

IN THE MATTER OF ARBITRATION BETWEEN

Hennepin County Medical Center,

Employer,

and

AFSCME Council Five, Local 2474,

Union.

DECISION AND AWARD

BMS CASE NO. 11-PA-0615

ARBITRATOR:

Stephen A. Bard

DATE OF HEARING:

April 15, 2011

PLACE OF HEARING:

Hennepin County Government Center

DATE OF RECEIPT OF POST-HEARING BRIEFS:

May 6, 2011

DATE OF DECISION AND AWARD:

May 15, 2011

GRIEVANT:

Andrew Brinkhaus

APPEARANCES:

For the Employer:

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For the Union:

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INTRODUCTION

This matter came on for arbitration before Neutral Arbitrator Stephen A. Bard, on April 15, 2011, at 9:00 a.m. in the Hennepin County Government Center in Minneapolis, Minnesota.

The Employer was present with its witnesses and was represented by Mr. Anthony G. de Sam Lazaro. The Union was present with its witnesses and was represented by Ms. Jill Kielblock.

The parties stipulated that there were no issues of timeliness or arbitrability and that the case was properly before the Arbitrator for a decision on the merits. Testimony and exhibits were taken at the time of the hearing and at the conclusion thereof the parties agreed to simultaneously serve and submit briefs on May 6, 2011.

ISSUES

1. Did the Employer violate the Collective Bargaining Agreement when it terminated the employment of the grievant?
2. If so, what is the remedy?

RELEVANT CONTRACT PROVISIONS

The following provisions of the Collective Bargaining Agreement are relevant to a decision of this case.

ARTICLE 33-DISCIPLINE

Section 1. The EMPLOYER will discipline employees in the classified service only for just cause.

Section 2. Discipline, when administered, will be in one or more of the following forms and normally in the following order:

- A. Oral Reprimand
- B. Written Reprimand
- C. Suspension
- D. Discharge or disciplinary demotion.

RELEVANT PROVISIONS OF HCMC POLICY ON RELEASE OF PROTECTED HEALTH INFORMATION

DEFINITIONS

Protected Health Information: Individually identifiable information, including all medical, financial, and demographic information that is created, collected, or maintained by Hennepin County Medical Center (HCMC) relating to past, present, or future health care or payment for health care. Information may be gathered at the time of interview, examination, diagnosis, intervention, or treatment of the patient, and will be comprised of data in the institutional medical record, medical images, specimens marked with patient identifiers, and other ancillary materials.

POLICY

Protected Health Information shall be released only through patient consent or appropriate authorization and in compliance with applicable laws.

Licensed registered nurses, members of the medical staff, residents/fellows, and dependent allied health professionals at Hennepin County Medical Center are the only individuals that respond to patient information requests on patient care areas over the telephone or in person.

RELEVANT PROVISIONS OF HCMC POLICY ON PATIENT RIGHTS AND RESPONSIBILITIES

All patients, patient's guardian or representative have:

.....

12. The right to privacy.
13. The right to confidentiality....
17. The right to personal privacy

RELEVANT PROVISIONS OF HCMC MCPO/SOC BEHAVIOR GUIDELINES

MCPO/SOC staff shall abide by all laws and HCMC policies regarding patient confidentiality....

MCPO/SOC staff should immediately communicate to the Duty Security Supervisor all significant information they receive as part of their duties. Violations of law, ethics, or policy should be immediately reported to the Duty Security Supervisor.

RELEVANT PROVISIONS OF HIPPA LAW AND REGULATIONS

45 CODE OF FEDERAL REGULATIONS §160.103 Definitions

Health information means any information, whether oral or recorded in any form or medium, that:

- (1) Is created or received by a health care provider, health plan, public health authority, employer, life insurer, school or university, or health care clearinghouse; and
- (2) Relates to the past, present, or future physical or mental health or condition of an individual; the provision of health care to an individual; or the past, present, or future payment for the provision of health care to an individual.

Individually identifiable health information is information that is a subset of health information, including demographic information collected from an individual, and:

- (1) Is created or received by a health care provider, health plan, employer, or health care clearinghouse; and
- (2) Relates to the past, present, or future physical or mental health or condition of an individual; the provision of health care to an individual; or the past, present, or future payment for the provision of health care to an individual; and
 - (i) That identifies the individual; or
 - (ii) With respect to which there is a reasonable basis to believe the information can be used to identify the individual

Protected health information means individually identifiable health information:

- (1) Except as provided in paragraph (2) of this definition, that is:
 - (i) Transmitted by electronic media;
 - (ii) Maintained in electronic media; or
 - (iii) Transmitted or maintained in any other form or medium.
- (2) *Protected health information* excludes individually identifiable health information in:
 - (i) Education records covered by the Family Educational Rights and Privacy Act, as amended, 20 U.S.C. 1232g;
 - (ii) Records described at 20 U.S.C. 1232g(a)(4)(B)(iv); and
 - (iii) Employment records held by a covered entity in its role as employer.

FINDINGS OF FACT

The Arbitrator finds that the following facts are either not in dispute or have been established by a fair preponderance of the evidence by the party having the burden of proof.

1. The grievant began working at HCMC on August 18, 2008 as a Medical Center Protection Officer (MCPO). Prior to his discharge in 2010 which is the subject of this grievance, the grievant received two annual performance reviews in which he was judged “fully capable” in all aspects pertaining to his job performance. In July 2010, he was presented with an “Award of Valor” for

outstanding dedication and bravery in dealing with a man with a gun outside the emergency department on July 21, 2010.

According to the “Contact Record” which was introduced into evidence, in a little over two years of employment, the grievant received some measure of discipline, including six “coachings” over how to handle certain aspects of his job better, as well as two verbal reprimands. He also received several “Thank You” notes and kudos for positive action. Although not flawless, his overall job performance was positive and the negatives were within tolerable limits and subject to improvement with training and experience.

2. In the case of HCMC’s Protection Officers, training related to patient privacy occurs at three points in time – 1) new employee orientation; 2) during the Field Training process; and 3) as part of an annual computer based confidentiality training. The evidence supports a finding that during the grievant’s new employee orientation, approximately one-half hour was spent addressing patient confidentiality through an introduction to HIPPA, the Minnesota Data Practices Act, and other related information.

The unrefuted testimony of Protection Officer Denne Nelson provided information about the level of detail covered about patient confidentiality during the Field Training process. Officer Nelson testified that he is a long time employee of HCMC and has served as a Field Training Officer for many years. He testified about his own frustration at the lack of training provided about what HCMC obviously views as an important topic and indicated that as a Field Training Officer he had not been provided with any more detail than any other Protection Officer. His testimony about what is covered on the subject of HIPPA compliance and patient confidentiality as part of the Field Training Manual was that it is very sketchy and at best appears to simply reiterate the definition of Protected Health Information contained in the HCMC Policy. The field training does not contain

situational specific information related to the duties of the HCMC Protection Officer.

The third area of training involves the confidentiality training that is a computer-based program each HCMC employee must take annually. A review of the power point slides that are part of that training shows that there is no detailed discussion about when an individual becomes a patient or what protected health information is.

Both Officer Rob Schoffstall and the grievant supported Officer Nelson's testimony that the training they received was limited in terms of truly understanding how HIPPA related confidentiality concerns related to their normal job duties.

3. The grievant was required to sign a confidentiality agreement annually, certifying that he understood the confidentiality rules under which he worked. That agreement states that "any data which the employee or agent is aware of should not be shared unless required by another employee in the performance of his/her duties," and that employees "are responsible for complying with the various rules, regulations and laws governing the collection, creation, storage, maintenance, dissemination and access to data." Above the signature line is an agreement that if the employee has any questions, he "will direct them to my supervisor or the Information Security & Privacy Officer." The grievant testified that he thought he understood the rules and thus had no questions to ask. However, he also testified that the training was "incomplete," "not applicable to his job," and "confusing."

4. On August 21, 2010 two women came to the HCMC Emergency Department seeking treatment for one of the women who was bleeding from the face. Upon entering the triage area of HCMC, the individuals first approached Officers Brinkhaus and Meints who were in the area as part of their normal patrol. It was at that time that the grievant asked what had happened and was told that one of the women had been involved in a hit and run accident in which she ran into another

vehicle and then left the scene. This interaction lasted approximately ten seconds before the grievant escorted the women to the triage desk. He then he stepped away for about a minute before walking back to the treatment area where the two women were speaking to the admitting nurse. He leaned over the desk and listened to the conversation between the patient and the nurse for about one minute before walking over to the security booth and calling the Minneapolis Police (MPD). The grievant testified that the only information that he overheard while leaning over the counter was of the “where does it hurt” variety.

HCMC witnesses provided hearsay testimony that Officer Brinkhaus obtained the information he provided during the call to the police by “hanging out” at the triage area and hearing it during the intake interview. Yet they provided no first hand evidence via testimony of the nurse that was actually interacting with the individual nor written patient records as to what was actually discussed during the interaction between the nurse and the individual. The HCMC Triage nurse who testified was the nurse that filed the complaint, not the one that was actually involved in this situation. Therefore the grievant’s testimony about when he obtained the information that a hit and run had occurred stands effectively unrefuted.

5. Whether the grievant consulted with other MCPOs on duty before calling the police was a matter of conflicting testimony. The grievant testified that he consulted both MCPO Brittany Meints and MCPO Cody Larson before calling, while Mr. Larson testified that this was not the case. The Arbitrator has not resolved this fact issue since he deems it ultimately unimportant to a decision of this case.

6. The phone call to the MPD was recorded and the recording and a transcript of it were introduced into evidence. On the recording of the phone call, the grievant can be heard stating to someone that “she’s fucking drunk” before the dispatcher picks up the line. He tells the police

dispatcher that a girl had just come into the hospital “all messed up” and that she “smell[ed] of alcohol” and that she had told him she may have been in a hit and run on Hennepin Avenue.. The grievant also ascertained and disclosed to the dispatcher the make, model, and color of the vehicle that the patient had been driving. At the end of the call, the grievant asked “So, if you want to send a car over?”

7. The grievant testified that he intended to notify his supervisor, John Gravermoen, about the incident after it occurred but simply hadn’t yet had a chance to do so. Mr. Gravermoen testified that he was available via phone and/or walkie-talkie within moments. Furthermore, by the time that Mr. Gravermoen was made aware of the incident by way of Charge Nurse Jean Tersteeg, the police had already arrived and visited the patient’s room. The statement of MCPO Brittany Meints states that this was at least 30-40 minutes after the call had been made. This provided the grievant with ample time to report to his supervisor what had happened, as is required by HCMC policy.

8. An “event form” alleging a possible violation of HIPPA rules by the grievant was filed by charge nurse Jean Tersteeg. The grievant then filed an Incident Report stating his version of events. In that report he stated, *inter alia*, that after speaking with Supervisor Gravermoen about the matter, he was informed that “...per HIPPA, we are not to call Law Enforcement about any patient in the hospital.” He stated he was unaware of this as were other officers on the shift. An investigation followed which ultimately led to the termination of the grievant’s employment on September 21, 2011. The reasons stated for the termination were that the grievant had acted outside the scope of a Protection Officer, that he had shared protected health information with authorities that led to their identification of the owner of a car involved in a hit and run accident, that his intention in making the call to the police was not, as he contended, motivated by a genuine concern for public safety, and that his actions had violated not only HIPPA, but also HCMC’S policies on Release of

Protected Health Information, Patient Rights and Responsibilities, and Security Department policy B-3 MCPO/SCC Behavior Guidelines. This grievance followed.

POSITION OF THE EMPLOYER

The Employer's arguments in defense of its actions are summarized below.

1. The grievant's testimony had numerous inconsistencies. In addition, his complaints about inadequate training are contradicted by the forms he signed acknowledging that he had received the training and that he understood the requirements of HIPPA regulations and HCMC Policies.
2. The young woman became a patient as soon as she walked into the emergency department doors. While the HIPAA regulations do not define explicitly when a person becomes a "patient," the preamble to the federal regulations does address the precise situation presented here.

The definition of protected health information, for instance, would now apply to a **statement by a patient that is overheard by a hospital security guard in a waiting room.** Such a statement would have been outside the scope of the proposed rule (unless it was memorialized in an electronic record), but is within the scope of the final rule.

Standards for Privacy of Individually Identifiable Health Information, 65 Fed. Reg. 82,462, at 82,539 (Dec. 28, 2000) (emphasis added). In addition, HCMC policies generally presume that an individual who arrives at the hospital is a patient before they are registered.

3. The information Mr. Brinkhaus disclosed to the police was the make, model and color of the car the patient drove, that she smelled of alcohol and that she had been involved in a hit and run. The patient's friend shared that information orally with the grievant. This transmission is Protected Health Information ("PHI") under its definition in 45 C.F.R § 160.103 (2010).
4. HIPAA exceptions allowing disclosure of PHI do not apply.
5. The grievant's intent in making the phone call to the police was not actually concern for a

victim or public safety.

6. Even if the grievant's actions somehow did not constitute a HIPAA violation, they clearly were serious policy violations. All of the language in the HIPAA regulations regarding permissive disclosures refers to actions on the part of the "Covered Entity." HCMC Policy is quite clear as to whose role it is to contact law enforcement officials when appropriate, in other words who is authorized to act on behalf of the covered entity in such situations.

The HCMC Policy on the Release of Protected Health Information in person, and by telephone clearly states that "Licensed registered nurses, members of the medical staff, residents/fellows, and dependent allied health professionals at Hennepin County Medical Center are the only individuals that respond to patient information requests on patient care areas over the telephone or in person. . . . Nowhere in the policy are Protection Officers like Mr. Brinkhaus authorized to disclose such information either in responding to requests or by affirmatively reaching out to the police.

7. Violation of patient confidentiality is very serious. Numerous courts have concluded that an employee disclosing confidential information warrants discharge.

8. The grievant's conduct during the investigation was an aggravating factor. It was felt that he was not forthcoming during the investigation and at the investigatory meeting would only answer questions by reading from his incident report. There were also inconsistencies in his statements.

POSITION OF THE UNION

The arguments of the Union in support of the grievance can be summarized as follows:

1. The information disclosed by the grievant to the police was not "Health Information",

“Protected Health Information” nor “Individually Identifiable Health Information” as those terms are defined in the HIPPA law and applicable regulations. All three definitions indicate that the information “relates to the past, present, or future physical or mental health or condition of an individual; the provision of health care to an individual; or the past, present, or future payment for the provision of health care to an individual.”

2. The grievant’s training on HIPPA and patient confidentiality was cursory and inadequate and did not prepare him to interpret properly intricate and technical regulation language as it applied to this situation. The determination that an employee makes about what information can or cannot be released is more a matter of what information an employee is able to glean from the training provided to him along with his experience in applying that training, than what the formal definitions are in the law or regulation.

3. There was also confusion as to when an individual is considered to be a patient. Even though Ms. Reidun Hanson, the Information and Security and Privacy Officer at HCMC, testified that in her opinion one becomes a patient the minute he or she enters HCMC property, she acknowledged that it is not clearly defined in HIPPA regulations or in any of the policies that are referenced in the grievant’s letter of termination. The definition of “patient” also does not appear to be covered in the training that is provided to HCMC employees and to Protection Officers in particular. HCMC wants to hold the grievant accountable for a level of knowledge based on Ms. Hanson’s interpretation, but that information was never communicated to him. A reasonable assumption is that one becomes a patient when one has gone through triage and is formally admitted to HCMC. The information that Officer Brinkhaus obtained and used in making the determination to initiate the call to Minneapolis Police and Fire Emergency Call Center was obtained prior to the triage process. Therefore in his mind it was acceptable to discuss information received since the individual was not yet a patient of HCMC.

4. Most calls to police, fire and emergency personnel at HCMC go through the internal call center and a dispatcher makes the actual contact. However nothing in any of the policies cited in the grievant's termination letter, the Protection Officer job description or the Field Training Manual require such a process in every situation. HCMC witness Gravermoen indicated that although he believes Officer Brinkhaus should have consulted with a supervisor prior to making the call there was no hard and fast directive that supervisors must be contacted before making contact with police, fire and emergency personnel. In fact, Officer Brinkhaus' explanation of making the call since he was close to the individual involved in case additional information was required makes sense.

DISCUSSION

BURDEN AND QUANTUM OF PROOF

The burden of proving "just cause" for discipline is on the employer. The burden must be carried by a fair preponderance of the evidence. *Elkouri and Elkouri, How Arbitration Works, Sixth Edition*, pp. 949-950.

DID THE GRIEVANT VIOLATE THE HIPPA LAW OR REGULATIONS?

Was the disclosed information "Health Information" as defined in 45 CFR §160.103?

The information disclosed to the police consisted of the make, model, color and year of the woman's car, the fact that she appeared to be drunk, and that she had admitted to having been in a hit and run accident. The definition of "Health Information" includes oral as well as written information created or received by a health care provider *and* "... relates to the past, present, or future physical or mental health or condition of an individual; the provision of health care to an individual; or the past, present, or future payment for the provision of health care to an individual."

The information provided to the police by the grievant did not relate to her health, her medical condition, her treatment, or payment. It was clearly not “Health Care Information.”

Was the disclosed information “Individually Identifiable Health Information” as defined in 45 CFR §160.103?

“Individually Identifiable Health Information” is defined as a “subset” of Health Information. Since the information was not “Health Information,” it is also not “Individually Identifiable Health Information” even though the information could and did help identify the individual involved in the hit and run accident.

Was the disclosed information “Protected Health Information” as defined in 45 CFR §160.103?

Since the Arbitrator has concluded that the disclosed information did not constitute either “Health Information” or “Individually Identifiable Health Information,” it follows that it also can not be considered “Protected Health Information” within the meaning of HIPPA and its regulations. However there is an additional reason to support this conclusion. “Protected Health Information” is defined as “individually identifiable health information” which:

- “(1) Except as provided in paragraph (2) of this definition, is:
 - (i) Transmitted by electronic media;
 - (ii) Maintained in electronic media; or
 - (iii) Transmitted or maintained in any other form or medium.”

The disclosed information was obtained verbally and clearly falls outside of the above definition of. “Protected Health Information.”

The Arbitrator has arrived at the above interpretation of the HIPPA Regulations based on the plain, clear, and unambiguous meaning of the words. All statutes and regulations are to be construed in that fashion and in accordance with the purpose and intent of the law. Clearly, in passing HIPPA, Congress intended to safeguard the confidentiality of medical records which consist

of information pertaining to a patient's health, medical condition, and treatment. Not every word uttered in a hospital falls into that category or within a zone of a patient's reasonable expectation of privacy. If, to take an extreme example, a Security Officer walking down the hall of a hospital in the course of his duty passed a room with an open door and overheard a patient confessing to a visitor that he had committed a robbery the day before he was admitted, no reasonable interpretation of the words of the HIPPA regulations would make that "health information", protected or otherwise.

The application of the HIPPA Regulations to the instant fact situation requires an interpretation of definitions and exceptions which is subtle and technical. For example, Mr. Martin Williams, the Director of Security and Parking for HCMC, participated in the decision to terminate the grievant's employment. Under cross-examination, Mr. Williams admitted that he was unable to definitely answer whether or not the information given to the police by the grievant constituted a "permitted disclosure" within the meaning of 45 CFR §164,512 (6). If a man with his expertise on the subject cannot be sure of that answer, it seems to this Arbitrator patently unreasonable to require the grievant, with his very limited training on the subject, to understand the application of the regulations to this situation.

The Arbitrator's decision that grievant did not disclose Protected Health Information makes it unnecessary to consider the issues of when a person becomes a "patient" and whether any of the exceptions to non-disclosure of Protected Health Information apply.

Did the grievant violate any of the HCMC Policies in his call to the police?

In light of his conclusion that the revealed information was not "Protected Health Information," its disclosure to the police did not violate HCMC's policy against release of such information. Similarly, the Arbitrator does not consider that its release violated the Policy on

Patient's Rights and Responsibilities.

The same is not the case in regard to the HCMC MCPO/SOC Behavior Guidelines which provides in relevant part that "MCPO/SOC staff should immediately communicate to the Duty Security Supervisor all significant information they receive as part of their duties. Violations of law, ethics, or policy should be immediately reported to the Duty Security Supervisor." The grievant did not follow this procedure and, accordingly, violated this policy which properly subjected him to some form of discipline. This is an important matter since any organization like a hospital must necessarily maintain a clear chain of command and responsibility in order to properly manage its affairs. In taking it upon himself to call the police instead of reporting it to his Supervisor, the grievant exceeded the scope of his authority.

Was termination of employment appropriate discipline?

The employer argues that disclosure of Protected Health Information is serious enough to warrant discharge and cites several cases in support of that position. Although it is not strictly necessary to a decision of this case in light of the holding that the grievant did not disclose Protected Health Information, a brief discussion of those cases may be helpful in future situations.

In the Arbitration between the University of Minnesota, Boynton Health Clinic and AFSCME Council 5, Local 3260, BMS CASE NO. 09-PA-0140, the grievant was terminated for disclosing protected health information to the police. The case is distinguishable in that there was no question that the information that was disclosed was protected health information. The issue was whether or not it fell under the "emergency" exception allowing disclosure in response to a police request. Arbitrator Miller concluded that the exception did not apply, that the grievant had in fact violated HIPPA, but that under all of the circumstances the discipline of termination was too severe.

UHC Management Company, Inc. v. Fulk is an unpublished opinion of the Minnesota Court of Appeals from 1995. As such it may not be cited as binding precedent on lower courts. The Respondent had accessed the private medical records of a subscriber who had been involved with his domestic partner in order to learn medical information that could affect his health status. He divulged that information to his partner. The Court of Appeals held that this constituted misconduct justifying his discharge and disqualifying him from receiving unemployment insurance benefits. While agreeing with the decision, the Arbitrator does not believe that it has direct applicability to this case.

In summary, the Arbitrator has decided that:

1. The grievant did not disclose Health Information, Individually Identifiable Health Information, or Protected Health Information in violation of HIPPA. Even if his actions did constitute a violation of HIPPA, his training was inadequate to allow him to understand what was required of him or forbidden to him in these circumstances. The lack of sufficient training is not rendered moot by his signature on the training forms.
2. The grievant did not violate the HCMC Policy on Release of Protected Health Information.
3. The grievant did not violate the HCMC Policy on Patient's Rights and Responsibilities.
4. The grievant did violate HCMC MCPO/SOC Behavior Guidelines by failing to report the matter to his Supervisor promptly and taking it upon himself to call the police.
5. Overall, the grievant has a good employment record and is unlikely to repeat this offense under similar circumstances. The purpose of progressive discipline is to teach, not punish, and it is clear that the grievant has learned a painful lesson from this episode.
6. Termination of Employment is too severe a discipline for the offense actually committed. The grievant was discharged without just cause. In the opinion of the Arbitrator, an appropriate penalty

would be a written warning for failure to notify his Supervisor in a timely fashion and exceeding the scope of his authority in calling the police to report the incident..

DECISION AND AWARD

For the above stated reasons the grievance is sustained. The termination of grievant's employment is reduced to a written reprimand consistent with this opinion. The grievant is reinstated to his job immediately with full back pay and no loss of seniority. The employer is entitled to credit for all money earned by the grievant since his termination as well as any money received as unemployment compensation benefits.

Respectfully Submitted

Stephen A. Bard, Arbitrator