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October 22, 2015

Redacted for Publication

OPINION AND AWARD

IN ARBITRATION PROCEEDINGS

PURSUANT TO A

COLLECTIVE BARGAINING AGREEMENT

In the Matter of a Controversy Between	)	
	)	
US Department of the Army, Fort Carson CO, Agency	)	
and	)	[Grievant] Suspension Grievance FMCS Case No. 15 – 50198 - 3
American Federation of Government Employees	)	
Local 1345, Union	)	

APPEARANCES:

For the Agency: William D. Hennessy, Labor Attorney
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Fort Carson, CO 80913-4303

For the Union: Albert Rivera, President
American Federation of Government Employees Local 1345
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PROCEDURAL BACKGROUND

The above-referenced matter was processed through the grievance procedure contained in the collective bargaining agreement (CBA) between the parties. Remaining unresolved, it was submitted to final and binding arbitration. The undersigned was selected as the arbitrator by mutual agreement of the parties from a list provided by the Federal Mediation and Conciliation Service. The matter was heard on September 1, 2015 in Fort Carson, Colorado. The parties stipulated that the matter was properly before the arbitrator and that all steps of the grievance procedure had been met or waived. The parties also stipulated that the arbitrator retains jurisdiction for the purpose of the implementation of the remedy in the event that the arbitrator grants in whole or in part the remedy sought by the union.

Both parties were afforded full opportunity to present documentary evidence and to examine and cross-examine witnesses. Both parties were ably represented by their respective representatives. At the conclusion of the hearing, the parties chose to conclude their presentations by written briefs. The briefs were received on or before September 29, 2015 and the matter was submitted for decision.

ISSUE

The issue in this matter is formulated as follows:

> Was the three-day suspension of [Grievant] in March 2014 for such cause as will promote the efficiency of the service? If not, what is the proper remedy?

RELEVANT CONTRACT, RULES and POLICY PROVISIONS

Negotiated Agreement Between American Federation of Government Employees Local 1345 and Headquarters Fort Carson and US Army Medical Department Activity, Amended July 1999

Article 20 – Disciplinary and Adverse Actions

Section 1. Definitions

a. Disciplinary actions consist of Letters of Reprimand and Suspensions of 14 days or less.

Section 2. Cause and Timeliness

Suspensions for 14 days or less and Adverse Actions will be timely and taken for such cause as will promote the efficiency of the service.

Section 3. Considering the Employee's Views

As part of the decision-making process the Employer will discuss with the employee, if available, the basis for the Disciplinary or Adverse Action. This discussion and careful consideration will take place before the Employer issues any written notices to the employee.

Health Insurance Portability and Accountability Act (HIPAA)

Privacy Rule 164.502 (i) A Covered entity may not use or disclose protected health information in a manner that is inconsistent with its notice of information practices, specifically, reviewing electronic privacy records for a potential unofficial use.

Dept. of Health and Human Services – 45 CFR

164.530 Administrative Requirements

(e) (1) **Standard: Sanctions**. A covered entity must have and apply appropriate sanctions against members of its workforce who fail to comply with the privacy policies and procedures of the covered entity…

MEDDAC (Medical Command) Pamphlet No. 6025 – Security Compliance (HIPAA)

Appendix R – Sanctioning of Workforce

2. Policy

a. EACH[1] will apply appropriate sanctions against members of its workforce…who fail to comply with the EACH policies and procedures.

b. All sanction actions will be done through the Human Resources process using the whole person concept of records and supervisor review. The type of sanction(s) applied shall vary depending on the severity of the violation, whether the violation was intentional or unintentional, whether the violation indicates a pattern or practice of improper access, use or disclosure of health information, and similar factors.

3. Procedures

a. The following sanctions apply as **<u>guidelines</u>** for the human resources process for any failure to comply with EACH policies or procedures or with the requirements of HIPAA privacy and security regulations:

(2) For Substantiated HIPAA Report:

Class I offenses:

1. Accessing information that you do not need to do your job

[1] The acronym EACH refers to Evans Army Community Hospital.

Class II offenses:

1. Second offense of any class I offense (does not have to be the same offense)
2. Unauthorized use or disclosure of PHI

Sanctions

Class I Sanctions shall include, but are not limited to:

a. Verbal reprimand
b. Written reprimand in employee's personnel file
c. Retraining on HIPAA awareness
d. Retraining on MTF Privacy Policies …
e. Retraining on the proper use of internal forms…

Class II Sanctions shall include, but are not limited to:

a. Written reprimand in employee's personnel file
b. Retraining on HIPAA awareness
c. Retraining on MTF Privacy Policies …
d. Retraining on the proper use of internal forms…
e. Suspension of employee (In reference to suspension period: minimum of one day / maximum of three days)

b. HIPAA Officer in conjunction with the Human Resources department is responsible for determining the severity of sanctions necessary.

FACTS

The HIPAA Violation Incident of July 31, 2013: The Grievant is an Office Support Assistant in the Department of Medical Readiness. She is assigned to the Medical Boards Section at the Evans Army Community Hospital (EACH). At the time of the incident, she had six years of service.

At the end of her shift on July 31, 2013, the Grievant went in to the work computer at her work station and looked up a personal friend, Captain [A], on the medical records system. She had no business reason to access Captain [A]'s record. Documents assembled later by investigators indicate that she opened the private patient record of Captain [A] at 4:22 PM and closed it at 4:28 PM. The record indicated that she accessed both the "Demographics" module and the "Previous Encounters" (patient medical information) module.

When asked at the arbitration hearing why she did this, she said that she wanted to "verify his status" with the US Army. She wanted to "find his rank and where he lived." She testified:

> He had come to visit me. We were good friends.

In a statement the Grievant wrote on 12/18/13 for the investigation of the incident, she wrote as follows:

> The reason I was in Capt. [A]'s medical record was not for malicious or vindictive reasons at all. I met Capt. [A] on an online dating website and for my personal protection I wanted to validate who he said he was.

The Grievant was asked during the hearing why, instead of violating patient privacy, she did not properly utilize the Army Knowledge Online (AKO) system to look up Captain [A]'s information. She acknowledged that she knew how to use that AKO system. She had no explanation of why she did not use it in this instance.

During her testimony, the Grievant acknowledged that she had received HIPAA training as noted in her training record – initial training in April 2012 and refresher training in March 2013. She also acknowledged that the training included warnings about potential sanctions and potential civil and criminal liability for HIPAA violations.

The Grievant's Co-Worker Reports Her Unauthorized Medical Record Access: On August 12, 2013, the Grievant's co-worker [Employee B] filed a "Health Information Privacy Complaint" against the Grievant.[2] The complaint alleged that, on or about August 1, 2013, she observed her co-worker [Grievant] looking at medical notes on Captain [A]. In a statement attached to her signed complaint, she alleged that she was aware that the Grievant had "briefly dated" Captain [A].

[Employee B]'s complaint was turned over to [Employee C], HIPAA Compliance Officer for EACH. On September 5, 2013, [Employee C] began his investigation. He requested information from the facility's Information Management Division (IMD) on this alleged breach. IMD ran a data report on September 17, 2013. The report verified the essence of the complaint, but determined that it took place one day earlier than that identified by the Grievant's co-worker.

[2] [Employee B] did not testify at the hearing. Since she was not available to testify in person, counsel for the Agency requested that she be allowed to testify by speakerphone. The arbitrator sustained the Union representative's objection to this procedure, agreeing that it would provide insufficient opportunity for assessment of credibility. The Agency representative then requested that [Employee B] be allowed to testify using "FaceTime" on a smartphone. This request was also denied by the arbitrator, on the same grounds.

On December 2, 2013, [Employee C] called the Grievant into his office and spoke with her about his findings. The Grievant admitted that she had improperly accessed Captain [A]'s patient record. [Employee C] wrote four follow-up memos that day. The first was to [Employee B], informing her that her complaint had been substantiated and assuring [Employee B] that proper steps were being taken to address the breach.

The second memo was to the Grievant, notifying her that the complaint was substantiated and that she should confer with her chain of command. He wrote the third memo to the Grievant's supervisor, Dr. [D]. His memo read, in pertinent part:

> I recommend that as [Grievant]'s supervisor (you) follow the appropriate adverse actions process through the human resources department…Please ensure a letter is forwarded from the supervisor to the HIPAA compliance officer for inclusion in the case file explaining the outcome of the supervisor's actions to this substantiated HIPAA privacy violation.

Finally, [Employee C] wrote to Captain [A], informing him of the violation. ([Employee C] testified that he could not find Captain [A]'s address, so he did not send the memo. He did however speak with him on the phone.) The memo stated "Based on your letter no further HIPAA actions were taken." It was not clear from the record in this case what "letter" [Employee C] is referring to. However, the record includes an email from [Employee C] dated December 19, 2013 (seventeen days after the date on the memo to Captain [A]). That email from Captain [A] to [Employee C] reads, in relevant part:

> …it was just recently brought to my attention of this matter concerning [Grievant], and the use of her position to review private information in my records. It is unfortunate that these events have come to light; however, she is a close friend to me and what has occurred was not done with malicious intent or to bring harm to my person or my personal identifiable information. I have not been negatively impacted by this action; nor do I hold any resentment to her personally or professionally because of this circumstance…I hope she is able to be given reconsideration to return to her regular duties…Please allow her the opportunity to continue in her capacity to serve the United States Army Medical Command.

In the meantime, the Grievant was denied computer access and reassigned to non-computer duties within the hospital. She was also given refresher training on HIPAA official use policy by [Employee C] in his office on 12/18/13.

[Employee C] testified that, as the Compliance Officer, he does not determine adverse actions. He refers supervisors to the guidelines and to human resources. He did testify that, in his opinion, the Grievant's offense should be classified as Class I (lowest level) under the MEDDAC 6025 guidelines (cited above.) He also testified that in his opinion "retraining would be sufficient in this instance."

The Grievant's Supervisors Recommend and Decide on a Three-Day Suspension: Dr. [D] testified that she consulted with human resources prior to recommending a penalty. They gave Dr. [D] a range of possibilities, from a written reprimand to a longer suspension. Legal advisers told her about a recent 10-day suspension for a HIPAA breach at EACH. She said that she had to justify to them why a shorter suspension was in order. She believed that the Grievant's conduct was not "malicious." But Dr. [D] noted that she has been in the medical field since 1984, and this is the first intentional patient privacy violation she has encountered.

On 1/28/14, Dr. [D] wrote a Memorandum proposing a three-day suspension. In the memo, she noted that she considered the Grievant's years of service and "fully successful" recent performance rating. She noted that the Grievant was observed by her co-worker improperly accessing a medical record. She also made note of the Grievant's recent refresher training on HIPAA, in March 2013.

Colonel [E], MD, Chief of the Department of Medical Readiness, was the deciding official. Colonel [E] testified that he reviewed all the documents, and considered the *Douglas*[3] factors in making his decision. He created a document, entered into the record, that listed each Douglas factor and applied it to the facts of this case. In regard to one factor, "The notoriety of the offense or its impact upon the reputation of the agency," he noted:

> If the affected party whose PHI was accessed inappropriately had filed an official complaint, both [Grievant] and the organization would potentially have been at significant risk for a large monetary penalty IAW HIPAA regulations.

While "reassured" by Captain [A]'s email, Colonel [E] still noted the "potentially significant liability." Colonel [E] testified that he considered the Grievant's breach a Class II violation, noting that she did what she did "for her own personal gain."

By memo of 3/11/14, he informed the Grievant that he supported the supervisor's recommendation and that she was to serve her suspension March 17 – 19, 2014.

The Union filed a grievance on behalf of the Grievant. At the time of the Grievance, the Union filed a request for information on other HIPAA violations and the resulting penalties. It made this request in support of its argument that the Grievant was subject to disparate treatment.

[3] Factors commonly utilized in federal sector disciplinary cases, derived from *Douglas v. Veterans Administration, 5 M.S.P.R. 280 (1981).*

Evidence of Other Employee HIPAA Violations and Resulting Discipline is Obtained: In response to the Union's request, the Agency produced two documents. One, from [Employee C]'s files, included all employee HIPAA violations that had come to his attention since 2009 – a total of eighteen cases. Since [Employee C] relied on supervisors getting back to him with information on employee outcomes, he testified that his records about subsequent discipline were incomplete.

[Employee C]'s records indicate three violations in 2013, including that of the Grievant. The other two cases were a "verbal disclosure" violation that resulted in retraining, and a "no official need to be in the record" case that resulted in a 10-day suspension. That case initially was recommended as a 30-day suspension. It involved an EACH employee who, along with dozens of other agency employees nationwide, improperly looked up the medical record of the "Navy shooter" after the highly-publicized shooting at the Naval Yard in Virginia.

Responding to the Union's request, the agency also produced a second chart of seven similar cases. The chart, prepared by the Civilian Personnel Advisory Center (CPAC), listed employee discipline resulting from HIPAA violations from 2009 – 2013. The incident that appears to be the closest comparator to the instant case is a 2012 breach by a medical support assistant. The issue in that case was listed as "accessing patient's PII" and the ultimate penalty was a five-day suspension.

Also on that chart were two 2011 incidents involving nurses, both charged with a generic "HIPAA Violation." Both received letters of reprimand.

AGENCY'S POSITION

The Agency argues that the negotiated agreement between the parties is the controlling document, since this case involves a suspension of 14 days or less. MSPB case law is not determinative, but it is informative. The Agency contends that the arbitrator must apply the "efficiency of the service" standard. It is appropriate, the Agency continues, for the arbitrator to also apply a more traditional "just cause" standard common in the field of labor relations.

The Agency asserts that the employer has provided sufficient evidence of misconduct, the penalty was demonstrably reasonable, and should not be incrementally adjusted. Moreover, no procedural errors were raised by the Union in this case.

The Grievant admitted her misconduct. There is a clear nexus between that misconduct and the efficiency of the service. She works in a hospital, and purposefully violated patient confidentiality. She had recently received refresher training in HIPAA rules.

The penalty assessed by the Agency was in line with penalties assessed on other employees for similar violations, the Agency argues. And local sanctions guidelines were not violated by this action. Those guidelines merely establish minimum penalties.

The Agency contends that the employer suffered a financial loss because of the Grievant's misconduct, since she had to be temporarily reassigned away from her normal duties.

The Agency asks that the discipline be sustained.

UNION'S POSITION

The Union contends that the discipline was not imposed fairly and equitably. The investigator assigned to this case determined that the Grievant was guilty of a Class I violation, and the maximum penalty for that is a one-day suspension.

The deciding official, the Union argues, overrode the investigator's determination classifying the offense as Class II without a stated reason for doing so. Apparently, the deciding official took the word of a co-worker without getting the Grievant's side of the story.

The Union contends that the pattern is to give retraining and verbal reprimands for similar violations. The 2013 ten-day suspension was a different kind of case that brought notoriety to the Agency.

The arbitrator, the Union argues, has the authority under case law precedent, to mitigate the penalty in cases of suspensions of fourteen days or less. The arbitrator must determine if the penalty was reasonable. The Union asks that the arbitrator examine the penalty and find that it was out of line with penalties for similar infractions. The suspension should be rescinded – the proper sanction is retraining in this instance.

DISCUSSION

Discipline of the Grievant was for Just Cause and for the Efficiency of the Service: There is little disagreement about the facts of this case. The Grievant, for personal reasons having nothing to do with her job, inappropriately accessed the patient records of a friend. After her co-worker reported this

unauthorized access, the breach was investigated and confirmed. When confronted with the evidence, the Grievant admitted her wrongdoing. She also conceded that she knew it was wrong, that she had been trained in HIPAA procedures, and was aware of the potential consequences of violating the HIPAA rules.

There is some question about what exactly the Grievant saw when she opened the patient record of Captain [A]. The Agency relies in part on a statement written by the Grievant's co-worker, the one who "blew the whistle" on the Grievant. However, since that individual did not testify at the hearing (for reasons explained above), the arbitrator will not give [Employee B]'s statement evidentiary weight.

On the other hand, collateral evidence points to the probability that the Grievant looked at more than just the "demographic" page, as she testified. The computer record indicates that the "previous encounters" page was open on her screen. The Grievant testified that she was familiar with the AKO system and knew that demographic information could have been obtained there, without running afoul of regulations. It appears to the undersigned that the Grievant was attempting to view her friend's medical information.

The undersigned concludes that the Grievant violated rules that she understood. The arbitrator also concludes that the Grievant was aware that she could be disciplined for doing so, did not come forward to self-report this lapse, and admitted it only after her co-worker filed a complaint.

The Penalty of a Three-Day Suspension was Reasonable under these Particular Circumstances: The parties have a slightly different view of the standard to be applied in this case, but their respective arguments converge. The Agency argues that the MSPB factors should apply, but that these factors also subsume the appropriate concept of "just cause." The Union argues that the arbitrator must consider mitigating factors, assess the reasonableness of the penalty, and not defer to management's view of the appropriate penalty. The undersigned agrees with both of these points of view, and will apply all of these measurements in the following analysis.

Potentially, the Union's strongest arguments for mitigation in this case are those of disparate treatment and failure of the Agency to follow its own guidelines. Those arguments will be addressed in separate sections below. The remainder of this section concerns other mitigating and exacerbating factors.

The Union argues that the fact that the target of the breach, Captain [A], wrote in favor of leniency should mitigate the penalty. Management witnesses affirmed this Union view, expressing that the Agency was relieved that no patient complaint was pursued. The undersigned interjects a cautionary note in this assessment that underscores the appropriateness of the suspension penalty, even for a first

offense. This HIPAA breach was motivated by the Grievant's desire to "protect herself" by secretly (she thought) gathering information about someone she was considering dating. By its very nature, the evolving relationship she had with the target was volatile and had high potential for disequilibrium. Captain [A]'s forgiving stance expressed in the email, while reassuring at the time, could have morphed into something less benign had there been a negative turn in this personal relationship. As a result, the Agency could have been exposed to greater liability.

The fact that the Grievant did not admit to the violation until confronted with the evidence also supports the assessment of the strong penalty. She had many days to think about what she had done – at least a week – prior to her co-worker coming forward. The fact that she did not self-report is a significant factor.

The Union argues that the deciding official was swayed by the statement of the co-worker in assessing the penalty, and that the Grievant's side of the story was not obtained. There was no documentary evidence or testimony presented at hearing supporting either of these contentions. The Agency consistently based its penalty decision on factors other than the co-worker's statement. As for obtaining the Grievant's point of view, this was done in the initial investigatory stage, and there was no need for the exercise to be repeated.

The Agency Did Follow Its Own Guidelines, Contrary to the Union's Assertion: The Employer has developed guidelines for appropriate sanctions in cases of HIPAA violations. The Agency, in closing briefing, asserts that these guidelines spell out "minimum" sanctions for various kinds of infractions. The Union argues, in essence, that these sanctions are "maximum" penalties not to be exceeded. The undersigned does not agree with either characterization. Rather, the sanctions in the MEDDAC Pamphlet 6025 table constitute an illustrative list. The phrase "shall include, but are not limited to" is key here. Read in conjunction with the next pamphlet clause about the means by which the severity of sanctions is to be determined, the guidelines give management flexibility. The exercise of that flexibility is ultimately subject to arbitral review.

The importance of this flexibility is revealed by the facts and charges in this case. [Employee C], the compliance officer, determined that the Grievant's actions constituted a Class I violation. She had "access[ed] information that you do not need to know to do your job." Colonel [E] considered it a Class II violation, noting that the Grievant did what she did "for personal gain."

Both of these assessments are reasonable. The difference is that Dr. [D] and Colonel [E] are in the Grievant's chain of command and had to make the ultimate determination on the penalty. [Employee C]

was candid in his testimony that he believed that retraining would have been sufficient. But he was also quite clear, in contemporaneous memos and in testimony, that it is not his role to determine the sanction.

Clearly, the deciding official gave serious thought to the issue of the appropriateness of the penalty. His charting of the case factors against the *Douglas* factors is strong evidence of a careful deliberative process.

The Union Has Not Made a Persuasive Case for Disparate Treatment: If a penalty seems to reasonably fit the circumstances, as it does in this case, the burden is on the Union to make the case that this employee has been treated more harshly than other Agency employees in similar circumstances.

The charts produced by the employer in response to Union information requests do lay out an overall pattern of discipline for HIPAA violations. Those charts show penalties ranging from retraining to resignation pending termination.

The Union argues that the data shows that, prior to 2013, employees received lesser penalties for offenses similar to that committed by the Grievant. The charts show, for example, two nurses in 2011 who received letters of reprimand for HIPAA violations.

But this general assertion falls short in a critical respect. The Union has not shown, even with a prima facie case, that the offenses of those other employees were indeed comparable to that of the Grievant. There was no documentary or testimonial evidence presented at hearing indicating the nature of those nurses' HIPAA violations.

Comparing two or more employees' misdeeds is an inexact business, at best. A host of exacerbating and mitigating factors go into disciplinary decisions. All of these factors influence how an arbitrator might view a disparate treatment claim. Unfortunately for the Union in this instance, the arbitrator was not presented with enough information on the conduct of the two nurses even to begin that type of comparative analysis.

The Grievant, to her credit, was forthright in admitting her misconduct. According to the Compliance Officer, she was fully cooperative in the retraining process she went through after the incident. And, fortunately for the Agency, no additional harm has come to the employer as a result of this breach. Nonetheless, the three-day suspension is appropriate given the totality of circumstances.

AWARD

The three-day suspension of the Grievant was for such cause as will promote the efficiency of the service. The grievance is denied.

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Paul D. Roose, Arbitrator

Date: October 22, 2015