

**STATE PERSONNEL BOARD, STATE OF COLORADO**

Case No. 99B095

---

**INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE**

---

DEBORAH J. BRUMMETT,

Complainant,

vs.

DEPARTMENT OF HIGHER EDUCATION,  
REGENTS OF THE UNIVERSITY OF COLORADO,  
UNIVERSITY OF COLORADO AT BOULDER,

Respondent.

---

This matter came on for hearing before Administrative Law Judge Mary s. McClatchey on June 23, June 25, July 15, and July 16, 1999. Respondent was represented by L. Louise Romero, Managing Senior Associate University Counsel, Office of the University Counsel, University of Colorado at Boulder ("C.U. Boulder"). Complainant appeared and was represented by Douglas C. Thorburn, Attorney at Law.

Respondent called the following witnesses: Ronald J. Stump, Associate Vice Chancellor for Student Affairs and Dean of Students, C.U. Boulder, Sarbina Spurlin, Records Administrator II, Wardenburg Health Center, C.U. Boulder ("Wardenburg"), Dr. Joanie De Bever, Healing Touch Chiropractic, Janis Schultz, Medical Records Technician III, Wardenburg, Michael Papacek, Accounting Technician IV, Wardenburg, and Complainant.

Complainant called the following witnesses: herself, Dr. Jean Kim, Vice Chancellor for Student Affairs, C.U. Boulder, Sarbina Spurlin, Michael Papacek, and Janis Schultz.

Respondent's Exhibits 1 - 4, 6, 7, 9, 10 - 17, 19, and 20 - 27 were stipulated into evidence, as was Complainant's Exhibit A. Respondent's Exhibits 8 and 18 were admitted over objection. Complainant's Exhibit B was admitted without objection. A protective order was entered to seal Exhibits 6 and 7, in order to protect confidential medical information.

**MATTER APPEALED**

Complainant appeals her transfer and demotion to the position of Accounting Technician II from the position of Release of Health Information Technician, her restriction

of access to confidential patient information, and the reduction to three quarter time. For the reasons set for below, respondent's action is reversed.

### **ISSUES**

1. Whether the Complainant engaged in the acts for which she was disciplined;
2. Whether the discipline was within the range of reasonable alternatives available to the appointing authority;
3. Whether the actions of the appointing authority were arbitrary and capricious, or contrary to rule or law;
4. Whether Complainant is entitled to an award of attorney fees and costs.

### **PRELIMINARY MATTERS**

At the close of Respondent's case, Complainant moved for directed verdict. A motion for directed verdict should be granted only when the evidence has such quality and weight as to point strongly and overwhelmingly to the fact that reasonable persons could not arrive at a contrary verdict. See, Jorgensen v. Heinz, 847 P.2d 1981 (Colo. App. 1992), cert. denied. In passing on a motion for directed verdict, a trial court must view evidence in the light most favorable to the party against whom the motion is directed, and every reasonable inference drawn from the evidence presented is to be considered in the light most favorable to that party. Pulliam v. Dreiling, 839 P.2d 521 (Colo. App. 1992).

At the time the motion was made, Respondent had made an initial showing that the Complainant had committed at least some of the acts for which she was disciplined, namely, accessing and releasing confidential patient information, and that such acts were in violation of the confidentiality agreement and Wardenburg policies regarding confidential patient information. At that time, Complainant had not yet presented any evidence regarding the equitable estoppel defense, or regarding arbitrary or capricious actions by the appointing authority. Therefore, Complainant's motion was denied.

### **FINDINGS OF FACT**

1. Complainant was employed at Wardenburg from 1989 to the present. She was initially hired into position of Medical Record Assistant IB, in the Health Information Management Department of Wardenburg.
2. On June 21, 1993, Complainant was promoted to the position of Medical Record Technician I, also known as Release of Health Information Technician, the position she held at the time she was disciplined in the within action. This position was also in the

Health Information Management Department.

3. On December 1, 1997, Complainant signed a confidentiality agreement, under which she agreed to keep patient care information confidential and to make it available only to authorized users. Authorized users were defined as “direct patient care givers, intake/check-in clerical support staff and health information management personnel and employees on a need-to-know basis in accordance with their predetermined scope of responsibility.”

4. Complainant’s job duties included: providing clerical support for releasing and obtaining health information in compliance with established local, state and federal regulations; obtaining parental consent for treatment of minor aged patients; retrieval and distribution of health records for internal quality reviews/audits; screening requests for release of health information for other health center departments for validity and authenticity; communicating policy, procedure, and legal requirements regarding release of information, consent issues, etc, to the public and other C.U. staff; training of new staff and cross-training of staff in release of information procedures.

5. Complainant held a position of leadership and responsibility in the area of release of health information at Wardenburg. According to the Release of Health Information policy at Wardenburg, Complainant was to act “as a role model in the regard of confidentiality and security of health information.” Complainant was responsible for assuring that C.U. staff complied with internal, local, state, and federal policies, rules, regulations and statutes regarding release of health information; therefore, her knowledge of same was crucial to her position. Complainant possessed the necessary knowledge to perform this function well.

### **The Out Guide Audit**

6. In October of 1998, Complainant assisted another Wardenburg staff member, Janis Schultz, with an “out guide audit”. The purpose of the out guide audit was to locate patient charts that were checked out of their permanent files, and to determine whether, once located, the files and charts should be archived. The patient charts had been removed in the normal course of Wardenburg business for a variety of reasons, such as patient appointments (scheduled or walk-in), or for medical staff review.

7. Patient files are tracked via “get cards.” The “get cards” have two portions, both of which are 3 x 5 cards. One portion of the card is kept with the large plastic sleeve/file which normally contains the patient chart. The other part of the card is with the patient chart.

8. Complainant’s role in the out guide audit was to determine whether the patient was still eligible for services, i.e., they were cleared to be treated at Wardenburg. If not, the chart and file would be archived in the basement.

9. Schultz gave Complainant a stack of approximately 150 “get cards”, one for each

patient. Complainant read the “get card;” based on the information on that card, she then accessed the patient records on the computer, Screen 5. That screen revealed whether the patient was eligible for Wardenburg services.

10. If the patient was still eligible for Wardenburg services, Complainant wrote an “up arrow” on the get card. If the patient was not eligible, she wrote a “down arrow”, indicating the chart and file should be archived in the basement.

11. In the course of performing the out guide audit, Complainant came across the get card for Peter Shostak, who at that time was director of Wardenburg, Complainant’s boss and appointing authority. Based on Complainant’s review of the information on the get card for Shostak, which revealed he was not eligible for services, Complainant drew the conclusion that Shostak had recently received free medical services at Wardenburg.

12. The apparent fact that Shostak had received free medical services at Wardenburg angered Complainant a great deal. Shostak had recently held an 833 meeting on August 12, 1998 with Complainant because of her having obtained free medical services at Wardenburg, specifically, a free hearing test.<sup>1</sup>

13. Complainant believed that she had just been disciplined by Shostak for conduct which he himself had just engaged in. Shostak had in fact not received free medical services, but had simply had a free consultation with a chiropractor.

14. Complainant had previously consulted with the University Ombudsman, Tom Seebok, and with Vice Chancellor Jean Kim, about the August 833 meeting regarding her free hearing test for three reasons:

A. it had been the general practice at Wardenburg for years for employees to receive such free services (notwithstanding a written policy to the contrary);

B. Complainant felt that she and the nurse who performed the hearing test, Tammi Minamyler, had been singled out by Shostak in retaliation for having complained about his performance to both Kim and Seebok; and

---

<sup>1</sup> The purpose of the hearing test was to prove that a new proposed location for Complainant’s work station would render it impossible for Complainant to perform her job duties.

C. Shostak had treated her in a rude and abrasive manner at that meeting. Seebok's intervention appears to have resulted in the issuance of a letter of counseling, instead of corrective or disciplinary action.<sup>2</sup>

### **Respondent's Approval of Complainant's Release of Confidential Information**

15. At the time Complainant discovered the get card for Shostak, she had already had several contacts with Seebok and Kim concerning the August 833 meeting. Armed with this new information against Shostak, and believing that she was "blowing the whistle" against him, Complainant called Seebok that same day and informed him that she had confidential information about one of the people instrumental in her 833 meeting. Seebok assumed it was Shostak.

16. In that telephone conversation with Seebok, Complainant asked Seebok to ask Shostak's boss, Kim, if she, Complainant, could share some confidential information about one of the people instrumental in her August 833 meeting. She also informed Seebok that she was subject to a confidentiality agreement as a condition of her employment, and asked him to address that with Kim.

17. Seebok did ask Kim if Complainant could share confidential information regarding wrongdoing by one of the people instrumental in Complainant's August 833 meeting. At the time of this conversation, neither Seebok nor Kim knew that the information was medical in nature. Kim assumed that it was more general negative information regarding Shostak's performance as director of Wardenburg, similar to information Complainant had shared in the past with her. (Numerous other Wardenburg staff had also had meetings and contacts with Kim regarding their extreme displeasure with Shostak's management style. He ultimately resigned in January of 1999 amid serious concerns about his performance.)

18. Kim told Seebok that it was fine for Complainant to provide confidential information to her regarding someone instrumental in her 833 meeting, and that if there was information regarding wrongdoing at Wardenburg involving her 833 meeting, this would outweigh the confidentiality agreement Complainant had signed. At the time Kim stated her approval to Seebok, Kim did not know that it was confidential medical information that Complainant sought to share with her. Kim did not know anything other than that it was confidential information.

19. After Seebok spoke with Kim, he left Complainant a telephone message indicating that Kim had approved the sharing of confidential information with her, and that if there was information regarding wrongdoing at Wardenburg involving her 833 meeting, this would outweigh the confidentiality agreement Complainant had signed. Respondent appears to

---

<sup>2</sup> Complainant ultimately agreed to pay for the hearing test pursuant to the letter of counseling.

contest this, but offered no evidence to rebut it. The ALJ finds Complainant's testimony on this issue to be credible for the following reasons:

A. Complainant stated this to the appointing authority, Ronald Stump, in the 833 meeting in December 1998 for this case. At the time she stated this, she expected Stump to verify her information with both Kim and Seebok. Complainant would have damaged her defense significantly by lying to Stump at the 833 meeting.

B. Complainant reiterated this statement to Kim herself in her November 30, 1998 letter to Kim (see Paragraph 31 below), sent when she knew her 833 meeting was impending. Complainant would have also fatally damaged her defense by mis-stating the facts to Kim at that time.

C. Kim testified at hearing and never rebutted Complainant's version of events stated to her in the November 30 letter.

D. Complainant did not sign a confidentiality agreement with Seebok, and understood the communications between them not to be confidential unless she requested it. Complainant noticed Seebok's deposition for this case and expended resources to defend the subpoena of him (the subpoena was ultimately quashed); Complainant would never have sought to solicit his testimony unless she expected it to corroborate her own testimony.

### **Complainant's Accessing and Releasing of Information**

20. On November 12, 1998, at 6:46 a.m., shortly before the commencement of her shift at 7 a.m., Complainant accessed the chart review screen, Screen 7, for Peter Shostak, on her computer. This screen contained the medical billing information for Shostak, indicating what Complainant assumed was his receipt of free medical services. It also automatically revealed the medical billing information for Shostak's wife, Myra. (When a chart review is pulled up on the computer screen, all family members on the same policy are also accessed.)

21. Complainant also accessed her own chart review in order to show that she had ultimately paid for the hearing test; this automatically resulted in the accessing of her daughter Katherine Brummett's chart review.

22. Complainant printed the chart reviews for Peter Shostak and herself on her own printer, which also resulted in the printing of Myra Shostak's and Katherine Brummett's chart reviews. Complainant immediately shredded Myra Shostak's and Katherine Complainant's chart reviews. She retained her own and that of Peter Shostak, for the purpose of presenting them to Kim.

23. When Complainant printed the chart reviews on her own printer, they also printed on the printer of Michael Papacek, Accounting Technician IV at Wardenburg, who oversees

the Department of Patient Financial Services. Chart reviews automatically printed on his printer, and part of Papacek's job was to remove the chart review reports from his printer each morning. Papacek had authority to review them as part of his position at Wardenburg. Complainant was unaware that the chart reviews printed on his printer, and learned of that printing for the first time at the December 1998 833 meeting. She therefore did not intentionally release the chart reviews to Papacek.

24. The chart reviews, while financial documents that are not a part of the patient's official health record, contained confidential medical information. This included: diagnoses; treatments provided, dates of treatment; identity of treatment provider.

25. Neither Peter Shostak, Myra Shostak, nor Katherine Complainant had any prior knowledge of, nor approved of, Complainant's accessing and printing of the confidential information from their medical billing records.

26. Papacek found the four chart reviews on his printer when he arrived at work the next day, November 13, 1998. A banner page (cover sheet) accompanied the chart reviews, clearly indicating they had been printed by Complainant. (Exhibit 6) Papacek was concerned because he had not been informed that his immediate boss, Shostak, had any pending issues regarding billing for services at Wardenburg that would necessitate the printing of his chart review. Normally, he would have known about such an issue.

27. Papacek showed the chart reviews to Sarbina Spurlin, Complainant's immediate supervisor, and asked if she knew why their department was looking into Shostak's account. She had no idea. Later that day, they spoke to Jane Jenkins, the Human Resources Director at Wardenburg, who also had no idea.

28. On November 13, 1998, Papacek showed the chart reviews to Shostak, who, again, had not given anyone authorization to access or print his or his wife's billing information at Wardenburg. Shostak was concerned about the breach of confidentiality, and the safety of other patients' records, and felt Complainant had violated the confidentiality agreement she had signed.

29. On November 13, 1998, Shostak noticed an 833 meeting with Complainant for November 18, 1998, concerning her violation of confidentiality in accessing and printing the financial information on the three patients other than herself. Complainant, through her attorney, objected to Shostak conducting the 833 meeting. The next supervisor in line was Kim, who recused herself due to her having given Complainant permission, through Seebok, to share confidential information with her. Kim asked Dean of Students, Ronald Stump, to act as appointing authority to conduct the 833 meeting and handle any discipline of Complainant. The 833 meeting was ultimately held on December 28, 1998.

30. On November 30, 1998, with full knowledge of the 833 hearing coming up, Complainant wrote a cover letter to Kim, enclosing the chart reviews containing billing information on both Shostak and herself. She hand delivered it to Kim's office in a sealed

envelope, handing it to Kim's assistant.

31. Complainant stated in the November 30 letter to Kim (Exhibit 3), "This information was accessed only to show that I had been charged and paid for a hearing test at Wardenburg, and that Mr. Shostak had also used Wardenburg facilities (no charge). Tom Seebok assured me that you felt any information that would shed light on circumstances surrounding my 833 disciplinary action meeting in August, 1998, would take precedence over the 'confidentiality statement' that I had signed at the Health Center. I am now fighting to retain my position after 9 years at Wardenburg, and would not have printed this information had I felt that I did not have your approval to do so."

32. After receiving the November 30 letter and Shostak's and Complainant's chart reviews from Complainant, Kim did not feel comfortable meeting or discussing the material with Complainant. She called Seebok and explained that she had not expected it to be confidential medical information, that she had expected it to be more general information regarding Shostak's general misconduct in his position.

### **The 833 process**

33. The 833 meeting occurred on December 28, 1998. Present were Complainant, her attorney, Ronald Stump, appointing authority, Jane Jenkins, his administrative assistant, and two university counsel. A transcript of the hearing was admitted as Exhibit B.

34. Complainant stated that she had found the information regarding Shostak's free medical services in the course of assisting with an audit. She further explained that she then approached Seebok, asked him to seek the permission of Kim to share the confidential information with her, and, having obtained that permission, she printed the chart reviews approximately one month later, on November 12, 1998.

35. Complainant did not state that the audit on which she assisted Schultz was a peer review audit.

36. Complainant did not state that her printing the chart reviews was in any way connected to the audit with which she assisted Janis Schultz.

37. Complainant stated at least twice that she specifically asked Seebok to inquire with Kim regarding whether the release of confidential information regarding the 833 meeting would violate the confidentiality agreement she had signed, and that she received word back from Kim through Seebok that it would not.

38. Following the 833 meeting, Stump delegated most of his investigation to Sarbina Spurlin, Complainant's immediate supervisor, and Jenkins, his assistant. He specifically directed Spurlin to talk to Janis Schultz about the audit.

39. Spurlin asked Schultz what audits Complainant had assisted on in October of 1998.

At that time, neither Schultz nor Spurlin recalled that Complainant had assisted with an out guide audit. In fact, Spurlin had requested that Schultz conduct the out guide audit in October of 1998, and Complainant had volunteered to assist Schultz with it. When speaking to Spurlin as part of the 833 investigation, Schultz recalled only that Complainant had assisted with a peer review audit, which is different from the out guide audit described above. The peer review audit does not involve working with the get cards, for example, but instead involves working from a computer generated list. Schultz did not inform Spurlin at that time that Complainant had also assisted with the out guide audit.

40. The reason Schultz did not recall that Complainant had assisted with the out guide audit in October of 1998 is that Schultz had never done one before that, and it was not a routine part of her job. By contrast, the peer review audit that Complainant had assisted Schultz with was a routine part of Schultz's job, one which she performed monthly.

41. Based on the erroneous assumption that Complainant had assisted with a peer review audit only, Spurlin re-created on the computer all of the names that were included in the peer review audits in September, October, and November of 1998. (Unlike the out guide audit, which was done manually by pulling the get cards from file sleeves, the peer review audit was done by using computer generated lists; therefore, the names utilized in the peer review audit were easily re-created and printed off the computer.)

42. The search of lists generated in the peer review audits performed in the fall of 1998 revealed that Peter Shostak was not included in any of them.

43. Based on this finding, and, because neither Spurlin nor Schultz recalled that Complainant had assisted with the out guide audit, Spurlin informed Stump erroneously that Complainant had only worked on a peer review audit, and that those audits performed in the fall of 1998 would not have resulted in her viewing information on Peter Shostak.

44. Stump and Spurlin therefore erroneously assumed that Complainant had lied at her 833 meeting when she stated that she discovered the information on Shostak in the course of viewing a get card while assisting with an audit. (See Exhibit 1, pages 1 - 3).

45. At some point in the investigative process, Stump became confused about other issues. He also assumed that Complainant had stated at the 833 meeting that she had accessed Peter and Myra Shostak's and Katherine Brummett's chart reviews in the course of assisting Schultz with the audit. (See March 3, 1999 letter imposing discipline, Exhibit 1, pages 1 - 3). It is unclear how Stump arrived at this faulty conclusion.

46. After Stump's delegated investigation revealed that Complainant had apparently lied about the audit, he directed university counsel to write a letter to her attorney requesting clarification. The letter, dated January 14, 1999, requested a full explanation of the audit with which Complainant had assisted, and of "the reason such audit required Ms. Complainant to access the patients' billing records." This letter reveals that Stump and university counsel shared the misunderstanding about the audit.

47. In fact, Complainant had explained in the 833 meeting that a full month after the audit, after receiving approval from Kim, she had accessed the chart reviews. She had never stated that the accessing of chart reviews was connected to the audit.

48. Complainant's attorney responded in a letter that Complainant had addressed those issues in the 833 meeting; explained that "she did not feel that she was 'required' to follow up by looking at his financial records. . . . After several conversations with the ombudsman and a phone message, prior to obtaining the financial records, she felt that it was appropriate to obtain them to establish that Shostak was discriminating in his persecution of Deborah and Tammi, as well as other potential employees, because they had complained about the way he administered Wardenburg." The letter also addressed concerns regarding the earlier 833 meeting and related issues.

49. Stump's March 3, 1999 letter imposing discipline against Complainant (Exhibit 1) reveals that numerous factual errors formed the basis for his decision to demote her.

A. Stump states, "I find that there is no validity to your defense that you printed the Chart Review Report because you were pulling information for an Audit for Ms. Schultz". In fact, Complainant never stated this or presented it as a defense. Significantly, pages 1 - 3 of the letter are dedicated solely to rebutting this nonexistent defense.

B. Stump further states, "In Paragraph 7 of the letter from your attorney, dated January 22, 1997, it was stated that you obtained the information on the three patients, Mr. Shostak, Myra Shostak and Katherine Complainant, . . . in order to help Janis Schultz. . . with her audit preparation (Primary Care Health Care Provider **Peer Review Audits**, hereafter "Audit" or "Audits." (Exhibit 1, emphasis added) In fact, Paragraph 7 of the January 22 letter (Exhibit 18) does not state anything about the three patients, nor does it reference a peer review audit. In addition, Stump admitted at hearing that Complainant never said anything about a peer review audit at any time in connection with this case. The peer review audit misinformation was generated (through innocent mistake) by Schultz and Spurlin.

50. Stump also cited the following in reaching his decision to demote Complainant:

- Complainant had not obtained the prior written consent of any of the three patients prior to accessing and, in the case of Peter Shostak, disclosing the medical information;
- Complainant did not have a bona fide business reason for accessing the information on the three patients or disclosing the information to Kim;
- Complainant had violated not only her confidentiality agreement, but numerous University policies regarding confidentiality of patient information;
- Vice Chancellor Kim did not have authority to approve Complainant's violation of the Confidentiality Agreement (or to grant unauthorized access to patient information, or to review confidential patient information), notwithstanding the fact that Kim was "at the top of the chain of authority with regard to Wardenburg";

- she had never offered a credible explanation of why Katherine Brummett's and Myra Shostak's records were accessed and printed;
- she had accessed medical information, not just financial information, as she had claimed;
- her violation of the agreement and policies "is especially egregious given that in your role as Wardenburg's Release of Health Information Technician (RHIT), you are the chief employee at Wardenburg charged with protecting the confidentiality of patient information as regards access and dissemination of records. See 'Release of Health Information: Security' policy";
- Complainant had violated workers compensation laws by being at work at 6:46, "well before the time that you were scheduled to report for work."

51. Stump concluded, "Based on the above, I find that in the very most technical sense, you may not have violated the proscriptions on unauthorized access of patients *medical* records. However, in your job as the designated RHIT, you have been made aware of the law, policies and procedures pertaining to the appropriate accessing and transmission of patients' medical information and the need to guard and protect all patients' confidential data. My investigation revealed that you did improperly access and disclose confidential patient information and that you accessed this confidential information regarding the Three patients treated at Wardenburg for purposes that are inappropriate to your role as an employee of Wardenburg and as the RHIT. I find that such action on your part breached the confidentiality expectations and requirements to which all staff of a health facility must adhere, but in particular, that you, in your particular job assignment, must adhere."

52. The central basis for Stump's decision to demote Complainant was his erroneous assumption that she had lied in explaining her actions. He assumed that she lied in stating that she discovered the information about Shostak in the course of assisting with the audit, and that she lied about needing to access the information on the Shostaks and Katherine Brummett as a part of assisting with that audit. Stump's March 3 letter states, "Further, and **of the most importance to my decision**, I find that your lack of veracity in explaining your actions is inconsistent with the high position of trust conferred upon the RHIT. I can reach no other conclusion than that you have violated your position of trust in such a way that you cannot be returned to your current position in the Department of Health Information Management." (Pages 7 - 8, Exhibit 1)(emphasis added).

53. Complainant had never been previously corrected or disciplined during her ten-year tenure at Wardenburg. Complainant's most recent completed PACE evaluation, 1996 - 97, and her 1995 - 96 evaluation were an overall "Commendable." Complainant's 1994 - 95 evaluation was not offered into evidence. Her 1993-1994 evaluation was an overall "Good." Her February to June 1993 evaluation was "Outstanding." Her November 1991 to February 1993 evaluation was "Commendable."

54. Wardenburg policies and procedures regarding confidential patient information bar the release of such information without the prior written consent of the patient. The Release of Health Information policy (Exhibit 14) also protects patients from "unauthorized

inspection,” or accessing, of confidential information.

55. Stump was asked at hearing whether there were any circumstances or authority under which a person could access chart review files if the person believed something was seriously wrong. Stump answered that it could happen “under the circumstances we’re talking about,” but the person would have to obtain authorization first.

56. On March 3, 1999, Stump transferred and demoted Complainant to the position of Accounting Technician II, then vacant, in the Department of Patient Financial Services, with a new monthly salary of \$2,409.00. The record does not reveal the amount of reduction in salary. In his letter, Stump stated that the position, “to the extent possible, will not include access to any patient confidential information. By copy of this letter. . . I am instructing [your new supervisors] to write a PDQ that will insure that you have no access, to the extent possible, to confidential patient information, either financial or medical.” The testimony of Papacek, Complainant’s supervisor, reveals that the position involves access to confidential patient information. Complainant has not yet signed her PDQ due to her concern that she may be held accountable for handling confidential patient information, in violation of the discipline imposed.

57. In April or May of 1999, Schultz remembered the fact that Complainant had assisted her with the out guide audit in October of 1998. She remembered this because “some of the facts of this case didn’t go along with the peer review” audit. Schultz informed Spurlin of her recollection at that time, and said to her, “Isn’t it possible she’s talking about the out guide audit?”

58. The record does not reflect whether Spurlin informed Stump of the enormous misunderstanding regarding this issue. This new, critically important information corroborated Complainant’s statements made throughout the 833 process.

59. Complainant regularly arrived at work prior to the 7 a.m. start time for her shift, at approximately 6:30 a.m., and no one at Wardenburg objected to it. Complainant never requested overtime pay for coming in early. Complainant did not violate the overtime policy at Wardenburg by coming in early on November 12, 1998.

60. Complainant requests reinstatement to the Release of Health Information Technician position, back pay, attorney fees and costs.

## **DISCUSSION**

The burden is upon Respondent to prove by a preponderance of the evidence that the acts on which the discipline was based occurred and that just cause warrants the discipline imposed. *Department of Institutions v. Kinchen*, 886 P. 2d 700 (Colo. 1994). The administrative law judge, as the trier of fact, must determine whether the burden of proof has been met. *Metro Moving and Storage Co. v. Gussert*, 914 P. 2d 411 (Colo. App.

1995).

**1. Did Complainant commit the acts for which she was disciplined?**

The evidence demonstrates that Complainant was disciplined for two things: 1. lacking veracity in explaining her actions to the appointing authority, and 2. violating the confidentiality agreement, Wardenburg policies and procedures governing accessing and release of confidential patient information, and the requirements of her position, by accessing and releasing the chart reviews of three Wardenburg patients.

**A. Lack of Veracity**

Stump made it clear in his letter imposing discipline that the primary reason for disciplining Complainant was his finding that “your lack of veracity in explaining your actions is inconsistent with the high level of trust conferred upon the RHIT.” The record has demonstrated, however, that Complainant did not lack veracity in explaining her actions. She was completely forthcoming at the 833 meeting and in the ensuing investigation regarding how she learned of Shostak’s apparent free medical treatment, how she later approached Kim about violating the confidentiality agreement in order to provide Kim with confidential information, and, one month after the audit, how she then accessed and released the information on Shostak to Kim. Since Complainant did not lack veracity in explaining her actions, she did not commit the primary act for which she was disciplined.

**B. Accessing and Releasing Confidential Patient Information**

The remaining conduct of Complainant under review is her accessing of the three patients’ chart reviews on November 12, 1998, her inadvertent release of those chart reviews to Papacek by printing them on his printer, and her subsequent release of Shostak’s chart review to Kim on November 30, 1998. The record is clear that Complainant committed these acts. Complainant does not deny that she committed these acts.

Since Complainant did not lack veracity in explaining her actions throughout the 833 process, she cannot be disciplined for that.

**2. Equitable Estoppel Defense**

Complainant has raised the equitable estoppel defense based on Kim’s approval of violating her confidentiality agreement. The defense of equitable estoppel may be applied against government agencies to prevent injustice. C.F. Lytle Co. V. Clark, 491 F.2d 834, 838 (10th Cir. 1974); Sisneros v. Booker, 981 F.Supp. 1374, 1377 (D.Colo. 1997).

The University Ombudsman, Seebok, informed Complainant that Kim had approved the sharing of confidential information in violation of her confidentiality agreement. Kim was the University administrator “at the top of the chain of authority with regard to Wardenburg.” As such, it was reasonable for Complainant to assume that Kim had authority to provide such approval on behalf of the University.

However, at the time Complainant received this approval from Kim, the only information Complainant had in her possession was the information from the get card on Shostak. Complainant could at that time have simply informed Kim of the information she had learned in reading the get card for Shostak, i.e., that apparently he had obtained services at Wardenburg at a time when he was not eligible for such services, and therefore had received them for no charge. It would then have been up to Kim to do what she saw as appropriate with that information.

By accessing Shostak's chart review, one full month after receiving Kim's permission to share confidential information, Complainant went beyond any approval Kim had given to her. Complainant did not have approval to make secret entry into the confidential patient file of Shostak. Nor did she have approval to obtain any new confidential information of any kind.

Complainant therefore willfully violated the Release of Health Information policy, which protects patients from "unauthorized inspection" of confidential information, when she accessed Shostak's chart review on her computer on November 12, 1998. Complainant also violated all Wardenburg policies governing the handling of confidential patient information by accessing Shostak's chart review for personal reasons that were unrelated to her position. She obtained unauthorized access to the records.

While Complainant argues that she felt she was uncovering wrongdoing by Shostak, the fact remains that this was an act unrelated to her job responsibilities, and she could have simply told Kim about her suspicions, and left it to Kim to pursue. Complainant did not have to access Shostak's chart review records to blow the whistle on him.

Patient medical information is a sacred trust. It is the most personal of all information retained in official business records. As the Wardenburg Medical Record Ethics Confidentiality Policy ("confidentiality agreement") signed by Complainant, states, "We are entrusted with a large number of Medical Records which require confidential handling. Do not betray this trust. Every employee of Wardenburg . . . will insure that [this institution] is one in which the confidentiality of Medical Records is appreciated and respected. Each employee, volunteer, or work-study student is employed upon the assurance that he/she understands and actively supports this concept." In signing this policy, Complainant agreed to "support and uphold the confidentiality of the patient's medical record and/or presence at Wardenburg." By its own terms, this policy applies not only to medical records, but to an individual's very presence at Wardenburg.

The question of whether Complainant's release of the Shostak chart review to Kim presents a closer question. Kim expressly approved Complainant's violation of the confidentiality agreement in order to share information about a supervisor at the August 1988 833 meeting. As the person at the top of the chain of command at Wardenburg, Kim did have apparent authority to authorize that violation. Therefore, it was reasonable for Complainant to rely on that authority. Although Stump stated in his letter imposing discipline that Kim did not have authority to approve Complainant's violation of the

confidentiality agreement, it was reasonable for Complainant to rely on Kim's apparent authority on November 30, 1998. It would be fundamentally unfair to hold Complainant responsible for conduct for which she received University approval.

It is also noteworthy that the only person to whom Complainant sought to release information was Kim herself, who, as the administrator at the top of the Wardenburg chain of command overseeing "health information management personnel", was arguably an "authorized user" under the confidentiality agreement. (See Paragraph 3). When Kim authorized the release of the information, she also took the position that she (Kim) had authority to review confidential information. In order to prevent injustice to Complainant, the University must be estopped from changing its position with respect not only to Kim's authority to authorize Complainant's release of information, but also regarding Kim's authority to review that information.

Complainant did not intentionally access either Myra Shostak's or Katherine Brummett's chart reviews. These were incidental to her accessing of Peter Shostak's and her own chart reviews. It is therefore found that those actions did not constitute a willful violation of the confidentiality agreement or university policies. Moreover, she immediately shredded them, and there is no evidence in the record that she even reviewed those records.

In addition, Complainant did not intentionally print the chart reviews on Papacek's printer. Therefore, it is found that this inadvertent "release" was not an intentional violation of any policies or the confidentiality agreement. Further, as a Wardenburg management employee with authorization to review patients' chart reviews, it was not a violation of Wardenburg confidentiality policies for Papacek to inspect them under these circumstances.

Complainant has therefore raised an equitable estoppel defense only in regard to her release of the Shostak chart review to Kim on November 30, 1998.

### **3. Arbitrary and Capricious Action**

Arbitrary and capricious action can arise in one or more of three ways: a) by neglecting or refusing to procure evidence; b) by failing to give candid consideration to the evidence; and c) by exercising discretion based on evidence in such a way that reasonable people must reach a contrary conclusion. Van de Vegt v. Board of Commissioners, 55 P.2d 703, 705 (Colo. 1936).

In this case the appointing authority, Stump, was told by Complainant at the 833 meeting, and in her attorney's follow up letter, that the accessing of the chart reviews was not related to the audit. Despite these statements, Stump specifically found that Complainant had told him that she had accessed the chart reviews as a direct result of her work on the audit, and had misrepresented herself on this issue. Stump ignored or

overlooked critical evidence provided by Complainant. His action of disciplining Complainant for her lack of veracity on this issue was therefore arbitrary and capricious.

Complainant's immediate supervisor, Spurlin, also learned one or two months after Complainant was disciplined that Complainant had worked on an out guide audit in October of 1998. This information corroborated Complainant's statements made throughout the 833 process, and therefore meant that the entire basis for the finding of Complainant's lack of veracity was unfounded. Complainant had suffered a significant setback professionally and financially, and had by then appealed her demotion. It was arbitrary and capricious for Respondent to fail to follow up on this critical corroborating evidence in an effort to actively pursue the truth. Instead, it allowed the finding of Complainant's lack of veracity to remain in her permanent personnel record.

#### **4. Sanction**

This case presents a number of mitigating and aggravating circumstances. In mitigation, the record is clear that the primary reason for discipline in this case was Complainant's lack of veracity, which was not proven at hearing. Any discipline based on that conduct must be overturned. In addition, this was Complainant's first such violation. Complainant has had a ten year track record of solid work performance at Wardenburg. Complainant did have the blessing of the top Wardenburg administrator to share confidential information about a supervisor at her 833 meeting. It is understandable, to some extent, that Complainant could translate this approval into an authorization to access the confidential information as well. Lastly, Complainant only released the information to Kim, at the top of the Wardenburg chain of command, not to an independent third party.

However, Complainant did willfully violate the confidentiality agreement and Wardenburg policies regarding handling of confidential patient information. This is a serious enough violation of Complainant's high position of trust to warrant a finding that corrective action could appropriately be bypassed. Wardenburg must be free to send a message to all employees that immediate disciplinary action will be imposed against any employee for breach of confidentiality regarding patient information. Further, Complainant was in the best position of anyone at Wardenburg to know all policies and procedures relating to handling of confidential information. She knew what a serious breach of confidentiality it was to access Shostak's billing records, which revealed the type of treatment he received, from whom, on what date, and which also would have revealed any diagnoses, had there been any. Further, the only reasons for making such unauthorized access were to remove a letter of counseling from her record and to prove Shostak to have violated his own rules.

In view of the fact that the primary basis for discipline was Complainant's lack of veracity, which has been disproven, as well as her flawless ten-year career at Wardenburg with no prior performance issues, it is found that a permanent demotion is outside the range of reasonable alternatives available to the appointing authority in this case. It can

only be assumed, based on the clear language in Stump's letter imposing discipline, that had he not assumed erroneously that Complainant lied to him about the entire incident, Stump would have imposed a lesser discipline in this case.

The University is free to impose corrective action, up to and including a temporary demotion for up to three months. The permanent demotion is rescinded.

## **5. Attorney fees**

Section 24-50-125.5, C.R.S (1998) , allows the awarding of attorneys fees only upon a finding "that the personnel action from which the proceeding arose was instituted frivolously, in bad faith, maliciously, or as a means of harassment or was otherwise groundless." This case presents somewhat of a close call, given Respondent's failure to act on the information received after discipline was imposed. However, since Complainant did access and release confidential information without patient authorization,

and since the circumstances of Kim's authorization were muddied by the fact it went through Seebok, Respondent did not act in bad faith, maliciously, or as a means of harassment in instituting discipline against Complainant, and c. Nor was the action of Respondent groundless,.

Therefore, no attorney fees are ordered in this case.

## **CONCLUSIONS OF LAW**

1. Complainant did not engage in the primary act for which she was disciplined, namely, being untruthful in explaining her actions. Complainant did access and release confidential information without patient authorization, but did so in reasonable reliance upon Vice Chancellor Kim's approval. The University is equitably estopped from holding Complainant responsible for her actions taken in reliance on Kim's approval.

2. Respondent's actions were arbitrary and capricious.

3. Neither party is entitled to an attorney fee award.

## **ORDER**

The relief requested by complainant is granted. Respondent is ordered to reinstate Complainant to her former position of Release of Health Information Technician, and to pay her back pay minus whatever compensation she has received in her new position since her

demotion. The discipline shall be expunged from Complainant's personnel record.

DATED this \_\_\_\_\_ day of  
August, 1999, at  
Denver, Colorado.

\_\_\_\_\_  
Mary S. McClatchey  
Administrative Law Judge

### **NOTICE OF APPEAL RIGHTS**

EACH PARTY HAS THE FOLLOWING RIGHTS

1. To abide by the decision of the Administrative Law Judge ("ALJ").
2. To appeal the decision of the ALJ to the State Personnel Board ("Board"). To appeal the decision of the ALJ, a party must file a designation of record with the Board within twenty (20) calendar days of the date the decision of the ALJ is mailed to the parties. Section 24-4-105(15), C.R.S. Additionally, a written notice of appeal must be filed with the State Personnel Board within thirty (30) calendar days after the decision of the ALJ is mailed to the parties. Both the designation of record and the notice of appeal must be received by the Board no later than the applicable twenty (20) or thirty (30) calendar day deadline. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990); Sections 24-4-105(14) and (15), C.R.S.; Rule R-8-58, 4 Code of Colo. Reg. 801. If a written notice of appeal is not received by the Board within thirty calendar days of the mailing date of the decision of the ALJ, then the decision of the ALJ automatically becomes final. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990).

### **PETITION FOR RECONSIDERATION**

A petition for reconsideration of the decision of the ALJ may be filed within 5 calendar days after receipt of the decision of the ALJ. The petition for reconsideration must allege an oversight or misapprehension by the ALJ. The filing of a petition for reconsideration does not extend the thirty calendar day deadline, described above, for filing a notice of appeal of the decision of the ALJ.

### **RECORD ON APPEAL**

The party appealing the decision of the ALJ must pay the cost to prepare the record on appeal. The fee to prepare the record on appeal is **\$50.00** (exclusive of any transcription cost). Payment of the preparation fee may be made either by check or, in the case of a governmental entity, documentary proof that actual payment already has been made to the Board through COFRS.

Any party wishing to have a transcript made part of the record is responsible for having the transcript prepared. To be certified as part of the record, an original transcript must be prepared by a disinterested, recognized transcriber and filed with the Board within 45 days of the date of the designation of record. For additional information contact the State Personnel Board office at (303) 866-3244.

**BRIEFS ON APPEAL**

The opening brief of the appellant must be filed with the Board and mailed to the appellee within twenty calendar days after the date the Certificate of Record of Hearing Proceedings is mailed to the parties by the Board. The answer brief of the appellee must be filed with the Board and mailed to the appellant within 10 calendar days after the appellee receives the appellant's opening brief. An original and 7 copies of each brief must be filed with the Board. A brief cannot exceed 10 pages in length unless the Board orders otherwise. Briefs must be double spaced and on 8 ½ inch by 11 inch paper only. Rule R-8-64, 4 CCR 801.

**ORAL ARGUMENT ON APPEAL**

A request for oral argument must be filed with the Board on or before the date a party's brief is due. Rule R-8-66, 4 CCR 801. Requests for oral argument are seldom granted.

**CERTIFICATE OF MAILING**

This is to certify that on the \_\_\_\_ day of August, 1999, I placed true copies of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE** in the United States mail, postage prepaid, addressed as follows:

Douglas C. Thorburn  
Thorburn, Sakol & Throne  
255 Canyon Boulevard at Cloud Creek, Suite 100  
Boulder, Colorado

L. Louise Romero  
Managing Senior Associate University Counsel  
202 Regent Administrative Center  
Boulder, Colorado 80309

---

