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IN RE ARBITRATION HEARING BETWEEN:

STATE OF MINNESOTA

And

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFSCME

DECISION AND AWARD

BMS 21-PA-1542

JEFFREY W. JACOBS

ARBITRATOR
7300 Metro Blvd.
Suite 300
Edina, MN 55439

July 11, 2022

State of Minnesota
Employer,

And

DECISION AND AWARD
BMS 21-PA-1542
Breanna Allore grievance

AFSCME,
Union

APPEARANCES:

FOR THE STATE:

Kathryn Fodness, Attorney for the State
Elizabeth Blomberg, Attorney for the State
Jennifer Claseman, Attorney for the State
Carol Olson, Exec. Dir. of Forensic Services
Elizabeth Trandem, HR Consultant
Melissa Grescyk, Former HR Director for DHS
Scott Melby, Chief Executive Officer

FOR THE UNION:

Annie Jakacki, Union Representative
Breanna Allore, grievant
Matthew Miller, former DHS employee
Ryan Cates, Local Union President

PRELIMINARY STATEMENT

The hearing was held on May 4, 2022 by video conference. The parties presented testimony and documentary and video evidence at that time at which point the record was closed. There were no procedural arbitrability issues raised and the parties agreed that the matter was properly before the arbitrator. The parties submitted post-hearing briefs on July 1, 2022.

ISSUE PRESENTED

Did the State have just cause to terminate the grievant? If not, what is the appropriate remedy?

PARTIES' POSITIONS

EMPLOYER'S POSITION

The employer took the position that there was just cause to terminate the grievant for her actions on several occasions as outlined below. In support of this position, the employer made the following contentions:

1. The grievant is a Forensic Support Specialists and was responsible to ensure the safety of the patients/clients, other staff and the public. She works in the Direct Care and Treatment Division, DCT, for the State Department of Human Services, DHS.

2. The State noted that there are clear policies in place regarding treating offenders with respect and dignity despite their offenses, whatever they may be. The grievant's position description requires that she "maintain a safe and therapeutic environment," "protect patients from maltreatment," "report any abuse or neglect," demonstrate "Person Centered Thinking" in all forms of communications, and "maintain confidentiality of information about patients." The State asserted that the grievant's actions in this matter violated all of those requirements.

3. The grievant in this case clearly violated that by posting insulting messages about the vulnerable adults in her care, calling them "fuckin' tards," which the grievant admitted that she uses to describe her patients, and claiming she would like to "kill them all." The State pointed to the messages she sent to others that described her patients as "my guys are all nuts." She also described some co-workers as fat and ugly.

4. The grievant also violated clear policies under HIPAA by copying and pasting into a Facebook message entries from a client's chart note and then stating, "fuck him" and that she would "ruin his week for him." The State noted that the chart note that appeared in Facebook was an entry about the patient, who was identified by name with detailed descriptions of the patient's behaviors.

5. These messages were sent to co-workers perhaps under the mistaken belief that no one else would see them, but the grievant was wrong – others did see them and were greatly offended by them. The State noted that mangers received several anonymous messages in the form of screenshots from the grievant's Facebook messenger screen with the messages outlined above. These messages named patients by name with the various insulting messages described above as well.

6. The State asserted too that its investigation showed that the screenshots were authentic and that it conducted a fair and thorough investigation to determine whether the entries were in fact made by the grievant. It was clear that they were and that the grievant later admitted posting them.

7. The State further noted that there are clear polices in place in the Employee Code of Conduct Policy requiring the grievant to maintain appropriate standards of professionalism, accountability and integrity. Further, the Workplace Relations Document mirrors the Code of Conduct and outlines Forensic Services' mission, vision, and values: "Mission: We assist the people we serve as they prepare for successful community living. Values: We are person-centered with each other and the people we serve. DCT expects that all employees treat patients/clients/individuals, their customers and each other with courtesy, professionalism, dignity and respect."

8. That document specifically identifies clear examples of unacceptable behaviors, including "demeaning or name calling," "humor directed at another person's expense," "using punitive language or behavior toward patients/clients/individuals," and "failure to act when you see non-therapeutic interactions, or observe disrespectful behavior." It further states, "All employees will be held accountable for any behavior that does not meet the standards outlined."

9. The State also pointed to the DCT Boundaries Policy and noted that it specifically establishes expectations for conduct between staff and patients receiving services, and States, "discussions involving other staff/clients who are not present may be shared if therapeutically indicated at the moment for the client. These discussions should be limited to professional communication only."

10. The HIPAA policy further requires that employees follow all privacy rules and regulations and to be mindful always of patient privacy and never disclose their private health information except as allowed by that policy.

11. The State's Respectful Workplace Policy also clearly requires that employees show respect for one another and further warns that failure to comply may result in discipline up to and including discharge. That policy also provides specific examples of actions and behaviors that run afoul of the policy as follows: "Behavior that a reasonable person would find to be demeaning, humiliating, or bullying," such as calling them fat or ugly or "fuckin' tards."

12. There is no question that the grievant knew and understood these policies, yet flagrantly ignored them. The State further alleged that this is not a "close call" and that the entries and actions by the grievant went far beyond these standards by any measure.

13. The grievant acknowledged that treating patients in this manner and that calling them names such as these was completely inappropriate. She also acknowledged her responsibilities to keep patient information confidential and that sending these message to another co-worker who did not work on the same area was a violation of the patient's HIPAA and confidentiality rights. Only those workers who have a current need to know that information have a right to that information.

14. The State also asserted that this was not mere venting, as the Union and the grievant claimed and was instead a pattern of serious misconduct. The grievant's actions have completely eroded the trust it must have in its employees and asserted that she cannot be trusted to care for the vulnerable adults in her care.

15. The State also noted that there were others who were also disciplined as the result of this entire affair and that in at least one other case there is a pending arbitration that has yet to be decided. The State asserted though that irrespective of the outcome of that other matter, the grievants actions by posing these scurrilous messages and the clear violation of her client's HIPAA rights, makes her actions far worse and more egregious.

16. The State asserted that it had just cause for termination in this matter and that it followed all of the requirements to establish just cause. The grievant had clear notice of these policies referenced above and even acknowledged them during the investigation. There is no question that she violated them by her posting messages on Facebook and that she clearly violated HIPAA by posting an entire chart note entry for a patient online to a person who had no legitimate reason to see that post. The policies are reasonable and related to the operation. In fact, they are required in many cases by the law.

17. The State noted that there was little dispute that the messages were hers and that she posted them on multiple occasions as established by the investigators. In fact, the State noted that the Union did not seriously dispute that the messages came from the grievant.

18. The State asserted that there was no evidence that the grievant was somehow "targeted" for discharge by her manager. The investigation was fair and objective and established without question that the grievant posted these messages in clear violation of applicable policies. Neither was there any proof of disparate treatment. Other employees were also disciplined; some were discharged as the result of this, but the grievant's actions were far worse as outlined herein.

19. The Union has the burden of proof in a disparate treatment matter and there was simply no proof that the grievant's situation was the same as others who were not discharged. While one person was reinstated following a veteran's preference hearing, his actions were not as serious as were the grievant's She threatened to kill them all, ruin one patient's day, called them "fuckin' tards," "nuts" and "so retarded." She also posted a chart note. None of the other employees involved in this matter did any of those things. The case is therefore not at all the same.

20. Finally, the State asserted that due to the loss of trust and the grievant's lack of any real remorse for this conduct, termination is appropriate. The State cannot trust that the grievant will return to her position and not carry with her the sentiments expressed in those Facebook messages in her dealings with patients, who are vulnerable adults within the meaning of State law, or her co-workers – some of whom she described as fat and ugly.

21. The State also argued that the fact that no maltreatment was found by DHS licensing did not erase her actions nor does that finding control the result here. While there was no direct maltreatment of any of the patients in the grievant's care, that alone does not change the fact that she posted these messages, including the chart note. The Union's argument thus misses the point in that a finding of no maltreatment does not equate with a finding that there were no violations of applicable policies outlined above.

22. The State also asserted that if the Union's argument is allowed to prevail it would mean that discharge for actions such as these could only occur if there was a specific finding of maltreatment by DHS Licensing, which is after all a separate agency charged with a somewhat different role.

23. The State argued that the penalty should only be disturbed if there is a clear showing that the discharge was arbitrary or capricious. Here the State argued there was no evidence of that at all. The grievant clearly violated policies she was aware of and knew to be reasonable. There was no showing of a flawed investigation or disparate treatment and the grievant ‘s action destroyed any level of trust in her ability to go forward in this position. The penalty should be left in place.

The employer seeks an award upholding the termination and denying the grievance in its entirety

UNION’S POSITION

The Union’s position is that there was not just cause for the termination. In support of this position the Union made the following contentions:

1. The Union noted that the offenders in this facility have violated the law and that in some cases they are violent and dangerous criminals. Staff is trained specifically on how to deal with their occasional outbursts, some of which can be violent. The job is stressful and staff need to occasionally “vent” their frustrations at the rigors of the job. This does not mean that the grievant or her co-workers are any less qualified to deal with patients in a professional and caring manner, despite the difficulties on occasion.

2. The Union noted that the grievant is a long-time and dedicated employee with 9 years of service with an exceptional record of caring and compassionate treatment of the patients in her care. Her performance evaluations have been excellent as well and at no point was there any indication that she mistreated or insulted any of the patients in her care. She has no discipline on her record and her demeanor at work is thus completely professional and appropriate.

3. The Union noted that the grievant and 5 other employees were disciplined as the result of the conversations that are the focus of this matter. These were intended to be non-public, private conversations between staff members. No members of the public were ever shown to have seen these messages and there was no public "outcry" or media attention in any of this.

4. Moreover, the messages were unspecific and did not give context to dates or times and there was no way of knowing what the conversations were referring to. The Union asserted that this one incident should not ruin an otherwise stellar career.

5. The Union also asserted that the information obtained was fraudulently obtained and cannot be used. The unethical acts of a supervisor formed the basis of these allegations and the Facebook posts were intended to be private and seen by only a few select people and never shared with the public, the patients or other staff. The Union focused on Ms. Weller and asserted that she has targeted the grievant for disparate treatment in the past and she must have hacked the Facebook accounts to gain access to these messages.

6. The Union asserted that the investigation was perfunctory at best and demonstrated that the outcome was decided even before the investigatory meeting. The meeting lasted less than 22 minutes and the witnesses from the Union alleged that the grievant was not even clearly told what she was being accused of. It was not until the second interview that she was shown the messages that are now being used to terminate her. The Union alleged that this was a violation of fundamental due process at article 16 and must be regarded as a fatal flaw in the investigation. Article 16 provides that the "The employee shall be advised of the nature of the allegation(s) prior to questioning." The Union asserted that the fact that the State conducted the 22-minute interview without clearly informing the grievant of the specific allegations was a violation of this clear provision.

7. The Union argued that the decision was in fact made well before the investigation was ever conducted. The Union pointed to the Loudermill hearing and asserted that there was no meaningful opportunity for the grievant to say anything on her own behalf; the decision was made and the hearing was a sham at best.

8. The Union also asserted that the State failed to provide the Union with all of the information it requested to defend the grievant and that this too was another fatal flaw in the investigation and of the grievant's due process rights. The Union asserted that the information was heavily redacted and that despite multiple requests for additional information, the State failed to provide it, claiming Data Privacy concerns for some of the other information regarding other employees who were involved in the conversations at issue here.

9. The Union also argued that the State treated the grievant differently from other similarly situatrf employees. One such employee who was fired and who was involved in these conversations on Facebook has since been reinstated with only a written warning. One other took his discharge to hearing and is awaiting the decision from another arbitrator.

10. The Union asserted that there were other individuals whose actions were the same or substantially similar to those taken by the grievant yet they were not fired. The Union argued that this presents a classic case of disparate treatment that again must result in the discharge being overturned or at least reduced to a written warning.

11. Further, the Union argued that the State has taken an unprecedented step in discharging an employee for Statements made away from work on the Internet. This has never occurred before and shows that the State is treating the grievant in a punitive and unreasonable manner.

12. The Union also asserted that the State has completely overstepped its boundaries here in using information that was essentially stolen from someone's private Facebook account and used as the basis for discharge of a 9-year employee with a good work record.

13. The Union also asserted that here was no HIPAA violation here since the chart note did not have any private data identifying the patient. Further, that the HIPAA "minimum necessary" rule did not apply since staff work together to care for these patients and Mr. Miller might well have been assigned to that particular patient's care team. There was no harm done to the patient and no unauthorized access to his private information.

14. The Union also argued that discharge is simply too harsh and that this is punitive and based on the vindictive nature of. Ms. Weller, who the Union alleged has engaged in a pattern of harassment against the grievant perhaps based on the relationship with Mr. Miller. The Union asserted that the grievant made an error in judgment, but has learned from this experience and can be trusted never to engage in this sort of behavior in the future. No harm was done to any patient nor to the public confidence in the care given by the facility and the grievant should be given another chance to prove herself.

The Union seeks an award reinstating the grievant to her former position with all the accruals of vacation and sick time, seniority missed, all benefits missed, and paid back the salary for the months of missed work dating back to the date of termination.

DISCUSSION AND MEMORANDUM

FACTUAL BACKGROUND

The grievant has been with the State for 9 years. It was clear that her record prior to the discharge was good. Her evaluations showed that her performance met or exceeded standards and there was no live discipline on her record as of the time of her discharge.

The grievant was a Forensic Support Specialists and was responsible to ensure the safety of the patients/clients, other staff and the public. She worked in the Direct Care and Treatment Division, DCT, for the State Department of Human Services, DHS, located in St. Peter Minnesota.

There was very little dispute about the operative facts of the case. The grievant posted various messages on her Facebook messenger account regarding her commentary about some of the patients in her care. As noted above these are all considered vulnerable adults under state law and even though they have in most cases committed serious crimes, they are treated as vulnerable .

There was also clear evidence that the grievant was well aware of the policies regarding their treatment and that disparaging their condition or their appearance or behavior in the manner she did was inappropriate and violations of various policies in place.

As noted, she referred to her patients as "fuckin' tards," which was presumed to be short for "retarded," a word generally regarded as a serious insult. She said she would like to "kill them all" and made other disparaging remarks to co-workers in what she thought was a private conversation. As discussed below, these were not comments that were intended to be protected concerted activity, such as might be found in private sector under Section 7 of the NLRA, or under PELRA as protected activity. Neither were they protected by some free speech theory. That too will be discussed below and no serious defense was raised in that regard.

It was clear that other employees were engaged in these conversations and that they too essentially joined in and piled on so to speak. The grievant's comments were shown to be far more serious and made far more often than those of other employees.[1]

Significantly, the grievant also copy/pasted a chart note from a patient and posted it on the Facebook page, almost in its entirety. She then indicated that she would like to ruin "his" – meaning the patient's – day and "fuck him." There was no evidence that any of the other individuals involved in this ever posted a chart note on the discussion. In that regard the grievant's actions were significantly different from those of the other participants in these conversations.

[1] The grievant's messages also made several questionable comments about George Floyd, noting that he "had a big nigga nose" but it was clear that these comments did not affect the decision to terminate her employment. They were thus not considered here either.

Management at the facility received several anonymous complaints about these messages that were apparently seen by someone who took offense to them. The person who reported these messages to management also specifically alerted managers to the grievant as well. This was shown to be related to the content of the messages as much as who sent them.

The Union and its witnesses asserted that Ms. Weller was the person that reported the comments to management. She was at the time these comments were made, a supervisor, although she was not in direct supervision of the grievant at the time. There was some evidence that she and Mr. Miller had a prior relationship and that she had access to his Facebook account and that this was how the messages were discovered. As discussed more below, there was no evidence that Ms. Weller was targeting the grievant or any other person involved in these conversations and that she simply went onto his Facebook page and found the messages. Pursuant to policy, she reported these comments to upper management who then began an investigation.

Overall, the investigation was shown to be fair and objective and designed to determine the facts. There was insufficient evidence that the investigation was skewed toward finding anyone guilty and that it was only upon discovery of pertinent facts that the grievant was the target of the investigation.

Investigators met with the grievant at least twice to determine the facts. It was clear that these meetings were relatively short and that the grievant was made at least generally aware of the nature of the possible allegations. The grievant acknowledged that she was aware of the relevant polices in these meetings and further acknowledged sending the messages as alleged. The grievant was also given a Loudermill hearing and that meeting was also short, but the grievant was given an opportunity to defend herself.

The grievant was terminated for her actions and for the comments alleged above. The Union filed a timely grievance and the matter proceeded to arbitration. It is against that general factual backdrop that the analysis of the matter proceeds.

ALLEGATIONS OF HACKING AND TARGETING OF THE GRIEVANT BY MS. WELLER

The Union asserted that the Facebook posts were accessed through hacking, which is an apparent illicit entry into someone else's account through nefarious means. See e.g., *Konop v Hawaiian Airlines*, 302 F.3d 868 (9th Cir 2002). Mr. Konop, a pilot for Hawaiian, maintained a website where he posted bulletins critical of his employer, its officers, and the incumbent Union. Many of those criticisms related to his opposition to labor concessions that Hawaiian sought from the Union. Because the Union supported giving management concessions to the existing collective bargaining agreement, Konop encouraged others via his website to consider alternative Union representation.

He controlled access to his website by requiring visitors to log in with a username and password. He provided usernames to certain Hawaiian employees, but not to managers or Union representatives. In order to get a password and view the site, an eligible employee had to register and consent to an agreement not to disclose the site's contents.

One of the airline's vice presidents began accessing the site using another person's name – another airline employee. That person had never logged onto the site nor had he filled out the registration form. In essence the company official was fraudulently accessing the site for the purpose of finding out what the employee was saying about the airline and its management.

Here, there was no evidence that Ms. Weller did any of that nor any evidence that anyone else from the State used someone else's name to access these posts. She never impersonated anyone as was the case in *Konop*, and apparently was able to simply access Mr. Miller's Facebook page with the access she had been granted earlier.

The evidence showed that Mr. Miller and Ms. Weller had access to each other's account due to a prior relationship and that she simply accessed his Facebook account using the access that had been previously provided, but never taken away, and saw the posts by the grievant and others. She then reported them to upper management.

There was nothing "nefarious" about that and once again demonstrates what everyone with access to the Internet should by now know – that what goes on the Internet is virtually *never* completely private.

See also, *Ehling v. Monmouth-Ocean Hospital Service Corp*., No. 2:11-cv-03305 (D.N.J. Aug 20, 2013). There the Court held that private Facebook posts are protected under the Stored Communications Act, and supervisors who surreptitiously go on to a Facebook page or gain access to it without the users consent or knowledge do so illegally under that Act. However, postings that are forwarded to another by a so-called "frenemy" are not. The Court held that it was permissible to discipline an employee for a posting forwarded to the employer by a "friend" on the employees Facebook page even though the employee limited viewers to only his friends on Facebook.

Here, as noted, Ms. Weller did not hack the accounts. She had been given access to it that was never apparently deleted or taken from her and she simply accessed the accounts. The *Ehling* holding appears to be almost squarely on point.

WAS THERE JUST CAUSE FOR DISCIPLINE?

The essential question here is whether the posts violated applicable policies. There was clear and convincing evidence that they did and that the grievant was the person who made these posts. She did so on multiple occasions and the overall record showed that these messages went beyond mere venting about having a bad day. While the threat to "kill them all" was not taken as a serious threat to actually go to the facility and harm people, a comment like that cannot be taken lightly.

The overall record established that these comments were violations of several of the policies relied on by the State. There were thus clear grounds for discipline.

Some prior cases were examined that supported this conclusion. In one case that appears to be based on eerily similar facts is *Vista Nuevas Head Start and Michigan AFSCME Council 25 #1640*, 129 LA 1519, AAA 54 390 00061**,** (Van Dagens 2011).

There, The grievant worked as a head start teacher and started a Facebook group called, "Don't U hate it when …" and invited people who worked for the facility to share their issues and concerns/gripes about the work and almost anything that bothered them. The description of the page was "Just for Fun/Inside Jokes."

Only 4 people joined the group, including the grievant, and they posted concerns about supervisors being late and other issues. The postings show a lot of fairly coarse language. The privacy settings were set to "Secret. No public content. Members can see all content."

The grievant was fired after the grievant's ex-husband took a screen shot of the postings and sent it to the employer. The employer contended that the messages contained information about teachers, parents and even students that were disparaging and insulting. The employer in that case also cited *Baker Hughes,* 128 LA 37 (Baroni 2010) in support of the claim that speech of this nature on a public blog is equivalent to any other communication that forms the basis of discipline.

The Union contended that these were intended to be private posts not accessible to anyone except the members of the group. This was thus not a public blog at all, but one that was intended to be private and limited to a very small group of people. The fact that the ex-husband got the screen shot through nefarious means should not result in the grievant being fired. She apologized for any harm she did and never intended that these private thoughts be shared with the world.

The arbitrator ruled that there was no question that the grievant created the Facebook page and next turned specifically to whether this was protected concerted activity. The Union argued that the grievant and her co-workers pointed out that their supervisor frequently came to work late and complained that she was never disciplined or reprimanded. However, there were other posts that were very insulting to parents and students and other teachers that were not about working conditions or for mutual aid and protection – they were just insults.

The arbitrator found that there was nothing in the communications that showed that these employees were seeking to band together for mutual protection. She rejected the Union's concerted activity claim.

The arbitrator also found that there was a nexus between these posts and the work. She also found that the vulgar and profane language used by the grievant in her posts would never be tolerated if they had been uttered in the classroom or around the school. Further, she discussed the notion of public versus private speech. The evidence showed that the postings were accessible by a wide audience and was therefore public.

In *Vista Nueva*, the arbitrator found the blog was entirely private and had been accessed only through an unwelcomed invasion of privacy. Despite that the arbitrator was persuaded that the posts were so insulting and disparaging that they crossed the "line." The arbitrator appeared thus to agree with the employer's argument that "there is no reasonable expectation of privacy when it comes to the internet." Further, once the employer found out about these they had to act. The grievance was denied and the discharge upheld.

It should also be noted that there was no serious allegation that these posts were somehow protected by free speech. See, *Pickering v Board of Education*, 391 U.S. 563 (1968). Clearly public employees have a right to express their opinions on matters of "public concern." However, that right is not absolute and public employees may not always have free speech rights in the same sense that members of the public do. This is especially true where the Statements made are simply insulting or threatening adverse actions, such as "kill them all," calling patients "fuckin tards" or "to ruin his day." These cases do not protect violations of HIPAA either. See also, *Garcetti v Ceballos*, 547 U.S. 410 (2006), where the Court held, citing *Pickering*, that when public employees make Statements pursuant to their official duties they are not speaking as citizens for First Amendment purposes and are not thus entitled to the protections under the Constitution afforded to private citizens.

Neither was any allegation that the comments were protected concerted activity under PELRA. See e.g., *Pier Sixty*, 362 NLRB No 52 (2015) or *Hispanics United of Buffalo*, 359 NLRB No. 37 (December 12, 2012), where in each case the employees were initially fired for posting vulgar statements about managers on the Internet, but the Board overturned their firing due to concerted activity issue.

Here, there was clear evidence that the information was accessed by someone who had already been given access to those accounts. The fact that neither Mr. Miller nor the grievant expected her to access those accounts did not change that nor did it give rise to a conclusion that the information was "stolen" or "hacked" as the Union suggested. Accordingly, on these facts, the Union's allegations that the information must be disregarded was unpersuasive as well.

DISPARATE TREATMENT ALLEGATIONS

The Union raised this multiple times in this process claiming that others who were just as involved in these conversations were not fired or who were fired, but were reinstated with minor discipline.

Simply stated, disparate treatment requires a showing that similarly situated employees who engaged in the same or substantially similar conduct are treated differently.

Here the facts did not support that. The grievant instigated these conversations on several occasions, threatening to kill the patients, and while this was not taken as a serious threat to actually do them bodily harm, a statement like that in today's world can never be sluffed off or ignored.

Further the grievant called them very insulting names as outlined above and made disparaging comments about their mental State – calling them "tards."

Further, while it was clear that one employee was reinstated with a written warning, it was clear that his involvement pales by comparison. He made only one entry and that appeared to be in response to the ones made by the grievant. He never threatened to ruin anyone's day or to kill them all nor did he call the patients tards etc.

Mr. Miller was also fired and awaits the decision from another arbitrator. Obviously, that must await a decision based on the record developed in that case. It was clear though that the grievant's actions here went beyond what Mr. Miller was shown to have engaged in as well, for many of the same reasons outlined above. He did not threaten to kill a patient or to ruin anyone's day.

Significantly, he also did not post a chart note in violation of HIPAA.

The HIPAA violation is perhaps more serious than the Union acknowledged. The Union asserted that there was no unauthorized access since no private identifying information was used. The overall record though shows that both the grievant and Mr. Miller knew exactly which patient she was talking about in the post and that is a technical violation of HIPAA and a violation of that patient's privacy.

Moreover, the Union asserted that Mr. Miller might have had a valid reason to know that information since he could at some point have been assigned to the patient's care team. That is not what HIPAA says.

HIPAA requires that only the information that is critical to know at the time it is disseminated be shared and then only with those individuals who have a valid reason to know it then. Mr. Miller was not on that patient's care team at the time this information was shared and did not have any valid reason to know it. Further, perhaps to state the obvious, but others saw it as well and there was no evidence that they had any need to see that information either. It was clear that the post was done merely to make a point about the patient's bad behavior and to make a comment about possible retribution for that. The fact that it was intended to be private does not negate the HIPAA issue nor the content of the message.

It is clear from the law that even health care providers who are in the same unit, but who are not working with a patient at the time do not have a right to access that patient's information.

On this record, there was in fact a HIPAA violation and that information was used in an inappropriate way and was frankly used by the grievant to make further disparaging comments about that patient.

ALLEGATIONS OF VIOLATION OF DUE PROCESS

The Union asserted that the investigation was fatally flawed and that the grievant was denied a meaningful opportunity to defend herself against these allegations. The Union relied on the language of Article 16 which provides that "The employee shall be advised of the nature of the allegation(s) prior to questioning." There was evidence that the State conducted a first interview and the Union asserted that the grievant was not told what the allegations were until the second interview. The overall record did not fully support that allegation however. The State's witnesses indicated that there was reference to the Facebook entries during the first interview.

The language does not require that the grievant be given all of the specificvs of the allegations or potential allegations, but rather requires that the Union and the affected employee be told the "nature" of the allegations. On this record, it was clear that this requirement was met by the State in its investigation.

Moreover, there was no showing of prejudice to the Union or the grievant as the result of this scenario. It was clear that the grievant was aware of the nature of the allegations and was fully able to mount a defense to them well prior to the hearing in this matter. Thus, this allegation did not find sufficient evidentiary support to warrant overturning the discipline.

The Union also asserted that the decision was likely made even before the investigation was commenced and that the Loudermill[2] hearing was a sham. It took a few moments after the State's representatives heard what the grievant had to say before they returned with the decision to fire her.

[2] *Cleveland Board of Education v Loudermill*, 470 U.S. 532 *1985).

A *Loudermill* hearing requires that grievant be given the chance to explain what happened and to provide any additional information that might tend to exonerate them or to mitigate the impact of whatever allegations have been leveled against them. it does not require that the employer change its mind based on the investigation that has been done nor does it require that any specific amount of time be taken for the hearing itself.

Elkouri discusses the procedural due process requirement mandated by *Loudermill* as follows:

> "This procedural due process requires two key elements: notice and an opportunity to be heard. But what is required to satisfy these due process concerns? … *The Loudermill* court explained that a public employee with a property interest is, at a minimum, entitled to oral or written notice of the charges against him, an explanation of the employer's evidence and an opportunity to present his side of the story before the proposed action is taken. … The minimal pre-disciplinary due process protections established by the Court – notice of the charge and an opportunity to be heard – take into consideration the fact that a government employer cannot arrange a full hearing prior to every adverse job action. In essence then, Loudermill hearing serves as an initial check against a mistaken action. " Elkouri and Elkouri, *How Arbitration Works* 8th ed, BNA book (2016) at section 19.3.A.i, pages 19-8 and 19-9.

On these facts, the State gave the grievant that *Loudermill* hearing and provided adequate notice of the charges against her and an opportunity to be heard. The essence of the Union's claim is that there must have been a decision made before the *Loudermill* hearing was held, but that is not what *Loudermill* prevents. It prevent a mistaken decision. There was no mistake here in what the grievant did. The remaining question is whether that action should result in discharge.

WAS THE DEGREE OF DISCIPLINE IMPOSED APPROPRIATE IN THESE CIRCUMSTANCES?

The employer argued essentially that once a violation has been established, it is virtually incumbent upon the arbitrator to follow the disciplinary decision and not disturb it. *Citing Enterprise Wheel and Car*, 36 LA 359 (Daugherty 1966). Arbitrator Daugherty noted that it is primarily the function of management to decide upon the appropriate penalty and that an arbitrator may disturb it only where the employer's action is shown to be arbitrary or capricious. Indeed, it has been said that leniency is the province of the employer, not the arbitrator.

There are arbitrators who still hold to that notion, but since 1966 it is well established, as discussed further herein, that the legitimate role of the arbitrator is to examine the penalty in light of all appropriate factors and decide if the degree of discipline was appropriate. See also *Steelworkers v Enterprise Wheel and Car*, 363 U.S. 593 (1960), where the court specifically discussed the arbitrator's role in that very regard and allowed for "reasoned judgment" about the penalty imposed whether it as shown to be arbitrary or capricious or not. Here, given the outcome on these facts it is unnecessary to delve further in that academic discussion since the facts were clear that the discharge was merited.

Elkouri cited Arbitrator Whitely McCoy as follows:

> "Where an employee has violated a rule or engaged in conduct meriting disciplinary action, it is primarily the function of management to decide upon the proper penalty. If management acts in good faith upon a fair investigation, and imposes a penalty not inconsistent with that imposed in other like cases, an arbitrator should not disturb it. The mere fact that management has imposed a somewhat different penalty or a somewhat more severe penalty than the arbitrator would have, if he had had the decision to make originally, is not justification for changing it. The minds of equally reasonable men differ. A consideration which would weigh heavily with one man will seem of less importance to another. A circumstance which highly aggravates an offense in one man's eyes may only be slight aggravation to another. If an arbitrator could substitute his judgment and discretion for the judgment and discretion honestly exercised by management, then the function of management would have been abdicated, and Unions would take every case to arbitration. The result would be as intolerable to employees as to management. The only circumstances under which a penalty imposed by management can be rightfully set aside by an arbitrator are those where discrimination, unfairness, or capricious and arbitrary actions are proved – in other words, where there has been an abuse of discretion." See, *Stockham Pipe and Fittings Company*, 1 LA 160, 162 (McCoy 1945) and *American Olean Title Company*, 107 LA 338, 339 (Welch 1996)); see also, *Kansas City Area Transportation Authority,* 127 LA 1196, 1206 (Wayland 2009) ("In discipline and discharge cases, arbitrators have generally acknowledged that they should not substitute their judgment for that of management as to the appropriate penalty unless they can find that the penalty imposed was arbitrary, capricious, or discriminatory."), Elkouri & Elkouri, *How Arbitration Works*, at 348 (6th Ed. Supp. 2008)

However, Elkouri cited that same Arbitrator McCoy and commented that:

> "It is said to be axiomatic that the degree of penalty should be in keeping with the seriousness of the offense." Arbitrator McCoy explained that "offenses are of two general classes: (1) those extremely serious offenses such as stealing, striking a foreman, persistent refusal to obey a legitimate order, etc., which usually justify summary discharge without the necessity of prior warnings or attempts at corrective discipline; (2) those less serious infractions of plant rules or of improper conduct such as tardiness, absence without permission, careless workmanship, insolence, etc. which will not call for discharge for the first offense (and usually not even for a second or third offense), but for some milder penalty aimed at correction." Elkouri 5th Ed at page 916.

In addition, Arbitrator Carroll Daugherty articulated 7 so-called tests of discipline in *Grief Bros. Cooperage*, 42 LA 555, 558 (1964). See also, *Enterprise Wire Co*., 46 LA 359 (Daugherty 1966). One of the basic tests is as follows:

Was the degree of discipline administered by the Company in a particular case reasonably related to (a) the seriousness of the employee's proven offense and (b) the record of the employee in his service with the Company?

It is thus clear that any arbitrator called upon to review discipline has the obligation to review the degree of discipline to determine whether the "punishment fits the crime." Without going into excruciating detail, which entails a review of the entire record, including the factors outlined by Arbitrator Barrett and many others over the course of time, such as length of service with the employer, overall record, any extenuating circumstances and whether there exists a prognosis that the employee can be corrected.

I was mindful of this longstanding precedent, yet, as noted above, one of the main roles of arbitrators is to determine the appropriate penalty where there are grounds for it. It is also clear that Arbitrator Daugherty *Grief Bros. Cooperage*, 42 LA 555, 558 (1964) outline the now famous 7-tests of just cause. One of those specifically provides for a review of the penalty imposed as follows: "Was the degree of discipline administered by the Company in a particular case reasonably related to (a) the seriousness of the employee's proven offense and (b) the record of the employee in his service with the Company?" See also, *Enterprise Wire Co*., 46 LA 359 (Daugherty 1966) in which he outlined those same 7 tests again. This clearly grants to arbitrators the obligation and discretion to review the penalty in light of the overall record, facts and circumstances of the case to determine if that element is met. Here, as discussed herein, the overall record established that there were grounds for discharge.

Here, it was clear that the grievant violated several applicable policies, including HIPAA and that her actions were indeed egregious. Mitigating against that was the fact that she has been with the State for 9 years and has a good work record.

These two factors were considered and made this case a difficult one to decide. While in some cases progressive discipline is the best and most effective way to correct employee behavior, it was apparent on this record that these violations were so serious that they overshadowed the length of service and good work record. The threats, the HIPAA violations and the derogatory and insulting names the grievant used to describe her patients went beyond merely having a bad day or venting. Accordingly, the grievance is denied and the discharge upheld.

AWARD

The grievance is DENIED.

Dated: July 11, 2022

Jeffrey W. Jacobs, Arbitrator