grievance denied.

The **UNION**, on the other hand maintains that Ms. Branstad’s termination lacked the negotiated just cause requirement found in the parties’ Labor Agreement. In support, SEIU contends that the Grievant was an excellent employee by most any standard, having consistently received high marks for her work and without any previously recorded disciplinary incidents. On April 6th her entries into Laura’s record were all for legitimate business reasons and did not constitute malice or reckless disregard as to the consequences. Often, according to the Union, someone occupying the position of Patient Registrar must close a file temporarily and open it later when he or she is inundated with work. That is what occurred in this instance. SEIU argues that each time Ms. Branstad accessed the record it was for a legitimate business need such as to print

a label, view the face sheet, or to finish a QA sheet which sometimes happens toward the end of an employee's shift. The Union notes further that another Patient Registrar was found to have accessed the same file an inordinate number of times (in the Employer's view) without any apparent reason, but did not receive any discipline as a result. Such desperate treatment cannot support the termination of the Grievant here. Moreover, the Grievant was questioned regarding the April 6th access several days later by Management. She had no knowledge of the reason for the inquiry in advance, and was quite naturally nervous going into the meeting which directly affected her memory of the events. Furthermore, she asserts that she had checked in a considerable number of patients in the interim making a clear recollection of a few entries on the 6th – some of which only lasted literally one second – impossible. Thus she was forced to speculate as to the reasons. In any case, the Union urges that her viewing of the file was only for business reasons and nothing else. For all these reasons then they ask that the grievance be sustained and that Ms. Branstad be returned to her position and made whole.

Analysis of the Evidence-

As with most disciplinary disputes, the burden of proof lies initially with the Hospital in this instance to establish justification for their decision to terminate the Grievant based upon clear and convincing evidence. Then, in the event this standard has been met, they need to demonstrate the penalty administered was reasonable under the circumstances.

Following a thorough review of the evidence presented and the respective arguments of the parties, I find that the Administration's obligations have not been adequately met in this instance.

At the outset a number of relevant and unrefuted facts were established on the record. No one disputes the Hospital's need to protect the privacy of its patients. By both Federal and state law, the Employer is obligated to do so or otherwise risk incurring significant administrative penalties and/or civil liability. Indeed, HIPPA privacy rules require such health care entities as the Employer's to develop, implement and enforce policies and procedures to ensure the preservation of such rights. In addition, it is clear that the information gathered in connection with Laura's admission to the Hospital in April of last year fell within the purview of these laws and policies as protected personal health information.

It is also fact that Ms. Branstad was terminated under the Employer's Code of Conduct and more particularly their "Breach of Confidentiality Procedures" (Administration's Ex. 12) for what was determined to be a "Level 3" violation, *supra*. While the most extreme stage of the policy describes such an infraction as "Intentional use, access or disclosure with malice or with reckless disregard for the consequences," it has been well demonstrated that Management did not charge the Grievant with a malicious act but rather with her recklessness in accessing the patients records, "...more than once without legitimate business reason (*sic*)" (Hospital's Ex. 4; Branstad's Separation Form).

While there has been some intimation that the Grievant had an ulterior motive for her repeated access of the patient's data, i.e. to determine why a co-worker was in the hospital, this was never established on the record.³ As explained by Registration Manager Winter, and Human Resources Director Nikki Mills, during the course of their testimony,

³ The evidence indicates that the Grievant knew why Laura was being hospitalized as it was part of her job to ascertain the reason for seeking medical attention when being first admitted. Further Ms. Branstad recalled that Laura would exit her hospital bed with some frequency during the course of her stay to visit with staff members (including the Grievant) and give them updates regarding her condition. Nor does the record indicate that the Grievant accessed any additional diagnostic or procedural information or admissions comments thereafter regarding this patient's condition.

it was not necessarily what she viewed but rather the sheer number of times she accessed the material without any apparent legitimate business reason that led to her dismissal.

Neither is the propriety of Ms. Branstad's initial access to Laura's records on April 6, 2009, in issue. As a Patient Registrar in the Emergency Department ("ED") she was responsible for registering Laura that morning (Employer's Ex. 7). It is however, according to the Administration, the sheer volume of visits to the patient's computerized medical file without any apparent (legitimate) business reason following her admission, that Ms. Mills described as "very, very significant."

More particularly, the Employer takes issue with three subsequent times that Branstad entered the patient's record on the day in question. The "Excellian Report" – the Hospital's electronic medical records system – demonstrates that the Grievant accessed patient Laura's records at 11:39 a.m., 12:27 p.m. and again at 2:26 p.m. According to the Administration these three entries were without any apparent legitimate business reason, thereby resulting in a violation of the Code of Conduct which constituted a Level 3 infraction. The Union counters by arguing that the Grievant's entries at 11:39 and again at 12:27 were to only access the "Inpatient Facesheet" which is the first page that appears

when a PR opens a patient's record. This document, the evidence shows, contains a composite of relevant demographic and financial information as well as the patient's chief complaint. All of this, according to the Union, was entered by the Grievant that day as part of her normal duties. At the hearing, Ms. Branstad testified that she may have re-entered Laura's record subsequently at these times to print off Facesheets, or labels as requested by the nursing department, to obtain a piece of information for QA review, or to add or make corrections, all of which she described (without contradiction) as legitimate business reasons.⁴

Manager Winter testified that while a PR might need to re-enter a patient's record after completing the verification of registration and benefits ("V-Reg" and "V-Ben" respectively) they are nevertheless supposed to place a notation in the record explaining the purpose of the re-entry. Under cross-examination however, this witness acknowledged that there is no written policy in place requiring such notations to be made after each entry by a PR. SEIU's position would appear to be further buttressed by a memorandum authored by Ms. Winter dated April

⁴ The Grievant testified that she could not recall for certain the purpose of the additional entries as it occurred some time ago and moreover that she registers dozens of patients each day in the course of performing her duties.

10, 2009, couched in a form of a request, that registrars not “V-Ben an account” until they are “thoroughly and completely finished” working on it (Union’s Ex. 12). This “reminder” would appear to be less than a hard-and-fast rule as written and, perhaps more significantly, was distributed after April 6th.

The Hospital has also emphasized that following Laura’s initial registration, Ms. Branstad accessed her record in the “view only” mode more than once. This is significant according to Management, as it allows the user to look at privileged information, but not make any substantive changes to the record. However, there was insufficient evidence present here demonstrating that printing labels or a new Facesheet, or obtaining additional information for the log for QA purposes – all of which may not necessarily require substantive changes – would be considered an illegitimate business reason to revisit the file. In addition, while the Employer sought to compare Ms. Branstad’s repeated viewing of patient Laura’s record with other entries she made on April 6th, which averaged only once or twice, I do not find this evidence to be particularly illuminating as a single day does not necessarily establish an unusual pattern. Both the Grievant and another PR with eleven years of experience at the Hospital, Daryl Carlson, testified that the frequency

with which registrar accesses a file in any given day can vary widely from one or two times to five or six.

The Hospital's Human Resources Director allowed that, to the best of her recollection, the Employer has consistently terminated employees who have been found guilty of a Level 3 breach. Beyond the fact that an examination of the evidence raises significant doubt as to whether a breach has been established by Management in the first instance, there was also a paucity of documentation supporting this witnesses' assertion concerning the Hospital's past practice.

Other comparative data however, was proffered which I find more compelling.

It is unrefuted that subsequent to Ms. Branstad's termination, the Employer conducted a second investigation into the events of April 6th. Some five months later it was purportedly discovered that another PR, Donna Meidinger, had also accessed Laura's medical records for no apparent legitimate reason on the same day (Employer's Ex. 14). A review of the access audit report for Ms. Meidinger reveals that although she did not register patient Laura, she nevertheless entered her record no fewer than seven times on the day in question observing such data as the "Diagnoses Table," "workflow" charts, the "Procedures" table,

"Admissions Comments," the patient's prior stay and "workflow finished" totaling some ten seconds (*id.*) According to the Hospital's Health Information Manager, Jeri Romano, who conducted the additional investigation, when asked the reasons behind her actions on the 6th, Meidinger responded that she had no specific recollection why, but speculated that it might have been to print off labels – one of the same reasons given to Management by Ms. Branstad in the course of her interview (Union's Ex. 22). Significantly, Ms. Romano concluded that the actions of Meidinger were "questionable," noting the patient had already been admitted several hours earlier, and that there was an absence of any update or printed information from the chart (*id.*).

Ms. Meidinger, however, received no discipline.

The Hospital attempted to explain the dichotomy based on the amount of time that elapsed between the "event" and the investigation into Ms. Meidinger's activities; that there was a substantive level of activity during this time as opposed to a simple viewing; that her access appeared to coincide with the patient's transfer to a room in the unit, and; that she may have been asked by a unit nurse to access the record for purposes of updating it. None of these defenses are particularly persuasive, however.

It is most difficult to understand why Meidinger's conduct escaped the Employer's initial investigation back in April of 2009 – particularly when they professed that its genesis was a voice mail Ms. Winter received on the 6th from another Hospital employee, asking if she could work Laura's shift the next day. Winter stated she was "concerned" that someone had inappropriately accessed the patient's medical file and thus began her inquiry by examining the relevant documents. Presumably, the Administration was reviewing all instances of access that day and not looking at any particular PR's conduct. Indeed, Ms. Winter indicated as much in the course of her testimony. As the Union points out, it is most difficult to understand why Ms. Meidinger's activity in connection with the file was not discovered at the same time the Grievant's was – particularly when it was shown that the former made eight or so separate entries over a period of ten seconds (a considerable amount of time when viewed in relative terms) and she was not the one who registered the patient.⁵ This begs the question of why Meidinger was not investigated at the same time but rather some five or six months later. At minimum, the initial review of the files should have raised an inference of potential violation of

⁵ Further, in the course of her testimony, Ms. Mills acknowledged that there was "no explainable business reason" why Ms. Meidinger accessed Laura's file on April 6th.

the applicable policy. This lapse increases in significance when paired with the fact that it is one of the Employer's primary excuses for not disciplining Meidinger at all.

Additionally, the Employer's argument that Meidinger's conduct may have coincided with the patient being moved to a room in the unit, and that she may have been asked by a unit nurse to access the record, is largely speculative. There was no concrete evidence presented to support either theory.

Desperate treatment exists when employees engage in the same type of (alleged) misconduct under the same or substantially similar circumstances in the presence of the same or substantially similar mitigating factors but are assessed with significantly different penalties. The components to be measured and weighed, as the term is meant in arbitral principles of industrial due process, include the seriousness of the misconduct as compared to that of other employees afforded lesser penalties, and the disciplinary record of the aggrieved as compared to others given lesser penalties. This case presents a near classic example of the definition. In light of the evidence, I must conclude that the severe discipline imposed on Ms. Branstad when compared to the total lack of same for Ms. Meidinger was both discriminatory and largely indefensible.

Finally, I have taken into consideration the Grievant's work record in the course of examining the evidence here. While such an exercise is normally reserved for evaluation of the penalty imposed – as a potential mitigating factor – in this instance I find it serves as support for the Union's claim that no breach of confidentiality has been demonstrated. It is unrefuted that Ms. Branstad had compiled an excellent work record prior to her termination. Both her supervisor and Ms. Mills testified that she was a "good quality worker." Over a period of 5½ years, the Grievant had absolutely no prior discipline imposed. This includes the absence of any incident accusing her of accessing patient information that she was not authorized to obtain. At the hearing Ms. Branstad testified that she takes very seriously the confidentiality of patient medical data and consistently strives to protect it as part of her job responsibilities. Her work history is most supportive of this claim.

Award-

That the Hospital has a genuine need to protect their patients' personal medical information and a reasonable expectation that their employees will maintain this confidence is undisputed. Indeed, in light of applicable law, any such health care facility needs to take adequate

steps to insure the protection of their patients' health information. The facility at Buffalo is no exception. In this instance however, I find the preponderant evidence fails to demonstrate that the Grievant committed the infraction with which she has been charged. Simply put, there is insufficient proof of a confidentiality violation on the part of the accused. Moreover, I conclude that the Administration engaged in desperate treatment of an otherwise excellent employee when Ms. Meidinger's situation is taken into consideration. For these reasons then, the Union's grievance is sustained. The Employer is directed to forthwith reinstate Ms. Branstad to her former position and to make her whole. The financial obligation of the Hospital in connection with the implementation of this remedy, however, shall be offset by any earnings or income the Grievant has received in the interim.

I will retain jurisdiction in this matter for the sole purpose of resolving any dispute that may arise in connection with the remedy ordered.

Respectfully submitted this 14th day of April, 2010.

Jay C. Fogelberg, Neutral Arbitrator