

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between
**THE WISCONSIN FEDERATION OF NURSES
AND HEALTH PROFESSIONALS, LOCAL 5001, AFT, AFL-CIO**

and

ST. FRANCIS HOSPITAL

Case 47
No. 68407
A-6344

Appearances:

Mr. Jeffrey P. Sweetland, Esq., Hawks, Quindel, Ehlke & Perry, S.C., 700 West Michigan, Suite 500, P.O. Box 442, Milwaukee, Wisconsin 53201-0442, appeared on behalf of the Union.

Ms. Stacie J. Andritsch, Vice-President and Associate General Counsel, Wheaton Franciscan Healthcare, 400 West River Woods Parkway, Glendale, Wisconsin 53212, on behalf of the Employer.

ARBITRATION AWARD

On December 9, 2008, the Wisconsin Federation of Nurses and Health Professionals, Local 5001, AFT, AFL-CIO and St. Francis Hospital filed a request with the Wisconsin Employment Relations Commission to initiate grievance arbitration. Pursuant to a subsequent request of the parties, the Commission designated Coleen A. Burns, a Commission staff member, as Arbitrator to hear and decide a grievance pending between the parties. A hearing was conducted on January 26, 2009 in Milwaukee, Wisconsin. The hearing was transcribed and post-hearing briefs were submitted and exchanged on March 16, 2009.

Having considered the arguments of the parties and the record as a whole, the undersigned makes the following Award.

ISSUES

The parties have stipulated to the following statement of the issues:

Was A.L. terminated for just cause?

If not, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE 3
Management Rights

3.01

The Union recognizes that the Hospital has an obligation of serving the public by providing high quality, efficient and economical care, and in meeting medical emergencies. The Union further recognizes that, in fulfilling its obligation, the Hospital must act in conformity with Sections 50.32 et. Seq. Wis. Stats., HSS 124, Wis. Adm. Code, and related regulations and statutes. Accordingly, it is agreed that the Hospital has the unilateral and exclusive right to operate and manage the Hospital so as to be in conformity with the provisions of those statutes and the rules and regulations promulgated under those statutes.

3.02

Without limiting the generality of the foregoing, and except as expressly and specifically limited or restricted by a particular provision of this Agreement, the Hospital's management rights include: ... the right to suspend, to discipline and to discharge for just cause any employee; ... and the right to reasonably make, modify, or change and publish or enforce employment rules, policies and practices.

3.04

It is agreed that the listing of management rights as noted above shall not be deemed to exclude other management rights and prerogatives not specifically listed above.

...

ARTICLE 23
Grievance Procedure

...

C. The decision of the arbitrator, if within the arbitrator's authority, shall be final and binding upon the employee, the Hospital and the Union. The arbitrator shall have no authority to add to, to take from, nullify, modify or alter any of the terms or provisions of this Agreement; or to impair any of the rights

reserved to management, directly or indirectly, under the terms of this Agreement, including substituting his or her judgment for that of management; and the sole authority of the arbitrator is to render a decision as to the meaning and interpretation of this Agreement with respect to issue(s) presented to the Arbitrator by the parties. If a matter is beyond the scope of the arbitrator's authority, s/he shall return the submission to the parties without action.

D. . . . The decision of the arbitrator shall be presented in written form, and shall be final and binding on the Hospital, the Union and the affected employee(s).

ARTICLE 25
Obligation of the Employees

Employees will use their best efforts to perform all of their work in a timely and proper and efficient manner. They will observe the reasonable rules that are published by the Hospital from time to time.

. . .

ARTICLE 32
Discipline/Discharge

32.01.

Discipline/Discharge. The Hospital shall not discharge or discipline any employee except for just cause. A grievance over a discharge or suspension must be initiated at Step 3 of the Problem-Solving Procedure within eight (8) calendar days from the discharge or suspension.

. . .

32.04

Suspension to Investigate. Employees may be suspended pending the outcome of an investigation. Such an investigation is not disciplinary action until and unless final action is taken by management at the conclusion of the investigation. At the conclusion of the investigation management will determine whether the investigation period, in whole or in part, should be considered disciplinary time off. If the investigation results in no discipline or a verbal or a written warning, less than a final written warning, the employee will receive back pay for the period of the investigation. If disciplinary time off is imposed, the employee will not receive back pay unless the investigation period is longer than the disciplinary period. A final written warning at the conclusion of the

investigation will explain how much of the investigation period is to be considered disciplinary time off.

...

BACKGROUND AND FACTS

St. Francis Hospital, hereafter Employer, is located in Milwaukee, Wisconsin. A.L., hereafter the Grievant, has been employed as a Health Unit Coordinator, also referred to as a Unit Clerk, since 1977. The Grievant's job duties included scheduling patient procedures, entering charge information, reviewing registration information, and ensuring that appropriate paperwork is present for patients receiving services. The Grievant had a password and user name that permitted the Grievant to log onto the hospital's computer network and access various hospital databases.

In response to a complaint from an individual (the Grievant's adult son) that the Grievant may have accessed hospital records to obtain information that was not needed to perform her job, the Employer, on September 16, 2008, ran an SDK report, covering a three month period, to determine whether or not the Grievant had accessed this account. This report showed that the Grievant's password and user name had been used to access the Grievant's son's records in July and August of 2008 and to view screens containing patient information. The Employer then reviewed their scheduling system to determine if the Grievant had a work related reason to access this information and concluded that the Grievant did not.

During a meeting to discuss the son's complaint and the results of the Employer's initial investigation, the Grievant admitted that she had accessed her son's information. The Grievant was sent home and the Employer continued its investigation. During the continued investigation, the Employer ran two other reports. These reports showed additional incidents of accessing the Grievant's son's information, as well as the information of three other individuals, without a work related reason.

In a letter to the Grievant dated September 19, 2008, the Employer stated as follows:

On September 15th, 2008 a potential breach of patient information was reported to Human Resources. The complaint alleged that you had accessed their information outside the scope of your position within Wheaton Franciscan Healthcare for the purposes of learning the patients address.

After completing our investigation you have admitted to viewing the medical record information on multiple occasions for this patient, which we have confirmed happened on 8 different occasions since November of 2007. Our investigation has also reveled (sic) that over the last 90 days you have also viewed the records of 3 other individuals for which you had no legitimate business need.

On February 1st, 2008, you received specific Health Insurance Portability Accountability Act of 1996 (HIPAA) training on confidentiality of all “health information, business information, and/or management information (collectively defined as “Confidential Information”)”. You signed a “Confidentiality Statement” that included the following:

1. I agree only to access information that is needed to do my job. I also agree only to disclose or discuss confidential information, including patient information, with those who need the information in order to do their job. I also agree not to disclose or discuss any confidential information outside the workplace.
2. I understand that I am responsible for understanding and following the laws, regulations, and policies that apply to my work.
3. I agree not to change, inquire or delete information except when authorized as part of my work responsibilities.
4. I understand that violation of this agreement may result in disciplinary action, up to and including loss of privileges, suspension and /or termination of employment.

Based on the seriousness of these infractions we are terminating your employment for gross misconduct, which was a willful and intentional disregard of Wheaton Franciscan Healthcare policy and procedure and patient interest.

...

At the time of the Grievant’s discharge, the Employer had a policy which contained language similar to a policy adopted shortly after the Grievant’s discharge. This policy contains the following language:

Expectations of Personal Conduct

WFH is committed to upholding the highest standards of conduct in order to create an environment that is reflective of WFH’s Mission, Vision and Values. As such, WFH is committed to fostering working relationships and conditions that reflect WFH’s Values and provide the highest quality standards for patient care and service excellence. Such standards of conduct are necessary for the efficient and orderly operation of WFH as well as for the benefit and protection of the rights and safety of all patients and associates.

Associates are required to meet all WFH service standards, compliance standards, regulatory standards and legal standards.

...

Violations of these expectations and standards are subject to discipline, up to and including discharge, depending on the seriousness of the violation, the surrounding circumstances, and the past record of the associate.

...

An Associate who commits an act that is offensive to the rules of common sense or decency, or an act that violates a published policy or standard of conduct of WFH, will face disciplinary action. Examples of violations include, but are not limited to:

...

2. Violation(s) of the Drug Free Workplace: Alcohol, Drug and Controlled Substance Abuse Program, HIPPA, criminal background and state caregiver laws, corporate compliance standards, Office of Inspector General regulations, or the rules or regulations of any other licensing or regulatory agency violations.

...

The Union grieved the Grievant's termination and the parties submitted this grievance to the final and binding arbitration procedure provided for in their collective bargaining agreement.

POSITIONS OF THE PARTIES

Employer

The Grievant has received extensive training regarding prohibited access to confidential information and has signed a "Confidentiality Statement" acknowledging her understanding of the Employer's confidentiality rules, including the rule that employees will only access information that is needed to do their job. The Grievant has also received notice that violations of the Employer's confidentiality rule may result in disciplinary action, up to and including termination of employment.

After the Grievant's son contacted the hospital to state his belief that the Grievant had accessed his records without authorization, the Employer conducted an investigation of hospital records. The Employer's investigation revealed that the Grievant accessed her son's records on eight (8) different occasions since November of 2007. The Employer's investigation

further revealed that the Grievant had accessed screens containing demographic information, medical appointments and their location, insurance and employer information.

During the investigation of her son's complaint, the Grievant admitted that she had accessed information on her son. Further investigation of hospital records revealed that the Grievant had accessed information on three other individuals when this information was not needed to perform the Grievant's job. Two of the three (3) individuals were current employees of the hospital and the third individual was a former employee of the hospital.

Prior to imposing discipline, the Employer considered a number of factors, such as the number of times that the Grievant admittedly accessed her son's information; that she had accessed similar information on three other patients; that she had received extensive training regarding prohibited access to confidential information, including demographic information; that the Grievant had committed multiple HIPAA violations; and that the Employer has consistently terminated others who have engaged in similar behavior.

The Grievant's stated reason for repeatedly accessing her son's records is compelling; but does not excuse her misconduct. Given the Grievant's behavior and the hospital's past practice of not tolerating this type of behavior, the grievance should be denied.

Union

The Employer has the burden to establish that it has just cause to discharge the Grievant. The just cause standard confers upon the arbitrator the authority to reduce a penalty imposed by management even when the arbitrator agrees that the employee has engaged in misconduct.

The appropriate level of discipline is not determined only by the act of misconduct. Consideration may also be given to mitigating factors; such as the employee's length of service and work record, and extenuating factors; such as the employee's personal circumstances that provide a context and reason for his/her actions.

Discharge is the capital punishment of the workplace. As such, it is generally warranted only for the most severe of offenses; when the employee has been disciplined for the same or similar offenses in the past; and when no lesser punishment would deter such conduct in the future.

The report relied upon by the Employer indicates, at most, that someone accessed the reports of these three individuals while the Grievant was logged on. Others had the opportunity to use the Grievant's computer to access information at times that the Grievant was not at her station.

The Grievant admits that she accessed her son's records, but denies that she accessed the records of the three other individuals. The hospital's evidence is insufficient to establish that the Grievant accessed the information of the three other individuals.

The Grievant had good extenuating reasons for her conduct and her conduct does not reflect a willful disregard of the hospital's interests. The Grievant's infraction was not of such a severe nature as would inherently warrant immediate dismissal. The Grievant's discharge is disproportionate in relation to other disciplines for HIPAA violations at the hospital.

The Grievant's years of service and good work record are mitigating factors. Nothing in the Grievant's work record suggests that lesser discipline would not correct the problem. The discharge should be set aside and replaced with a short-term suspension without pay.

DISCUSSION

The Employer's reasons for discharging the Grievant are set forth in the termination letter of September 19, 2008. As set forth in this letter, the Grievant was discharged for "gross misconduct, which was a willful and intentional disregard of Wheaton Franciscan policy and procedure and patient interest." The alleged "gross misconduct" was the intentional viewing of medical records information without a legitimate business need. As stipulated by the parties, the issue to be decided by the arbitrator is whether or not the Grievant was terminated for just cause.

A review of the termination letter reveals that the Employer's disciplinary decision was based upon two separate allegations. The first allegation was that she viewed the medical records of one patient on multiple occasions since November of 2007 for personal reasons. The second allegation is that she viewed, over a ninety (90) day period, "the records of 3 other individuals for which (the Grievant) had no legitimate business need."

The Grievant has acknowledged that she viewed the medical records of one patient (the Grievant's adult son) as asserted by the Employer. The Grievant has denied that she viewed the records of "3 other individuals" as asserted by the Employer.

Allegation that the Grievant viewed the records of 3 other individuals

At hearing, the Grievant denied that she had "viewed the records of 3 other individuals for which (the Grievant) had no legitimate business need" as asserted in the termination letter. The Grievant states that, when she was confronted with these allegations on September 19, 2008, she told Employer Supervisor Gansemer and Human Resource Director Bauer that she had not done it.

Gansemer and Bauer testified at hearing. Gansemer recalls that the Grievant was asked if information on these three other individuals was needed for her job and the Grievant said "No." Bauer did not testify regarding the meeting of September 19, 2008. Neither Gansemer's testimony, nor any other record evidence, rebuts the Grievant's testimony that, when confronted by the Employer, she told the Employer that she had not "viewed the records of 3 other individuals for which (the Grievant) had no legitimate business need" as alleged by the Employer.

No witness claimed to have observed the Grievant access the records of the “3 other individuals.” The Employer relies upon computer usage reports indicating that the information of these “3 other individuals” had been accessed through use of the Grievant’s user name and password.

According to the Grievant, her user name is her employee number and she has had the same password for at least fifteen years. The Grievant indicates that, although she never shared her password with another employee or observed another employee using her password; it is possible that another employee knew her password.

The Grievant recalls that, at times after she had entered her user name and password to log onto her computer, she would leave her computer unattended in order to perform work or for other reasons. The Grievant maintains that, at such times, other employees would have an opportunity to use the Grievant’s computer to access information through the use of the Grievant’s ID number and password without being noticed. According to the Grievant, she had understood that she would be automatically logged off after ten minutes, but now understands that the automatic log-off time is fifteen minutes.

Gansemer confirms that, at times, the Grievant’s work required that she leave the area where her computer is located. According to this supervisor, through Employer training, the Grievant knew that she was required to log off prior to leaving her computer unattended.

Gansemer states that her own user name and password have not changed in ten years. Gansemer’s testimony indicates that the Grievant has trained employees; that it is physically possible for a trainee to observe numbers being keyed in by the Grievant; and that Gansemer assumes that the Grievant would take steps to protect her password.

By failing to log off at times that she was not in control of her computer, the Grievant may have violated Employer rules. However, as a review of the discharge letter reveals, such a rules violation was not a basis for the Employer’s discharge decision and, therefore, cannot be relied upon by the Employer to justify its decision to terminate the Grievant’s employment.

In summary, the records of the “3 other individuals” were accessed using the Grievant’s user name and password. It is evident, however, that an employee other than the Grievant could have accessed these records by using the Grievant’s user name and password.

The Grievant’s testimony that she did not view the records of “3 other individuals” as asserted by Employer is not rebutted by the record evidence. Accordingly, the Employer’s claim that the Grievant engaged in misconduct by viewing the records of the “3 other individuals” has not been proven.

Allegation that the Grievant viewed the medical record of her adult son

In the termination letter, the Employer asserts that from November, 2007 until the date of her discharge, the Grievant, on eight separate occasions, accessed her adult son's hospital records for the purpose of obtaining information for personal use. The Grievant does not dispute that she accessed her son's records on eight different occasions. The Grievant admits that she was seeking information for personal reasons and did not need to access her son's records in order to perform her job.

According to the Grievant, she accessed the SDK site for the purpose of obtaining her son's current address and the location of any scheduled appointments. Screens displaying the information sought by the Grievant also displayed other information, such as date of birth and social security information.

In 2002, the Grievant signed a "Confidentiality Statement" in which she agreed "only to access information that is needed for her job" and acknowledged that she understood "that violation of this agreement may result in disciplinary action, up to and including loss of privileges, suspension and /or termination of employment." Subsequently, the Grievant received training and information on patient confidentiality requirements, including HIPAA requirements. At hearing, the Grievant confirmed her understanding that the Employer's "rule of thumb" was that, if you did not need to access information for your job, don't access it.

Under HIPAA, the Employer is required to comply with certain patient privacy requirements and a privacy breach occurs when the patient's protected health information (PHI) is used when it should not be. The HIPAA training provided by the Employer was sufficient to place the Grievant on notice that it was a HIPAA violation for the Grievant to access the SDK site for the purpose of obtaining her son's current address, as well as the location of any scheduled appointments, unless such information was needed to perform the Grievant's job. The HIPAA training provided by the Employer also placed the Grievant on notice that such a HIPAA violation could subject the Grievant to disciplinary action, including suspension or termination.

According to Bauer, if a HIPAA investigation were to be conducted and a violation found, the Employer could face civil and criminal penalties. Bauer further states that HIPAA violations could affect hospital accreditation, as well as Medicare/Medicaid reimbursements. Given the likelihood that individuals would not patronize a hospital that did not protect the confidentiality of patient records, as well the Employer's need to comply with HIPAA requirements, the Employer rule restricting employee access of records to only that information needed to perform the employee's job serves a significant employer interest.

In summary, on eight occasions, the Grievant violated a reasonable Employer rule by accessing her son's medical records for the purpose of obtaining information that was not needed to perform her job. The Grievant has engaged in misconduct as alleged by the Employer. By engaging in this misconduct, the Grievant has given the Employer just cause to

discipline the Grievant. The undersigned turns to the issue of whether or not the Employer has just cause to discipline the Grievant by terminating her employment.

Appropriate level of discipline under the just cause standard

The Union acknowledges that some level of discipline is appropriate, but argues that, based upon the Grievant's work record and the surrounding circumstances, discharge is too excessive. While agreeing that, in determining the appropriate level of discipline, it is appropriate to consider work record and surrounding circumstances, Bauer disagrees that discharge is too excessive.

According to Bauer, when HIPAA was newly implemented, intentional violations of HIPAA did not necessarily result in discharge; but that after employees received training and became familiar with HIPAA requirements, the Employer moved to the standard of terminating employees who have committed intentional breaches. Bauer defines an "intentional breach" as one in which an employee who has no legitimate business need would deliberately access information for their own personal gain. Bauer's testimony concerning the discharge policy for intentional breaches is not contradicted by other record evidence.

Bauer states that, at the time of the discharge decision, he was aware that the Grievant had been employed by the hospital for over thirty years and, to his knowledge, the Grievant did not have prior discipline. According to Bauer, the Grievant's discharge was justified given the existing Employer policy of discharging employees for intentional breaches and the number of times that the Grievant intentionally accessed HIPAA protected information.

The testimony of Union local representative Deborah Acuff and Gansemer demonstrates that there have been four other employees who have been discharged for HIPAA violations. According to Acuff, these discharges included an employee who had accessed records to determine the condition of a related baby and then reported that condition to other relatives; an employee who browsed patient and employee records when the employee had nothing else to do; and an employee who had seen the death notice of an acquaintance and accessed hospital records for the purpose of determining the prior health status of that acquaintance. Gansemer recalls that the fourth employee had accessed patient records of her mother, for which she had a power of attorney, as well as co-workers and that information accessed included the health status of a physician who had coded. Acuff's testimony indicates that one of the discharged employees had one HIPAA violation. Gansemer's testimony indicates that another of the discharged employees may have accessed information on as many as sixty occasions.

Two other employees received counseling for disclosing HIPAA protected information, *i.e.*, that a patient was at a lab for an EKG and preadmission testing. Based upon the record evidence, this information was disclosed to an individual who had claimed to be a friend of the patient; stated that she was supposed to pick-up the patient, but was unsure of which area of the hospital the patient was at; and asked for assistance in locating the patient.

The Union argues that the Grievant's discharge is disproportionate in that, unlike the previously discharged employees, the Grievant did not access the Physician's Portal because she understood that the information contained therein would be HIPAA-protected medical information and that the Grievant restricted herself to information that she believed, incorrectly, would not create a HIPAA problem. Under the Employer's rule, information regarding the Grievant's son's address, as well as information regarding her son's future medical appointments, is information that may not be obtained from hospital records unless such information is needed to perform the Grievant's job. The rule does not differentiate information on the basis of the portal accessed. Nor does the rule differentiate employee conduct upon the basis of whether or not the employee knew the information being accessed was HIPAA-protected.

In the present case, the Grievant engaged in the same type of misconduct for which the other four employees were discharged, *i.e.*, intentionally accessing information that was protected by HIPAA without a legitimate need for the information and for personal reasons. The Grievant did not engage in the same type of misconduct as the two employees who received counseling. Notwithstanding the Union's argument to the contrary, the evidence of prior disciplines does not establish that the Grievant has been the recipient of disparate discipline.

The Employer acknowledges that the Grievant had compelling reasons for her decision to access the information of her adult son. Unlike the Union, the Employer argues that these reasons are not a mitigating factor.

Summarizing the Grievant's testimony, the circumstances which lead to her decision to access her son's hospital records for personal reasons are as follows:

At the time of hearing, the Grievant's son was in his mid-twenties. In March of 2006, the Grievant's son had been living in her home, but due to conduct that troubled the Grievant, she asked the son to leave home; which he did. Thereafter, the son would periodically visit and telephone the Grievant. The son would also visit on major holidays. The Grievant last saw her adult son on March 6, 2007. Thereafter, the son did not contact the Grievant or her family and did not respond to family voice mail messages. Eventually, the Grievant and/or her family members contacted her son's last known employer, friends and the Police Department in an effort to obtain information on her son, but were not successful in obtaining such information. At some point, a friend of the Grievant's son reported that he had seen her son; that he was alone; and that he "looked bad." In response, the Grievant and her husband drove around the neighborhood of the reported sighting and questioned businesses and/or individuals in that neighborhood in an attempt to locate her son. Shortly before Thanksgiving of 2007, the Grievant read a press account that indicated that her friend's son had been murdered. As a result of this press account, the Grievant became increasingly worried about the safety of her son. Shortly after learning

of the murder, the Grievant, who knew that her son had been a patient of the hospital, began to access the Employer's records for the purpose of obtaining a current address on her son; only to learn that these records continued to list the Grievant's home address. The Grievant also accessed records that would show whether or not her son had a scheduled appointment; with the intention of going to the place of the appointment for the purpose of ascertaining that her son was all right. These records did not show any appointments. Between November 2007 and August 2008, the Grievant would periodically access her son's records to obtain information that would help the Grievant locate her son because she was worried about her son and wanted to ascertain that he was all right. Shortly after she accessed her son's records on August 13, 2008, the Grievant received a report that her son had been seen entering a residence. Using the address of this residence, the Grievant sent her son a card for his upcoming birthday. The Grievant's son responded by filing a complaint with the hospital; claiming that the Grievant had obtained his new address by accessing hospital records.

The undersigned has no reasonable basis to doubt the Grievant's claim that she was concerned about her son. An adult son, however, has the right to determine what, if any, contact he wishes to have with family members; including his mother.

There are individuals who are in the business of locating missing persons. Thus, there was at least one means of obtaining the information that she sought which did not involve accessing hospital records in violation of the Employer's rule and HIPAA requirements. While the Grievant may question the soundness of her son's decision-making, this record provides no reasonable basis to conclude that her son's physical or mental well-being was dependent upon the Grievant having knowledge of her son's physical location or condition.

The Union argues that the Grievant did not intend to impair or compromise the Employer's interests. The fact that the Grievant did not comprehend that her misconduct would have an adverse impact upon the Employer's interests, including compliance with HIPAA, is not a mitigating factor.

Notwithstanding any Union argument to the contrary, the Grievant's violation of the Employer's rule was not reasonable or justified by the circumstances. In accessing her son's hospital records for personal reasons, the Grievant has engaged in multiple instances of misconduct that exhibits a willful and intentional disregard of a work rule that serves the significant Employer interest of protecting the confidentiality of patient records and complying with HIPAA requirements.

The Employer argues that, although HIPPA does not specifically prescribe sanctions for employee misconduct, there is an undoubted intent to impose sanctions that will deter future violations. Based upon the record evidence, HIPPA requires the hospital to "have and apply appropriate sanctions" against members of its workforce who fail to comply with privacy

policies and procedures. The record provides no reasonable basis to conclude that the application of the parties' just cause for discipline standard does not result in "appropriate sanctions" within the meaning of HIPPA.

As the Union argues, the undersigned previously has recognized that the "just cause" standard embraces the principle of progressive discipline. Nonetheless, there is misconduct that is so egregious as to warrant bypassing the traditional steps of progressive discipline. As the Employer asserted in the termination letter, the Grievant has engaged in gross misconduct that exhibits a willful and intentional disregard of Wheaton Franciscan Healthcare policy and procedure and patient interest. Given the egregious nature of the Grievant's misconduct, the Employer has just cause to bypass the traditional steps of progressive discipline.

As the Employer argues, the hospital must be able to trust employees to maintain confidentiality as required by hospital rule and law. In the present case, the Grievant has betrayed the Employer's trust. However, when viewed in the light of surrounding circumstances, including the evidence that the Grievant's conduct was motivated by concern for the well-being of her estranged son, as well as the Grievant's work record of more than thirty years of service without any evident prior discipline, the reasonable conclusion is that this betrayal of the Employer's trust is an aberration and that the Grievant's future behavior can be corrected by the imposition of discipline that is less than discharge.

Conclusion

As discussed above, the Employer's claim that the Grievant engaged in misconduct by viewing the records of "3 other individuals for which (the Grievant) had no legitimate business need" is not proven. Accordingly, the Employer does not have just cause to discipline the Grievant for engaging in such misconduct.

The Employer's claim that the Grievant, on multiple occasions, engaged in misconduct by intentionally viewing the medical records of her son for personal reasons has been proven. Accordingly, the Employer has just cause to discipline the Grievant for engaging in such misconduct.

As discussed above, under the circumstances, discharge is too severe a penalty for the Grievant's proven misconduct. Accordingly, the undersigned has concluded that the Employer does not have just cause to terminate the Grievant's employment.

Given the egregious nature of the Grievant's proven misconduct, the Union's argument that Employer's disciplinary interest is served by a short-term suspension without pay is not persuasive. Accordingly, in remedy of the unjust discharge, the Grievant's termination has been converted to an unpaid suspension; effective from the last day of the Grievant's employment in 2008 until the date of this Award.

An unpaid suspension of this length is unusual. Additionally, such a suspension may remove an incentive for the Employer to give due consideration to future disciplinary decisions. Nonetheless, the undersigned considers the length of this suspension to be appropriate under the just cause standard for discipline agreed to by the parties in that it recognizes the Employer's legitimate disciplinary interest in deterring the misconduct for which the Grievant has been disciplined while providing the Grievant with the opportunity for rehabilitation that is warranted under the circumstances of this case.

Based upon the above and foregoing, and the record as a whole, the undersigned issues the following

AWARD

1. A. L. was not terminated for just cause.
2. The appropriate remedy for A.L.'s unjust termination is to set aside the discharge and to suspend the Grievant without pay; effective from the last day of the Grievant's employment in 2008 until the date of this Award.
3. The Employer is to immediately rescind the discharge letter dated September 19, 2008; expunge all reference to the unjust discharge from the Grievant's personnel files; and return the Grievant to the position that she occupied at the time of her unjust termination.
4. The undersigned will retain jurisdiction for a period of at least sixty days from the date of this Award to resolve, at the request of either party, any dispute that may arise concerning the meaning and application of the remedy ordered above.

Dated at Madison, Wisconsin, this 22nd day of July, 2009.

Coleen A. Burns /s/

Coleen A. Burns, Arbitrator

