COMMONWEALTH OF PENNSYLVANIA

Angella D. Egwaikhide	:	State Civil Service Commission
	:	
v.	:	
	:	
Wernersville State Hospital, Department of Human Services	:	Appeal No. 29627

David L. Deratzian[1]
Attorneys for Appellant

Peter J. Garcia
Attorney for Appointing Authority

ADJUDICATION

This is an appeal by Angella D. Egwaikhide challenging her removal from regular Psychological Services Associate, MH, employment with Wernersville State Hospital, Department of Human Services. Hearings were held on October 19, 2017 and August 13, 2018 at the State Civil Service Commission's Eastern Regional Office in Philadelphia, Pennsylvania, before Commissioner Bryan R. Lentz.

The Commissioners have reviewed the Notes of Testimony and exhibits introduced at the hearing, as well as the Briefs submitted by appellant and the appointing authority. The issues before the Commission are: (1) whether the appointing authority had just cause to remove the appellant; and (2) whether the appointing authority removed appellant for reasons motivated by discrimination.

[1] The hearing was held over the course of two days. Appellant was represented by Carol Herring on the first day of the hearing. David L. Deratzian represented appellant on the second day of the hearing and filed a post-hearing brief on appellant's behalf.

FINDINGS OF FACT

1. By letter dated April 3, 2017, appellant was notified of her removal from her position as regular status Psychological Services Associate, MH, (hereinafter "PSA") with Wernersville State Hospital (hereinafter "the appointing authority"), effective April 6, 2017. Comm. Ex. A.

2. In the April 3, 2017 letter, the appointing authority listed the following reasons for removing appellant:

> 1. **Unauthorized Transmission of protected health information (PHI) under the Health Insurance Portability and Accountability Act (HIPAA) of 1996 and related regulations.** Specifically, on November 22, 2016 you emailed Mandatory Abuse Reports for five separate patients to your private email address and to your union business agent. These documents identified the five patients by name and gave details of the patients' PHI. In addition to violating Wernersville State Hospital Policy/Procedure Manual IM 200, Documentation/Handling of Confidential Consumer Information, this disclosure violates HIPAA privacy and security requirements. You verified your understanding of the HIPAA requirements by your

signature on the Wernersville State Hospital Confidentiality, Security, & Integrity Statement of Understanding on March 8, 2011, and reaffirmed your understanding as late as December 28, 2015, before disclosing the patients' PHI. Your disclosure of PHI required the Department of Human Services (DHS) to notify the patients or their families of the breach of privacy and report the breach to the federal Department of Health and Human Services (DHHS), potentially making you and/or DHS liable for criminal or civil penalties. This violation could result in your removal from employment.

2. **Failure to Follow General Instructions or Procedures, as defined in DHS Manual 7174.** You improperly used the Commonwealth personal computer you were issued in a manner that runs counter to Management Directive 205.34, Standards for Employee and Other Authorized User Internet Use and Electronic Mail Communications; Human Resource Bulletin 08-03, Standards for Personal Use of Electronic Mail and Internet and Prohibition of the Use of Instant Messaging. You have acknowledged your understanding of Management Directive 205.34 by the User Agreement you signed on March 7, 2011.

a) Specifically, on November 14, 2016, your supervisor directed to copy him on all work-related emails you sent. After being directed to do so, you failed to copy him on numerous work-related emails.

b) Specifically, on June 20, 2016 you used a Commonwealth computer to inappropriately send a series of at least 10 character letters for yourself to current and former employees at Wernersville State Hospital.

c) Specifically, on November 1, 2016, you used a Commonwealth computer to send an inappropriate, personal email to a Dr. Ayo Gooden – a member of the public who has no business connection to the Wernersville State Hospital or Department of Human Services – describing a confidential counseling session and making disparaging remarks and accusations about supervisors and staff at Wernersville State Hospital.

Comm. Ex. A (emphasis in original). The appointing authority also noted in the letter that Charge 1 standing alone would warrant removal. Comm. Ex. A.

3. The appeal was properly raised before this Commission and was heard under Sections 951(a) and 951(b) of the Civil Service Act, as amended.

4. In 2009, appellant began working for the Commonwealth at Allentown State Hospital as a pre-doctoral psychology intern. N.T. p. 611.

5. In 2010, after finishing her internship with Allentown State Hospital, appellant obtained her doctorate degree. N.T. p. 611.

6. In March 2011, appellant began working as a PSA for the appointing authority. N.T. p. 612.

7. The appointing authority is an inpatient psychiatric facility. N.T. p. 23

8. The appointing authority's employees are mandatory reporters. As mandatory reporters, the appointing authority's employees are required to report patient abuse. N.T. pp. 459-460.

9. The appointing authority's Chief Executive Officer (hereinafter "CEO") and her office are responsible for receiving reports of abuse. N.T. p. 461.

10. Employees who witness patient abuse may report the abuse by submitting either a mandatory abuse report form or the SI-815 form. N.T. pp. 458-459.

11. It is not a requirement that a form be used when reporting abuse. If a form is not used, the employee may be asked to fill out a form. N.T. pp. 458-459.

12. Mandatory abuse report forms may be submitted to the CEO or directly to the local area agency on aging (hereinafter "AAA"). N.T. p. 485.

13. Mandatory abuse report forms are required to be shared with the AAA. If the form is submitted to the CEO, the CEO will forward it to the AAA. N.T. pp. 482-485.

14. When abuse is reported to the CEO's office, an investigation is conducted by the appointing authority's supervisors and managers. N.T. pp. 461-462.

15. Appellant's union does not conduct patient abuse investigations. N.T. p. 208.

16. By email dated November 22, 2016, appellant sent five unredacted mandatory abuse report forms to her private email address and her union business agent. N.T. pp. 202, 204-208; AA Ex. 7.

17. The first mandatory abuse report form attached to the November 22, 2016 email was dated September 21, 2015. The following information is noted on this form: the patient's name; name and address of the hospital where the patient was residing; and the patient's consumer number. AA Ex. 7 (pp. 2-3).

18. The second mandatory abuse report form attached to the November 22, 2016 email was dated September 21, 2015. The following information is noted on this form: the patient's name; name and address of the hospital where the patient was residing; the unit number; and the patient's consumer number. Statements the patient made during group therapy are also quoted on the second form. N.T. pp. 468-470, 522; AA Ex. 7 (pp. 4-5); Ap. Ex. 4.

19. The third mandatory abuse report form attached to the November 22, 2016 email was dated November 2, 2015. The following information is

noted on this form: the patient's name and race; name and address of the hospital where the patient was residing; and the patient's consumer number. On the third form, there are also references that the patient was in a work program and individual therapy, and the patient's response to the treatment is noted. N.T. pp. 476-479, 525; AA Ex. 7 (pp. 6-7); Ap. Ex. 5.

20. The fourth mandatory abuse report form attached to the November 22, 2016 email was dated November 2, 2015. The following information is noted on this form: the patient's name; name and address of the hospital where the patient was residing; and the patient's consumer number. There are also references on the fourth form that the patient was in an anger management group. N.T. pp. 480, 482, 526; AA Ex. 7 (pp. 8-9); Ap. Ex. 6.

21. The fifth mandatory abuse report form attached to the November 22, 2016 email was dated September 23, 2015. The following information is noted on this form: the patient's name; name and address of the hospital where the patient was residing; and five patient consumer numbers. There

is also a reference to the patient's therapy on the fifth form. N.T. p. 537; AA Ex. 7 (pp. 10-11); Ap. Ex. 7.

22. The patient's consumer number is part of the patient's medical record. It is used to identify the patient. N.T. p. 470.

23. Appellant did not notify the appointing authority's Medical Records Department that she disclosed the five unredacted mandatory abuse report forms to a business agent of the union. N.T. pp. 45-46.

24. The information contained in the five mandatory abuse reports attached to the November 22, 2016 email was disclosed without prior notification to the patients and without their consent. N.T. pp. 238, 683-684.

25. The appointing authority does not have a means by which it can track the dissemination of information from an employee's private email address or by the union. N.T. pp. 228-229, 240-241.

26. Appellant chose not to attend an in-person pre-disciplinary conference (hereinafter "PDC") regarding the charges in the April 3, 2017 letter. Instead, appellant provided a written response to the charges. N.T. pp. 212, 392-394.

27. Appellant filed three discrimination complaints with the Department of Human Services Bureau of Equal Opportunity (hereinafter "Bureau of Equal Opportunity") in 2014, 2015, and 2016. N.T. p. 622.

28. In her 2016 discrimination complaint, appellant specifically named thirteen people as alleged offenders. Ap. Ex. 13.

29. Two of the thirteen people named in appellant's 2016 discrimination complaint were also named as offenders in three of the mandatory abuse report forms attached to the November 22, 2016 email. Ap. Exs. 5, 6, 7, 13.

30. None of the persons, who were involved in the determination to remove appellant, were named in the mandatory abuse reports. N.T. pp. 727-729.

31. IM 200 is the appointing authority's policy and procedure manual which addresses the documentation and handling of confidential consumer information. N.T. pp. 450-451; AA Ex. 1.

32. Section (IV)(A) of IM 200 defines medical record as follows:

> The collection of written or electronic information, observations, and reports concerning a consumer and his or her health care that is created and maintained in the regular course of treatment at Wernersville State Hospital in accordance with policies, made by persons who have knowledge of the acts, events, opinions, diagnoses relating to the consumer….
>
> - The presence or absence of a consumer who is currently involuntarily committed at Wernersville State Hospital is not considered a part of a medical record. Such information may be released at the discretion of the Chief Executive Officer of Wernersville State Hospital in response to legitimate inquiries from governmental agencies or when it is clearly in the best interest to do so.
> - No document which was a public record prior to the individual's treatment shall

> become confidential by its inclusion in the medical record of Wernersville State Hospital. *When information and observations regarding consumers are not made part of the consumer's medical records, there remains a duty and obligation for hospital staff to respect the consumer's privacy and confidentiality by acting responsibly in using or discussing such information.* Records and proceedings of peer reviews and investigations, including incident reports are not part of consumers' medical records.

AA Ex. 1 (p. 1)(emphasis added).

33. Section (IV)(C) of IM 200 defines PHI as follows:

> Individually identifiable health information that is transmitted or maintained in any medium, including oral statements.

AA Ex. 1 (p. 2).

34. Section (V)(D)(1) of IM 200 provides:

> All employees involved in handling consumers' medical record information are responsible to protect the privacy of each consumer's medical record. A breach of

> confidentiality of consumer information may be cause for hospital disciplinary action.

AA Ex. 1 (p. 4)

35. Section (V)(D)(3) of IM 200 provides:

> Hospital employees are responsible to direct all written, electronic and telephone requests for release of consumer information to the Medical Records Department before any disclosure of information occurs. An inappropriate disclosure of consumer information may result in hospital disciplinary action against the employee responsible for making the inappropriate disclosure.

AA Ex. 1 (p. 5).

36. Section (V)(I)(1) of IM 200 provides:

> Copies of medical record information should not be made or released without first notifying the Medical Records Department. Medical Records Department policy requires that such releases of medical record information be logged and stamped appropriately….

AA Ex. 1 (p. 9).

37. Section (V)(H)(1)(a)-(k) of IM 200 provides:

> 1. Relevant portions or summaries of information pertaining to a consumer's hospitalization at the appointing authority may be released without consent only as follows:
>
> a. To those actively engaged in treating the individual, or to persons at other facilities, including professional staff of state correctional institutions and county prisons, when the consumer is referred or discharged to that facility and the information is necessary to provide for continuity of care and treatment.
>
> b. To third party payors, both those operated and financed in whole or in part by a governmental agency and their agents, intermediaries, or those who are identified as payor or co-payor for services and who require information to verify that services were actually provided for reimbursement purposes.
>
> c. To reviewers and inspectors, including regulatory and accrediting agencies, when necessary to obtain certification as an eligible provider of services.

d. To those participating in utilization review of hospital services and resources.

e. To the Chief Executive Officer, pursuant to his duties under applicable statues and regulations.

f. To a court, mental health review officer, or attorney in the course of legal proceedings authorized by the Mental Health Procedures (i.e., commitment hearings).

g. To appropriate Department of Public Welfare personnel when information from the medical record is necessary and appropriate for the proper performance of job duties. The Medical Records Director limits the information to those portions of the medical record which are relevant to the request.

h. In response to a court order when production of documents is ordered by a court order under Section 5100.35(b). Legal counsel is contacted upon receipt of same.

i. In response to an emergency medical situation when release of information is necessary to prevent serious risk of bodily harm or death. Only specific information

pertinent to the relief of the emergency may be released without written consent. Requestors who need information over the telephone in cases of medical emergency are given information after a validity screening is conducted.

j. To parents or legal guardians and others when necessary to obtain consent to medical treatment.

k. To law enforcement agencies, pursuant to the Mental Health Procedures Act of 1976 and Mental Health/Mental Retardation Act of 1966, whenever an involuntarily committed consumer elopes from Wernersville State Hospital.

   1. The Chief Executive Officer or his designee releases consumer information as is necessary, relevant and appropriate for the safe return of the consumer.

   2. Consumer information includes name; identifying information, including a photograph; next-of-kin, addresses and phone numbers; and medical information

> necessary for the safety of the consumer and others.

AA Ex. 1 (pp. 8-9).

38. IM 200 does not permit the non-consensual release of patient information to a business agent for an employee's union. N.T. p. 42; AA Ex. 1 (pp. 8-9).

39. Section (V)(K)(1) of IM 200 provides:

> Electronic transmission of consumer health information should be limited to consumer care emergency situations.

This includes the release of information via email attachments. N.T. pp. 42-43; AA Ex. 1 (p. 10).

40. The appointing authority's policies governing confidential patient information are provided to all employees. N.T. p. 46

41. All new employees are required to take the appointing authority's HIPAA training, which is in slideshow format. N.T. pp. 46-47, 58-59; AA Ex. 2.

42. The appointing authority's HIPAA training contains a slide notifying employees of the appointing authority's IM 200 policy and informing

employees that this policy can be found on the appointing authority's Intranet. This training also informs employees of the following: (1) the consumer is to be informed when information leaves the appointing authority; (2) prior written permission must be obtained before releasing patient information; and (3) patient information may be dispensed to others in the healthcare system on a need-to-know basis only. N.T. pp. 48-50, 58-59; AA Ex. 2 (pp. 9, 11-12).

43. In addition to the HIPAA training, employees are required to take the Annual Revision Training ("ART"). This training reviews the same information as the HIPAA training and is sometimes divided into more than one part. N.T. pp. 62, 66, 120.

44. Appellant's training transcript reflects she took the following patient confidentiality trainings, which also address HIPAA: (a) 21 WeSH: ART 2015 Training Exams on December 28, 2015; (b) 21 WeSH: ART 2014 Part II—Live Training on July 16, 2015; (c) PW-21WSH: ART 2014 Training Exams on December 23, 2014; and (d) PW-

21WSH: ART 2013 Training Exams on September 30, 2013. N.T. pp. 64-69, 87-89; AA Ex. 5.

45. Upon taking the HIPAA training, every new employee signs the appointing authority's Confidentiality, Security, and Integrity Statement of Understanding. The Statement of Understanding provides in pertinent part:

> It is the responsibility of all persons granted access to confidential information to protect the confidentiality of patient, employee and hospital information and to make use of that information only to the extent authorized and necessary to provide patient care and/or to perform proper Hospital, Medical Staff or Educational functions.

N.T. p. 60; AA Ex. 4.

46. By signing the Confidentiality, Security, and Integrity Statement of Understanding, employees recognize and acknowledge:

> …that patient-identifiable information and certain other information [the appointing authority] maintains for business purposes including personnel information is confidential.

AA Ex. 4. Additionally, employees "recognize that unauthorized disclosure of confidential information is totally prohibited…." AA Ex. 4.

47. By signing the Confidentiality, Security, and Integrity Statement of Understanding, employees agree to the following:

> …that I will not, at any time during or after my employment or term of service, improperly disclose any confidential information to any person or permit any unauthorized person to examine or make copies of any reports, documents, or on-line information that comes into my possession that contains Individually Identifiable Health Information. Additionally, as this confidential information is available only on a Need-to-Know basis, I will not access confidential information without authorization, will do so only when required, and will adhere to the Health Insurance and Portability and Accountability Act of 1996 Minimum Necessary Standard [45 CFR Part 164.502(b), 164.51(d)].

AA Ex. 4.

48. Appellant signed the appointing authority's Confidentiality, Security, and Integrity Statement of Understanding on March 8, 2011. N.T. p. 60; AA Ex. 4.

49. DHS Policy 7174 provides suggested charges that might be levied against an employee along with the suggested level of discipline that should be imposed if those charges are substantiated. This policy provides that a first offense for failure to follow general instructions and procedures may result in removal, if the violation is serious in nature. N.T. pp. 217-218, AA Ex. 9.

DISCUSSION

The current appeal challenges the appointing authority's decision to remove appellant from regular status employment as a PSA. The issues in the present appeal are: (1) whether the appointing authority has established just cause to remove appellant from her position; and (2) whether appellant has established her removal was based on discrimination. The text of the charges is listed in Finding of Fact 2. The appointing authority asserts that Charge 1, standing alone, is sufficient grounds for removal, and elected at the hearing to proceed by offering evidence only to support appellant's removal based on this single charge.[2] N.T. pp. 8-9.

In an appeal challenging the removal of a regular status employee, the appointing authority has the burden of establishing just cause for the personnel action. *Mihok v. Department of Public Welfare, Woodville State Hospital,* 147 Pa. Commw. 344, 348, 607 A.2d 846, 848 (1992); 71 P.S. §§ 741.807, 741.951(a); 4 Pa.

[2] The appointing authority cited "efficiency and economy" as the basis for this election and reiterated in its Brief that it limited its case to Charge 1. AA Brief, p. 1

Code § 105.15. Just cause must be job related and in some manner rationally and logically touch upon the employee's competency and ability to perform. *Mihok*, 147 Pa. Commw. at 348, 607 A.2d at 848.

Concerning the discrimination claim, appellant bears the burden of establishing that the personnel action was due to discrimination. *Henderson v. Office of the Budget*, 126 Pa. Commw. 607, 560 A.2d 859 (1989). In analyzing claims of discrimination[3] under Section 905.1 of the Act, appellant has the burden of establishing a *prima facie* case of discrimination by producing sufficient evidence that, if believed and otherwise unexplained, indicates that more likely than not discrimination has occurred. 71 P.S. § 741.951(b); 4 Pa. Code § 105.16; *Department of Health v. Nwogwugwu*, 141 Pa. Commw. 33, 38, 594 A.2d 847, 850 (1991). The burden of establishing a *prima facie* case cannot be an onerous one. *Henderson*, 126 Pa. Commw. at 616, 560 A.2d at 864. Once a *prima facie* case of discrimination has been established the burden of production then shifts to the appointing authority to advance a legitimate non-discriminatory reason for the personnel action. If it does, the burden returns to appellant, who always retains the ultimate burden of persuasion, to demonstrate that the proffered merit reason for the personnel action is merely pretext. Id. at 614-615. In particular, an employee claiming disparate treatment must demonstrate that he or she was treated differently than others similarly situated. *Nwogwugwu*, at 141 Pa. Commw. 40, 594 A.2d 851 (1991).

[3] The Act addresses both "traditional" and "procedural" discrimination. "Traditional discrimination" encompasses only those claims of discrimination based on race, sex, national origin or other non-merit factors. "Procedural discrimination" refers to a technical violation of the Act. In a case where an employee alleges a technical violation, no showing of intent is required. There must be evidence, however, to show that the employee was harmed by the technical non-compliance or that because of the peculiar nature of procedural impropriety that he or she could have been harmed but there is no way to prove that for certain. *Pronko v. Department of Revenue*, 114 Pa. Commw. 428, 439, 539 A.2d 456, 462 (1988); 71 P.S. § 741.905a.

Here, appellant alleges discrimination based on race and non-merit factors.[4] Comm. Ex. B; Ap. Brief, pp. 10-11. Specifically, appellant asserts she was treated differently than a Caucasian employee and retaliated against for filing discrimination complaints and reporting patient abuse. Comm. Ex. B; Ap. Brief, pp. 10-11.

In support of its charges, the appointing authority presented the testimony of Alicia Boyer and Diana Karlinsey. In support of her appeal, appellant testified on her own behalf and presented the testimony of Iliana Ramirez, Shirley Sowizral, Joy Alexander, and Mary Thompson. The evidence provided by the parties has been reviewed by the Commission and is summarized below.

I. The Appointing Authority's Evidence

A. Charge 1 – Unauthorized Transmission of Patient Information

The appointing authority[5] charged appellant with violating its policy regarding the handling of patient information and HIPAA in that on November 22, 2016, she emailed mandatory abuse reports for five separate patients to her private

[4] Appellant also alleges she was discriminated against based on a disability and the patients identified in the mandatory abuse reports were discriminated against. Appellant did not present any evidence regarding disability discrimination. Therefore, the Commission finds that appellant's evidence of disability discrimination is too vague to show that it is more likely than not that the appointing authority removed her for that reason. Additionally, the Commission does not have jurisdiction to address discrimination claims filed on behalf of non-civil service employees, such as patients at a mental health facility.

[5] The appointing authority is an inpatient psychiatric facility with 266 beds, which is the maximum number of persons who can be admitted for treatment. N.T. p. 23. All of the appointing authority's employees are responsible for handling medical records. N.T. p. 26. This includes both contracted employees as well as volunteers. N.T. p. 26.

email address and to her union business agent. Comm. Ex. A. By way of background, Diana Karlinsey,[6] who is the Acting Chief of Labor Relations, testified appellant had been instructed to copy her supervisor on all emails that she sent. N.T. pp. 197, 200, 270. Appellant's supervisor noticed appellant was not following this instruction because he received emails from appellant containing other emails on which he had not been copied. N.T. p. 200. Consequently, the appointing authority's Human Resources Department asked Karlinsey's subordinate to submit a request to the Governor's office to obtain appellant's emails.[7] N.T. p. 200. By obtaining appellant's emails, Karlinsey's office sought to determine to what extent appellant was following the directive to copy her supervisor on all emails. N.T. pp. 200-201.

Upon being granted access to appellant's emails, Karlinsey stated she and her subordinate reviewed the emails before sharing them with the appointing authority. N.T. p. 201. Karlinsey explained they were reviewing the emails to determine which emails were relevant to the appointing authority's request. N.T. pp. 201-202. During the course of this review, Karlinsey's subordinate located an email containing PHI[8] that appellant sent to Daisy Powell, who works for the Bureau

[6] Karlinsey has held the position of Acting Chief of Labor Relations since the end of August 2017, but she has served as the Labor Relations Supervisor for approximately seven years. N.T. p. 198. Karlinsey has worked for the Labor Relations Department for almost twenty-five years. N.T. p. 242.

[7] The subordinate employee who made the request to the Governor's office retired in July of 2017. N.T. p. 203. This employee had been assigned to work directly with the appointing authority's Human Resources Department on employment related matters. N.T. p. 200.

[8] PHI refers to "protected health information." *See* Finding of Fact 2.

of Equal Opportunity. N.T. p. 202; AA Ex. 7. Karlinsey stated her subordinate brought this to her attention because the information probably should not have been shared outside of the hospital. N.T. p. 202.

Karlinsey testified the attachment to the email contained quotes from the patients, and there was no evidence that the attachments had been redacted. N.T. pp. 204, 222-223; AA Ex. 7. Karlinsey also noted appellant blind copied herself at her own private email, which ended in "yahoo.com," and Deb Langman, who's email ended in "seiu688.org." N.T. pp. 205-208; AA Ex. 7 (p. 12). Karlinsey stated Langman is a staff representative with the SEIU Local 668 (hereinafter "SEIU"), which was appellant's union.[9] N.T. p. 208.

Karlinsey testified the SEIU does not conduct patient abuse investigations. N.T. p. 208. Karlinsey explained the SEIU may file a grievance on behalf of an employee who was disciplined for patient abuse, and as part of the process may request some of the appointing authority's information regarding the abuse allegation. N.T. pp. 208-209. However, the SEIU would not receive unredacted confidential patient information. N.T. p. 209.

Karlinsey testified that, upon reviewing the email and attachment, she and her subordinate believed it could potentially be a HIPAA violation or a violation of the appointing authority's disclosure policy because the patients were named and there were descriptions of conversations from a meeting or treatment plan, which potentially involved PHI. N.T. pp. 210-211. Karlinsey further testified they wanted

[9] Appellant does not dispute that Langman represents employees for the SEIU. N.T. pp. 685, 689-690. Further, appellant stipulated Langman is not employed by the hospital and is not a caregiver or healthcare professional. N.T. pp. 686-687.

the legal department to review the matter to determine whether it was indeed a HIPAA violation. N.T. pp. 202-203, 210. Karlinsey noted the legal department determined this was a HIPAA violation. N.T. p. 211.

Additionally, Alicia Boyer,[10] who is the appointing authority's Medical Records Director, testified appellant did not notify the appointing authority's Medical Records Department that she made a disclosure of patient information to a business agent of the union. N.T. pp. 45-46. Boyer testified employees are required to check with the Medical Records Department prior to disclosing a patient's medical records. N.T. pp. 36-37; AA Ex. 1 (p. 9). However, no request to disclose such information was received by Boyer or anyone in the Medical Records Department. N.T. pp. 45-46.

Karlinsey testified they advised the appointing authority of their findings and recommended a PDC be scheduled and held to provide appellant with an opportunity to explain why the information was shared. N.T. pp. 211-212. Karlinsey stated her office formulated the charges, to which appellant responded. N.T. p. 212. Based upon the investigation, charges, and appellant's response, Karlinsey recommended to the appointing authority that appellant be terminated. N.T. p. 213. Karlinsey stated appellant's explanation for sharing the information was not sufficient to excuse the fact that patient's health information had been

[10] Boyer has held the position of Medical Records Director since mid-December of 2016. N.T. pp. 23, 70. As the Medical Records Director, Boyer is responsible for all patient medical information that is sent and received by the appointing authority. N.T. pp. 23-24. Boyer also provides training to the employees regarding patient confidentiality. N.T. pp. 32, 84. Prior to holding the position of Medical Records Director, Boyer worked with the Department of Corrections at SCI Coal Township as the Medical Records Provider, which is a supervisory position below the Medical Records Director and has the same duties as the Medical Records Director. N.T. pp. 23, 70. Boyer worked for the Department of Corrections for approximately four years. N.T. p. 70. Boyer received an associate degree in health information from Pennsylvania College of Technology in Williamsport, Pennsylvania, and is certified as a registered health information technician. N.T. pp. 73-74.

shared. N.T. pp. 213, 266. Karlinsey further stated that, as a health practitioner, appellant was aware of HIPAA. N.T. p. 213. Therefore, Karlinsey believed the most appropriate way to ensure such a disclosure did not happen in the future was to terminate appellant. N.T. p. 213.

Karlinsey testified she consulted with the program office of the Office of Mental Health and Substance Abuse Services (hereinafter "OMHSAS") when determining the appropriate level of discipline, and OMHSAS gave its approval. N.T. pp. 213-214, 216. Karlinsey stated she did not seek input or a recommendation from Iliana Ramirez,[11] Mary Thompson,[12] or Joy Alexander.[13] N.T. p. 214. However, Karlinsey did not know whether OMHSAS consulted the appointing authority's officials. N.T. p. 215. Nonetheless, Karlinsey testified her office and OMHSAS both recommended to the appointing authority what the appropriate level of discipline should be. N.T. p. 216.

Karlinsey testified DHS Policy 7174 provides suggested charges that may be levied against an employee along with the suggested level of discipline that should be imposed if those charges are substantiated. N.T. pp. 217-218; AA Ex. 9.

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[11] Ramirez is the Human Resources Director for the appointing authority. N.T. p. 309. Ramirez has held this position since February 2016. N.T. p. 309.

[12] Thompson is the appointing authority's Director of Psychology and served as appellant's direct supervisor for part of the time that appellant worked at the appointing authority. N.T. p. 601. Thompson was removed as appellant's direct supervisor after a complaint was filed against her based on information provided by appellant. N.T. pp. 600-601, 608-609. Thompson did not have any role in investigating or recommending the discipline which is the subject of the instant appeal. N.T. pp. 606-608.

[13] Alexander is the appointing authority's Chief Social Rehabilitative Services Executive. N.T. p. 582. In her capacity as Chief Social Rehabilitative Services Executive, Alexander serves as the social work manager. N.T. p. 582. Alexander held this position in November of 2016. N.T. p. 582.

Karlinsey stated DHS Policy 7174 does not contain a specific charge for violating HIPAA; however, the catchall provision regarding failure to follow general instructions and procedures would apply. N.T. pp. 218-220. Karlinsey explained that, as a mental health practitioner, appellant received instruction regarding HIPAA during her education, orientation, and yearly refresher courses provided by the appointing authority. N.T. p. 219. Therefore, Karlinsey reasoned appellant was aware of, or should have been aware of, the policies pertaining to HIPAA. N.T. pp. 219-220. Karlinsey stated appellant failed to follow these policies when she shared patient PHI. N.T. p. 220. Karlinsey also noted there were no mitigating factors because based on appellant's experience, she should know that patient health information is to be respected. N.T. p. 221.

On cross-examination, Karlinsey provided additional testimony regarding: (1) practical concerns associated with the disclosure of such information; (2) harms caused by appellant's action; (3) factors considered when determining the level of discipline; (4) an abuse complaint filed by appellant; and (5) grievance procedures.

Karlinsey testified there is a presumption that, when a doctor is hired, he/she will do what is in the best interest of the patient and hospital and he/she will not engage in illegal conduct. N.T. pp. 229-231. Karlinsey stated appellant failed to protect patient health information as required under HIPAA. N.T. pp. 225-226. Karlinsey was unable to indicate which section of HIPAA was violated and explained this is why she referred the matter to the legal office for review. N.T. p. 226. With that said, Karlinsey expressed a couple of practical concerns with appellant's actions. N.T. pp. 227-228.

First, appellant sent the confidential patient information to her private email address and the union. N.T. pp. 228, 244-245. Thus, there was a concern that the information may be forwarded by appellant or the union to others. N.T. pp. 228-229, 240-241. Karlinsey noted this was particularly troubling because the appointing authority has no way to track the dissemination of the information from appellant's private email address or by the union. N.T. pp. 228-229, 240-241. Karlinsey explained that, when something is sent through the Commonwealth email, it can be tracked. N.T. p. 229.

Additionally, Karlinsey noted appellant was not charged with disclosing the information to Powell. N.T. p. 245. Rather, the primary concern was that appellant sent the information to her private email address and the union. N.T. p. 245. The secondary concern was the disseminated information was work product belonging to the appointing authority. N.T. p. 228.

Regarding the harm that occurred, Karlinsey explained the patients were harmed because their information was disclosed without their knowledge in a manner that was not appropriate and violated HIPAA. N.T. pp. 238-239, 246. Karlinsey stated the appointing authority also could have been harmed if the patients decided to take some sort of action. N.T. pp. 238, 246. Karlinsey noted that, at the time the information was disclosed, the patients were not aware the disclosure had occurred. N.T. p. 238. Karlinsey further noted she did not tell the patients that their information was disclosed, and she does not know if the patients were ever informed of such. N.T. pp. 238-239, 262-263.

Karlinsey testified that, before the discipline was issued, there were one or two discussions in her office about the matter. N.T. pp. 233-234. Karlinsey stated these discussions occurred over the course of a week or so. N.T. p. 234. Karlinsey did not recall how long these discussions lasted; however, she noted the discussions would have been thorough. N.T. p. 234. Karlinsey also explained the length of disciplinary discussions vary based on the complexity of the case. N.T. p. 235.

Karlinsey further testified as to several of the factors that were considered when determining the level of discipline to be imposed. Karlinsey stated appellant's years of service were considered, which totaled six to eight years at the time of the discipline. N.T. p. 232. Appellant's explanations as to why she sent the information to her personal email account, the union, and Powell were also considered. N.T. p. 258. Karlinsey stated appellant failed to provide a reasonable explanation as to why she sent the information to her own email account and the union. N.T. p. 258. Karlinsey also noted that, after hearing appellant's explanation as to why she sent the information to Powell, they were still puzzled as to how it was relevant to an investigation by the Bureau of Equal Opportunity, because the Bureau of Equal Opportunity is not involved in patient abuse matters. N.T. p. 258.

Additionally, Karlinsey noted she did not consider whether appellant was a whistleblower under HIPAA because the Bureau of Equal Opportunity does not address whistleblower claims. N.T. pp. 267-269. Karlinsey explained the Bureau of Equal Opportunity investigates discrimination complaints. N.T. p. 269. Thus, it was irrelevant whether appellant was acting as a whistleblower when she sent the information to Powell.

Karlinsey further stated the harm to the patients was also a factor in determining whether appellant's actions merited termination as opposed to a lesser form of discipline. N.T. p. 262. Karlinsey explained that, although this was appellant's first offense after her probationary period, it was serious enough in nature to discharge her. N.T. p. 259. Karlinsey noted appellant is the only person, of whom she is aware, who sent private information to herself and/or the union. N.T. p. 260. Karlinsey further stated there are no other persons, of whom she is aware, who violated HIPAA and were not terminated. N.T. pp. 261-262.

Karlinsey testified that, in 2015, appellant filed a report of what she perceived to be abuse. N.T. p. 249. Karlinsey did not know what happened with that report; however, she speculated the appointing authority's management team would most likely know what happened with it. N.T. p. 250. Karlinsey also noted the Public Welfare Code sets forth the procedures regarding abuse reports. N.T. p. 251. Karlinsey further explained that the outcomes of abuse investigations are confidential; therefore, actions may be taken but are not communicated. N.T. pp. 251-252. Alternatively, no action may be needed, or it may be determined the allegations were unfounded. N.T. p. 252.

Regarding grievances, Karlinsey explained her office does not become involved until the third step in the grievance process; however, Karlinsey noted sometimes an issue may be elevated to the headquarters level by a statewide committee or by the union. N.T. p. 255. Karlinsey further explained the union is the employee's exclusive representative in all employment matters. N.T. p. 257. Therefore, Karlinsey stated appellant would not have been permitted to bring outside counsel into the grievance process on the matter. N.T. p. 257.

B. Appointing Authority Policies

Boyer testified that, before any employee discloses a patient's medical records, he/she must check with the Medical Records Department. N.T. pp. 36-37; AA Ex. 1 (p. 9). Boyer further testified section (V)(D)(3) of IM 200, which is the appointing authority's policy on release of information, requires hospital employees to direct all written and electronic requests for the release of consumer information to her department. N.T. p. 33; AA Ex. 1 (p. 5). Boyer stated this policy applies to all such requests. N.T. p. 33. The only exceptions are emergency situations wherein the patient is transported to a hospital; otherwise, all patient information goes through Boyer's office. N.T. p. 24. Boyer noted this policy was in effect in November 2016. N.T. p. 26.

Boyer testified that, pursuant to IM 200, her office logs all information leaving the facility. N.T. pp. 24, 35; AA Ex. 1. Boyer explained the appointing authority has a HIPAA disclosure tracking system, which tracks releases. N.T. pp. 44-45, 173; AA Ex. 1 (pp. 16, 24). Boyer stated her office is responsible for this tracking system. N.T. p. 45. Boyer also noted her office stamps all information leaving the facility with a "confidentiality stamper." N.T. pp. 24, 35; AA Ex. 1 (p. 9). The "confidentiality stamper" states the information should not be copied and is only intended for the person who is receiving it. N.T. pp. 24-25; AA Ex. 1 (p. 9).

Boyer explained that, when her office processes the release, they ensure all of the required information has been provided, including the patient's name, birthdate, and signature, as well as a list of the requested information. N.T. pp. 35-36. Boyer testified she cannot accept an email as written authorization to release patient information. N.T. p. 36. Boyer explained she needs a full release with the patient's signature, stating that he/she authorizes the release of his/her information.

N.T. p. 36. Boyer noted this release could be sent through email; however, an email alone is insufficient. N.T. p. 36. Boyer further noted that, if any of her staff has a question as to how to handle a release, they can ask her for guidance. N.T. p. 34.

Regarding the dissemination of confidential patient information via email, Boyer testified section (V)(K) of IM 200 discusses the release of information via electronic devices, which includes email attachment. N.T. pp. 42-43; AA Ex. 1 (p. 10). Boyer explained there are limited circumstances in which patient information may be transmitted electronically. N.T. pp. 43-44. Boyer stated patient information may be transmitted electronically in an emergency situation wherein the patient is transported to the hospital and the hospital needs the information. N.T. p. 43. Such information may also be transmitted electronically to the appointing authority employees who need the information for data reasons, such as quality assurance. N.T. p. 43. Boyer explained the appointing authority's email is very secure, which is why an appointing authority employee may email such information to another employee who needs the information for data reasons. N.T. pp. 43-44, 163-164. Boyer noted there are also instances where information is transmitted through a secure email to the county liaison or the advocate who works for the consumer. N.T. p. 165.

Boyer testified there are limited circumstances under which patient information may be disclosed without patient consent. These circumstances are set forth in section (V)(H) of IM 200. N.T. pp. 36-38; AA Ex. 1 (p. 8). Boyer stated this section does not permit the non-consensual release of patient information to a business agent for an employee's union. N.T. p. 42; AA Ex. 1 (p. 8). Boyer noted business agents for the union are not involved in the treatment, payment processing, or healthcare operations for patients. N.T. p. 45. Boyer further noted she has never

seen an employee's union listed as a "business associate." N.T. pp. 53-54. Boyer testified business associates are outside companies that have contracted with the appointing authority to provide services to the consumer, such as x-ray companies. N.T. p. 51; AA Ex. 2 (p. 10). Boyer explained these entities are held to the same standards of confidentiality as the appointing authority's employees. N.T. p. 51.

On cross-examination and redirect, Boyer provided additional testimony regarding: (1) the consistency of confidentiality and HIPAA procedures throughout Commonwealth agencies; and (2) the redaction of documents. Regarding confidentiality and HIPAA procedures, Boyer testified these procedures are the same at the appointing authority as they were when she worked for the Department of Corrections.[14] N.T. p. 70. Boyer reiterated the release must come through the medical records department before the information is sent out. N.T. p. 71. To that end, the medical records department, must log the release and put a disclosure stamp[15] on the information before it is sent out. N.T. p. 71.

Boyer further testified no one should be sending anything to outside places, unless it is going to an advocate or county liaison, who is assigned to provide care for the patient, or it was released. N.T. pp. 158, 165. Boyer stated that, if something needs to be redacted, it would go through her department and the chain-of-command to determine what information needs to be redacted before it is sent

[14] Boyer noted the general purpose of HIPAA is to prevent the dissemination or disclosure of personal information to persons who do not need that information or who do not have a right to that information. N.T. p. 166. Boyer indicated she is well versed in HIPAA based on her education and training in health information. N.T. p. 76.

[15] Earlier in her testimony, Boyer referred to this as a "confidentiality stamper." N.T. pp. 24-25.

out. N.T. p. 158. Boyer stated there is no training on redacting medical records because the medical records department does the redacting. N.T. p. 159. However, Boyer clarified that, if the consumer signs a release to have the information sent out, then nothing should be redacted. N.T. p. 160.

Boyer stated she has not personally dealt with a situation where something is released inadvertently. N.T. p. 162. Boyer explained the medical records department is responsible for releasing information and will send the information to the mailing address indicated on the patient's release form. N.T. p. 162. Boyer noted a disclosure statement is included with the information that is sent. N.T. p. 162. Boyer explained the disclosure statement instructs the recipient to immediately return any information that was mistakenly sent to them. N.T. pp. 162-163.

C. Training on Appointing Authority Policies

Boyer testified the appointing authority's policies governing confidential patient information are shared with employees. N.T. p. 46. Boyer stated all new employees are required to take the appointing authority's HIPAA training, which is in slideshow format.[16] N.T. pp. 46-47, 58-59; AA Ex. 2. Boyer testified this training sets forth the type of information employees must keep confidential, as well as the responsibilities of the appointing authority and its employees with regard to disclosure of patient information. N.T. pp. 48-50; AA Ex. 2 (pp. 3, 9).

[16] On cross-examination, Boyer noted she did not create the slideshow training, but she has updated it. N.T. pp. 80-82. For example, Boyer stated she updated the penalties for HIPAA violations. N.T. p. 82. Boyer also noted the 2013 HIPAA handbook contains the most current version of the law, the basic tenants of which have not changed. N.T. p. 82.

Regarding the disclosure of patient information, Boyer further explained the training informs employees, the consumer must be informed when patient information leaves the appointing authority. N.T. p. 49; AA Ex. 2 (p. 9). For example, if the state police are conducting an investigation and request information, the consumer must be informed the information will be supplied to the state police. N.T. p. 49. Boyer noted not only does the appointing authority have a responsibility to notify the consumer when such information is released, but the consumer has a right to that information. N.T. p. 50.

Boyer testified that, upon taking the training, every new employee signs a Confidentiality, Security, and Integrity Statement of Understanding. N.T. p. 60. Boyer testified appellant signed such a statement. N.T. p. 60; AA Ex. 4. The statement, which appellant signed, was also signed by the Medical Records Director who presented the training. N.T. p. 61; AA Ex. 4. In addition to the new hire training detailed above, Boyer testified employees receive yearly training on patient confidentiality and HIPAA. N.T. pp. 62, 120. This yearly training is abbreviated ART, which stands for Annual Revision Training. N.T. p. 62. This training is required and reviews the same information employees received when they first started with the appointing authority. N.T. p. 62. Boyer noted sometimes this training is broken into more than one part because it is so large. N.T. p. 66.

Boyer testified a record is kept of the training each employee receives. N.T. p. 59. Boyer testified each employee, who works for the Commonwealth, has an employee transcript, which is maintained on the Commonwealth's ESS system and lists the classes that the employee was required to take for his/her employment. N.T. pp. 63, 119. Boyer testified appellant's training transcript reflects she took the following patient confidentiality trainings: (1) 21 WeSH: ART 2015 Training Exams

on December 28, 2015; (2) 21 WeSH: ART 2014 Part II—Live Training on July 16, 2015; (3) PW-21WSH: ART 2014 Training Exams on December 23, 2014; and (4) PW-21WSH: ART 2013 Training Exams on September 30, 2013. N.T. pp. 64-69; AA Ex. 5. Although Boyer did not work at the appointing authority when appellant took these trainings, Boyer testified she is aware all of these trainings would have addressed HIPAA because this is a topic addressed during ART trainings. N.T. pp. 87-89.

D. Release of Information

1. Requests from Union Representatives

Karlinsey testified her office handles employee relations or labor relations matters for the Department of Human Services. N.T. pp. 198-199. To that end, Karlinsey's office interacts with all of the unions and addresses grievances. N.T. p. 199. Karlinsey noted the unions generally submit requests for information to her office. N.T. p. 199.

Karlinsey stated that, unless the patient information is relevant to the discipline taken, it may not be shared. N.T. p. 209. If the information is shared, an agreement would be reached between Karlinsey's office and the union as to what would be shared and the format in which it would be shared. N.T. p. 209. The information would also be redacted, and the union would be advised as to how the material would be handled. N.T. pp. 209-210.

Additionally, Boyer noted she has never received a request for patient information from a union representative; presumably, because union representatives know they are not authorized to have such information. N.T. p. 171. Boyer stated that, if she received a request for confidential patient information from a union

representative, she would not release the information. N.T. p. 170. Boyer explained union representatives do not need such information because they do not provide services to the consumer. N.T. p. 170. Rather, union representatives provide support to employees. N.T. p. 170.

2. Requests from the Bureau of Equal Opportunity

Karlinsey testified employees are trained on how to file discrimination complaints. N.T. p. 248. However, she could not recall whether the sharing of patient records was addressed during trainings on discrimination. N.T. p. 248. Karlinsey noted that, generally, patient records would not be relevant to a claim of discrimination. N.T. p. 248.

On cross-examination and redirect, Boyer provided additional testimony regarding the release of information pertaining to discrimination complaints. Boyer testified there is an anti-discrimination policy that applies to all of the appointing authority's departments.[17] N.T. pp. 123-124. Boyer stated all employees "sign off" on the discrimination policy when they become Commonwealth employees. N.T. p. 124.

Regarding the handling of requests for information from the Bureau of Equal Opportunity, Boyer explained she would consult with a lawyer or someone who works for the state to determine whether she can send the information. N.T. p. 167. Boyer noted that, if the requester works for the state and the information is needed for the investigation, then it could be sent. N.T. p. 167. However, Boyer

[17] The anti-discrimination policy was not entered into evidence; nor was there any testimony regarding its specific provisions.

clarified the information cannot be sent through a personal email. N.T. p. 167. Boyer added whether the requested information is released depends upon whether the person has a right to that information. N.T. p. 170.

II. Appellant's Evidence

Appellant began working for the Commonwealth in 2009 at Allentown State Hospital as a pre-doctoral psychology intern. N.T. p. 611. In 2010, after finishing her internship with Allentown State Hospital, appellant obtained her doctorate degree. N.T. p. 611. Appellant then began her post-doctoral hours while working at Allentown State Hospital. N.T. p. 611. Appellant obtained 600 hours of post-doctoral experience prior to accepting a PSA position with the appointing authority. N.T. p. 612. Appellant began working as a PSA for the appointing authority in March 2011. N.T. p. 612. During her time as a PSA with the appointing authority, appellant completed the hours for her post-doctoral internship.[18] N.T. p. 612.

Appellant argues the appointing authority failed to establish just cause for her removal. Appellant further argues her removal was based on discrimination. Specifically, appellant claims: (1) she was treated differently than the CEO, who allegedly committed a similar violation; and (2) she was retaliated against for filing discrimination complaints and patient abuse reports. The evidence presented by appellant regarding these claims is set forth below.

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[18] Appellant argues she was delayed in receiving the requisite number of hours to qualify for her license because Thompson was unable to meet with her two hours per week. N.T. pp. 613-615. Contrary to appellant's claim, Thompson testified appellant earned the requisite number of hours and she (Thompson) submitted the required documentation attesting to this fact. N.T. pp. 603-604. Nevertheless, this is not a personnel action appealable under the Civil Service Act or Rules. *See* 4 Pa.Code § 105.2. Therefore, the Commission does not have jurisdiction to hear this issue.

A. Response to Charge 1

Appellant asserts the appointing authority failed to establish just cause for her removal because: (1) the November 22, 2016 email and attachments were related to a discrimination complaint that she filed; (2) the appointing authority failed to investigate the mandatory abuse reports attached to the November 22, 2016 email; (3) the mandatory abuse reports did not contain confidential health information; and (4) the appointing authority's policy on release of consumer information permitted the release of the information. Appellant's testimony, along with the testimony of her witnesses, relating to each of these assertions is summarized below.

1. *Claim 1: The November 22, 2016 email and attachments were related to a discrimination complaint filed by appellant.*

Appellant testified the November 22, 2016 email and attached mandatory abuse reports were related to a discrimination complaint she filed. Appellant explained that, "years ago," she complained to Joy Alexander that she was being treated unfairly because she is African American. N.T. pp. 582, 619. Appellant testified she also complained to her co-workers, Mary Thompson, and Dr. Ashland, who is a Chief Executive at the appointing authority. N.T. pp. 619-620.

Appellant stated Alexander suggested appellant call her (Alexander's) husband who worked for the Bureau of Equal Opportunity about the alleged discrimination. N.T. pp. 621-622. Appellant stated she called Alexander's husband in 2014 and left several messages, but another person, whose name she does not remember, returned her call, after which she filed a complaint with the Bureau of

Equal Opportunity. N.T. pp. 621-622. Appellant stated that, between 2014 and 2017, she made three complaints, which were filed in 2014, 2015, and 2016. N.T. p. 622. Appellant stated she conversed with Powell about her 2016 complaint. N.T. pp. 623-624, 694-697; Ap. Ex. 12. However, appellant claimed the discrimination had been ongoing since 2014. N.T. pp. 695-697.

Appellant testified Powell asked her to provide documents related to the alleged discriminatory acts against her. N.T. pp. 624, 662. Appellant stated that, in response to Powell's request, she provided the mandatory abuse reports and other documents to Powell. N.T. pp. 624-625, 696. Appellant also stated she copied herself and her union representative, Langman, when she sent the documents to Powell.[19] N.T. pp. 663-664, 667.

Appellant explained she provided the mandatory abuse forms to Powell because Powell wanted to know: (1) the circumstances under which appellant was experiencing discrimination; (2) whether management failed to investigate the reports; and (3) when Thompson asked her not to report patient abuse.[20] N.T. pp. 645-646, 699-700. Appellant explained the reports were examples of the ways in which people were discriminating against her. N.T. p. 692. Appellant also noted

[19] Appellant noted that, in November of 2016, she retained counsel, provided paper copies of the unredacted mandatory abuse reports to her attorney, and retained a copy for herself. N.T. pp. 663-664, 718-719. Appellant was not charged with providing copies of the reports to her attorney. *See* Finding of Fact 2. Therefore, this issue will not be addressed as part of this adjudication.

[20] Initially, appellant indicated Thompson asked her to stop reporting patient abuse in 2016, but later in her testimony, appellant stated Thompson told her to stop reporting patient abuse over several years. N.T. pp. 645-646. Appellant stated she continued to file patient abuse reports but did not do so every time she witnessed abuse. N.T. p. 646.

she was concerned because she did not participate in the investigation of the abuse that she previously reported. N.T. pp. 644-645. However, appellant stated not all of the persons against whom she filed the discrimination complaint were involved in the patient abuse that she was presently reporting.[21] N.T. pp. 694-695; Ap. Ex. 13. Appellant further stated Powell did not suggest to her that it was inappropriate for her to provide the reports to Langman. N.T. p. 663.

Additionally, appellant testified she did not consider an alternative such as providing the date when she made a report, the initials of the patient, and the name of employee to whom she made the report because she was too busy handling her day-to-day work, obtaining documentation for doctor visits, and addressing false reports filed against her. N.T. pp. 701-702. Appellant also claimed she did not redact the patient's name because she did not know whether Powell would want to interview the patient. N.T. p. 703. However, appellant noted Powell did not ask for the patients' names. N.T. p. 704. Rather, Powell asked appellant to send all of the information. N.T. pp. 704, 707.

Further, appellant acknowledged that, pursuant to the appointing authority's policy, she can only disclose information necessary for Powell to do her job. N.T. pp. 706-707. However, appellant argued she did not know the scope of what Powell needed. N.T. p. 707. Appellant further stated she believed everything she provided to Powell was confidential because the Bureau of Equal Opportunity

[21] In her 2016 discrimination complaint, appellant specifically named thirteen people as alleged offenders. Ap. Ex. 13. Two of these thirteen people were also named as offenders in three of the mandatory abuse report forms attached to the November 22, 2016 email. Ap. Exs. 5, 6, 7, 13.

told her that everything being sent to them is confidential. N.T. pp. 707, 709-710. Appellant also believed Powell was entitled to the information because she was conducting an investigation. N.T. pp. 707-708.

Regarding her union representative, appellant explained she provided the mandatory abuse reports to Langman because the reports illustrated she was being discriminated against in that she was not permitted to talk with patients. N.T. p. 667-668. Appellant clarified she was not reporting the patient abuse to Langman; rather, she was reporting the alleged discrimination against herself. N.T. pp. 667-668. Appellant stated she hoped her union could facilitate a conversation with management about the discrimination. N.T. p. 668. Appellant further stated she believed Langman was permitted to hear such information because Langman had been present when she previously discussed such matters with Alexander. N.T. pp. 670-671. Appellant added that, prior to her PDC in February 2017, no one at the appointing authority told her that she was not permitted to share such information with her union representative. N.T. p. 671.

Appellant further testified that, based on what Langman told her, she does not believe Langman has forwarded the unredacted versions of the reports to anyone. N.T. pp. 723-725. However, appellant indicated she has not spoken to Langman since she was removed, nor does she have personal knowledge as to what Langman did with the reports. N.T. pp. 723-725. However, appellant stated Langman assured her when they spoke in person that the information would be kept confidential. N.T. p. 710.

Regarding copying herself on the email, appellant explained she copied herself because Powell had given her a deadline and she did not have time to "put things together" for Powell while she was at work because she had sixty clients and barely had time to eat or use the restroom during her workday. N.T. pp. 669-670, 711-712. Appellant added she received approximately fifty questions from Powell that she needed the documents to answer. N.T. p. 712. However, appellant admitted she sent the email on Tuesday at 8:53 a.m. during her work hours, which were 8:00 a.m. to 4:00 p.m. N.T. p. 713. Nonetheless, appellant argued it only takes five minutes to attach an email, whereas it would take her longer to answer the fifty questions and prepare her discrimination case. N.T. p. 713.

Appellant stated she does not believe she deleted the email from her personal email account, which is still active. N.T. pp. 716-717, 720. However, appellant stated her computer died in July 2018; therefore, she does not have access to the electronic copy of the reports which are on her computer. N.T. pp. 716-717, 720. Appellant further stated she cannot afford to have the computer fixed and does not know if the data will be recovered. N.T. pp. 722-723.

In addition to her testimony above, appellant presented the following testimony from Ramirez, Sowizral, and Alexander. Ramirez testified she was not aware of any reason Powell would need to use the mandatory abuse reports.[22] N.T. p. 407. Ramirez explained the Bureau of Equal Opportunity investigates complaints

[22] When asked about testimony that she provided during an Unemployment Compensation hearing, Ramirez acknowledged testifying that she did not have a problem with appellant utilizing the information to support her discrimination case. N.T. pp. 414-415, 425-426. However, at the hearing on the present matter, Ramirez clarified appellant should have redacted the documents. N.T. p. 415. Ramirez further noted there is no reason the Bureau of Equal Opportunity investigator would need to know the treatment administered to a patient to support a discrimination case. N.T. pp. 415-416.

of discrimination regarding employment as well as the issuance of public benefits.[23] N.T. pp. 339, 371. Ramirez further noted the Bureau of Equal Opportunity is not authorized to investigate complaints of patient abuse. N.T. pp. 371-372. Ramirez stated she is responsible for providing information to the Bureau of Equal Opportunity regarding persons who are being investigated, and she is responsible for putting the staff on notice. N.T. p. 373. Ramirez stated that, if Powell had requested the documents pursuant to an investigation, the documents should have been redacted. N.T. pp. 341, 421-422.

Ramirez also stated that there was no legitimate reason for appellant to send the reports to her personal email or the union representative. N.T. pp. 383, 405. Ramirez noted that appellant would only have been permitted to view the unredacted confidential patient information on mandatory abuse reports in the scope of her duties as an appointing authority employee. N.T. pp. 341-342, 378-379. Ramirez stated that, once appellant was terminated, she no longer had any legitimate business treatment-related purpose to access the confidential patient information. N.T. p. 379.

[23] Ramirez did not know whether Powell was permitted to receive such information. N.T. pp. 338.

CEO Shirley Sowizral,[24] likewise, stated appellant is permitted to view confidential patient health information on a patient to whom she is providing treatment. N.T. p. 536. However, Sowizral noted there is no legitimate reason for appellant to have that information at home because she does not treat the patients from home, nor is she permitted to have patients in her home. N.T. p. 562.

Additionally, Sowizral noted she did not know whether Langman ever viewed PHI in the context of disciplinary matters. N.T. p. 540. Sowizral explained such information is redacted when shown to a union business agent or representative. N.T. p. 541. However, Sowizral acknowledged that, in her experience, at times, patients are mentioned by name when verbally discussing disciplinary issues with the union representative. N.T. pp. 542-543. Sowizral also noted if the treatment of the patient is the basis for the discipline, it would be discussed with the union representative and mentioned during the grievance process. N.T. pp. 542-544, 547-549.

Alexander recalled conducting an investigatory meeting at which treatment was discussed. N.T. pp. 583-590. Alexander explained there was an investigatory meeting to determine whether the proper procedure was followed on a trip because the consumer returned from the trip with improper pornographic materials. N.T. pp. 584, 588. Alexander stated Langman attended this meeting by

[24] Sowizral is the appointing authority's CEO and has held this position since July 2, 2016. N.T. pp. 443-444. Prior to that, Sowizral was employed by the appointing authority as the Chief Nurse Executive. N.T. p. 444. Sowizral became the Chief Nurse Executive for the appointing authority in 2007. N.T. p. 444. Sowizral has worked for the Commonwealth for thirty-five years. N.T. p. 445. Sowizral testified she is responsible for ensuring all the appointing authority's divisions adhere to its policies. N.T. pp. 451-452. Sowizral also noted that, when she held the position of Chief Nursing Executive for the appointing authority, she was responsible for ensuring the nursing staff adhered to the records privacy policy. N.T. pp. 452-453. Sowizral further testified she received training on HIPAA when the legislation was first passed along with informal trainings regarding policies and procedures related to HIPAA and record confidentiality every three years. N.T. pp. 447-448, 453. Sowizral also noted she reads articles regarding developments in HIPAA law. N.T. p. 453. However, Sowizral stated that she is not a HIPAA specialist. N.T. p. 450.

telephone and noted she would not have muted the telephone if the consumer's name was mentioned during the meeting. N.T. pp. 585, 589. Alexander explained the names and treatment are not concealed during such discussions because that is what is at issue. N.T. p. 589. Alexander added such a situation could also arise during PDCs. N.T. p. 590. However, Alexander stated it is understood the union representative will not disclose the information. N.T. pp. 589-590.

2. *Claim 2: The appointing authority failed to investigate the mandatory abuse reports attached to the November 22, 2016 email.*

Appellant claims that, when she filed the mandatory abuse reports with the appointing authority, they were not investigated. N.T. p. 630. However, appellant agreed that once the mandatory abuse report is completed, it becomes an official document of the Department of Aging and the Department of Human Services. N.T. p. 714. Appellant further acknowledged such reports are not the property of the employee who completes the report. N.T. p. 715. Appellant agreed the completed reports are the property of the Department of Aging and the Department of Human Services. N.T. p. 715. Additionally, appellant admitted she did not ask permission to take the reports. N.T. pp. 715-716.

In addition to her testimony above, appellant presented the following testimony from Ramirez. Ramirez testified she does not believe the mandatory abuse reports in question were submitted in 2015 because no investigation had been

done. N.T. pp. 343-344, 348-349. Ramirez stated the reports were later found in an envelope in the mailroom in the fall of 2016,[25] and this was brought to Sowizral's attention because she was the CEO at that time.[26] N.T. pp. 345-346.

Ramirez testified that, after it was determined no investigation had been done, Sowizral initiated an investigation. N.T. p. 346. Ramirez stated all of the appointing authority's employees are required to report any type of abuse, and the CEO is required to investigate those reports. N.T. pp. 352-353. Ramirez explained there is an in-house process by which abuse allegations are investigated. N.T. p. 379. Ramirez stated typically, an investigation regarding abuse is initiated with a SI-815 form, which is the initial incident report. N.T. pp. 355, 379. Ramirez stated a trained patient investigator is then assigned to determine whether it is more likely than not that patient abuse occurred. N.T. pp. 379-380. A mandatory abuse report is also generated as a part of this process and is submitted to the CEO or the CEO's office. N.T. pp. 344, 382. After a final determination is made that it is more likely than not that abuse occurred, a report is sent to the AAA, which is responsible for investigating any acts of abuse. N.T. p. 381-382. Ramirez did not know whether appellant forwarded the mandatory abuse reports to the AAA N.T. p. 383. However,

[25] Ramirez did not know who found the envelope containing the reports, nor could she recall how she was notified when the reports were found. N.T. pp. 428-429. However, Ramirez recalled the reports were found in an inter-office envelope that was among a stack of inter-office envelopes from which people could take one when they need it. N.T. p. 429. Ramirez could not recall if she saw the envelope in which the reports were found. N.T. p. 429.

[26] Ramirez noted Sowizral replaced Andrea Kepler as the CEO in 2016. N.T. pp. 344-345. Ramirez stated Kepler was the CEO during the fall of 2015. N.T. p. 344. Ramirez indicated she did not discuss with Kepler whether the reports had been submitted. N.T. p. 347.

she noted such reports are not completed by the person who reports the allegations.[27] N.T. p. 382. Additionally, Ramirez noted she reviews mandatory abuse reports to determining what, if any, discipline should be imposed. N.T. p. 325.

3. *Claim 3: The mandatory abuse reports, which were attached to November 22, 2016 email, did not contain PHI.*

Appellant claims the mandatory abuse reports, which were attached to the November 22, 2016 email, did not contain PHI. Appellant testified on her own behalf as to the contents of these reports and she presented testimony from Sowizral. By way of background, Sowizral explained all of the appointing authority's employees are required to report incidents of abuse. N.T. p. 553. Sowizral further noted, while employees are not required to report the abuse directly to the AAA, they must at a minimum report it to her. N.T. p. 553. Additionally, Sowizral noted the requirement that the abuse be reported to her can be found in the policy regarding patient abuse. N.T. pp. 553-554.

Sowizral testified the mandatory abuse report form was created in conjunction with the Department of Aging and the Department of Human Services. N.T. p. 456. Sowizral stated this was done pursuant to the Adult Protection Act, which requires the reporting of all allegations of abuse. N.T. pp. 457, 516. Sowizral explained persons witnessing abuse may use either the mandatory abuse report form

[27] Ramirez initially indicated the investigator normally completes the mandatory abuse reports. N.T. p. 397. However, shortly thereafter Ramirez stated either the CEO or someone in the CEO's office, not the investigator, completes the mandatory abuse reports. N.T. p. 397. Therefore, it is unclear who is responsible for completing such reports. Nevertheless, this detail is irrelevant to the determination as to whether appellant violated the appointing authority's policies when she sent patient information to her private email address and her union business agent.

or the SI-815 form to report the abuse.[28] N.T. pp. 458-459. However, Sowizral noted it is not a requirement that a form be used when reporting abuse, although the person may be asked to fill out a form if one has not been provided. N.T. pp. 458-459.

Sowizral testified the appointing authority's employees are mandatory reporters, which means that they are required to report abuse. N.T. pp. 459-460. Sowizral also noted the appointing authority's policy requires its employees to report abuse. N.T. p. 460. Sowizral explained she and her office are responsible for receiving reports of abuse. N.T. p. 461. Once her office receives an abuse report, an investigation is conducted. N.T. p. 461. Sowizral stated the investigations are conducted by the appointing authority's supervisors and managers, who have all received training as administrative patient investigators. N.T. p. 462. The supervisors and managers receive their investigation assignments from the appointing authority's Patient Abuse Coordinator, Frank Botto. N.T. p. 463. Sowizral noted Botto has held this position since the fall of 2015. N.T. p. 463.

Sowizral testified she is aware appellant was terminated for sharing confidential information; however, she stated she never saw the documents that appellant shared. N.T. pp. 464-466. During direct examination, Sowizral was

[28] Sowizral noted the mandatory abuse report form is required to be shared with the AAA. N.T. pp. 482-484. Sowizral explained the form can be turned into the CEO or it can be submitted directly to the AAA. N.T. p. 485. Sowizral stated that, if the form is turned into her, she submits it to the AAA. N.T. p. 485.

shown four mandatory abuse reports,[29] which she had not previously seen.[30] N.T. p. 463-466, 475-476, 481, 488; AA Ex. 7 (pp. 4-11); Ap. Exs. 4, 5, 6, 7. Both Sowizral and appellant stated the signature dates on these reports spanned from September to November 2015. N.T. pp. 460-461, 637, 640, 642. Sowizral was not the CEO at this time and indicated she did not investigate the allegations contained in the reports. N.T. pp. 461, 465, 476, 480-481. Sowizral further indicated she has no reason to doubt Ramirez's testimony that these reports were not investigated.[31] N.T. p. 466.

Appellant noted the reports, which were shown to Powell and Ramirez, are the same reports that she provided to Powell. N.T. p. 645. These reports are unredacted copies of the second, third, fourth, and fifth forms attached to the appointing authority exhibit number 7 (AA Ex. 7) and will be referred to by that designation below when discussing their contents.

[29] These were the same mandatory abuse reports that were shown to Ramirez.

[30] On the four reports shown to Sowizral, there is a box wherein the reporter can indicate the type of abuse. N.T. pp. 563-564. The categories from which the reporter can select are neglect, exploitation, abandonment that does not involve sexual abuse, serious bodily injury, or suspicious death. N.T. pp. 564-565. Sowizral explained exploitation involves personal gain, such as taking something that a patient made in art class without giving the patient the financial worth of the item. N.T. p. 566. Sowizral stated abandonment means the person was left unattended. N.T. pp. 566-567. Sowizral defined neglect as failing to provide care that the patient needs. N.T. p. 567.

[31] Sowizral did not know whether the reports that were shown to her during the hearing were sent to the AAA. N.T. pp. 485-486, 488. However, she noted there is no documentation on the reports which indicates this occurred. N.T. p. 486. Sowizral explained there is a part on the report where the person who speaks with AAA indicates the date, time, and person to whom they spoke. N.T. p. 487.

a. Second Mandatory Abuse Report

Appellant testified she reported the following abuse in the second report: an unsupervised patient exited through a door which was left open by a manager.[32] N.T. p. 629; AA Ex. 7 (pp. 4-5); Ap. Ex. 4. Additionally, Sowizral testified the following patient information is noted in the second report: the patient's name; the hospital name and address; the unit number; and the patient's consumer number. N.T. pp. 468-470. Sowizral explained the patient's consumer number is part of the patient's medical records and it is used to identify the patient. N.T. p. 470. Sowizral also noted that, while there is no specific diagnosis on the second form, it establishes the patient was at the hospital for treatment, which Sowizral argues is part of the patient's medical record. N.T. pp. 470-471, 474; AA Ex. 7 (pp. 4-5); Ap. Ex. 4. Statements the patient made during group therapy are also quoted on this form. N.T. p. 522; AA Ex. 7 (pp. 4-5); Ap. Ex. 4. Sowizral stated such statements are confidential information. N.T. pp. 523-524. Sowizral further stated patient identifiable information[33] is protected under HIPAA. N.T. p. 524.

b. Third Mandatory Abuse Report

Appellant testified she reported the following abuse in the third report: (1) the patient was denied an African American counselor with whom the patient had a therapeutic relationship; and (2) the patient was denied the ability to work

[32] Appellant testified Thompson told her that it was not her position to find out which doctor left the door open. N.T. p. 643. Appellant stated Thompson further told her that, once she submitted the information, it would be followed-up on during the investigation. N.T. pp. 643-644. Appellant stated Thompson told her not to do any investigation on her own. N.T. p. 644.

[33] Section 160.103 of the HIPAA Privacy Rules defines "individually identifiable health information" to include information that identifies the individual or which can reasonably be used to identify the individual. 45 C.F.R. § 160.103.

contrary to the recommendation of the patient's therapeutic team. N.T. pp. 630-631; AA Ex. 7 (pp. 6-7); Ap. Ex. 5. Appellant argues both of these denials were based on the patient's race. N.T. p. 632.

Conversely, Sowizral stated it is not abuse to deny a patient a therapist of the same race, but it could be considered a form of discrimination. N.T. pp. 570-571. Sowizral further clarified it would be abuse if the patient was denied treatment because of his/her race. N.T. p. 572. Additionally, Sowizral explained if it is deemed the patient does not need a particular treatment, then the treatment will not be given. N.T. p. 581.

Regarding the contents of the third report, Sowizral testified that, unlike the second report, the third report indicates who the alleged perpetrator was. N.T. pp. 475, 480; AA Ex. 7 (pp. 6-7); Ap. Ex. 5. Sowizral stated the patient's name, consumer number, and race are also listed on the third report. N.T. pp. 478-479; AA Ex. 7 (pp. 6-7); Ap. Ex. 5. Additionally, Sowizral testified the third report contains information regarding the patient's treatment, because there is an indication that the patient was in a work program and individual therapy.[34] N.T. pp. 476-477; AA Ex. 7 (pp. 6-7); Ap. Ex. 5. Sowizral stated there is also a notation that specifically sets forth the patient's response to the treatment. N.T. p. 525; AA Ex. 7 (pp. 6-7); Ap. Ex. 5. Sowizral stated such information is PHI. N.T. pp. 525-526

[34] Sowizral noted not all patients receive individual therapy; patients may also receive group therapy, other types of treatment, or both group and individual therapy. N.T. pp. 477, 556, 558.

c. Fourth Mandatory Abuse Report

Appellant testified she reported the following abuse in the fourth report: (1) the patient was denied access to appellant because of his race; and (2) the patient wanted a job. N.T. pp. 633-634; AA Ex. 7 (pp. 8-9); Ap. Ex. 6. Appellant does not indicate whether the patient was denied a job.

Additionally, Sowizral testified the following information is noted in the fourth report: (1) the patient's name; (2) the appointing authority's address; and (3) the names of the alleged perpetrators. N.T. p. 480; AA Ex. 7 (pp. 8-9); Ap. Ex. 6. Sowizral also noted the fourth report contains information regarding the patient's treatment, because there is an indication that the patient was in an anger management group. N.T. pp. 482, 526; AA Ex. 7 (pp. 8-9); Ap. Ex. 6. Sowizral stated this information is PHI. N.T. p. 526.

d. Fifth Mandatory Abuse Report

Appellant testified she reported the following abuse in the fifth report: the patient was abused because the staff failed to supply the patient with a job. N.T. pp. 635-636; AA Ex. 7 (pp. 10-11); Ap. Ex. 7. Additionally, Sowizral testified there is a reference to the patient's therapy in the fifth report, which is PHI. N.T. p. 537; AA Ex. 7 (pp. 10-11); Ap. Ex. 7.

4. *Claim 4: The appointing authority's policy on the release of information, IM 200, permitted the release of the information.*

Appellant acknowledged she was trained on the appointing authority's IM 200 policy and received annual retraining in 2013, 2014, and 2015, as indicated on her training transcript. N.T. pp. 672-675; AA Ex. 5. Appellant could not recall

the specific information covered by the trainings but noted the trainings did not cover everything in the policy. N.T. p. 675. Additionally, appellant admitted she signed an acknowledgement indicating she received training and understood the hospital policies and HIPAA requirements with regard to patient confidentiality. N.T. pp. 675-677.

Appellant acknowledged IM 200 sets forth when patient information may be released without consent. N.T. pp. 677-678. Appellant agreed patient information includes the patient's full name and treatment. N.T. pp. 678-679. Appellant further admitted the mandatory abuse reports that she emailed contained the patients' full names and information regarding their treatments, to include references to the patients' participation groups, such as anger management, as well as comments a patient made during group. N.T. pp. 680-681. Appellant admitted she did not have the patients' consent to disclose information about them or their treatment to the persons to whom she made the disclosures. N.T. pp. 683-684. Nevertheless, appellant argues: (1) IM 200 permits the release of the name of a patient who is voluntarily at the appointing authority; and (2) public information is not considered PHI under section A of IM 200.

Sowizral provided further clarification regarding the tenets set forth in IM 200. Sowizral explained this policy addresses the handling of confidential consumer information and medical records and defines the terms medical record and health information. N.T. pp. 450-451. However, Sowizral did not know whether this was the only policy that addresses the handling of consumer health information. N.T. p. 451. With that said, Sowizral agreed section (IV)(A) of IM 200 defines medical record as the collection of written or electronic information, observations or

reports concerning a consumer and his or her healthcare that is created and maintained in the regular course of treatment at the appointing authority. N.T. pp. 472; AA Ex. 1 (p. 1). Sowizral further testified that section (IV)(A) of IM 200 reads:

> No document which was a public record prior to the individual's treatment shall become confidential by inclusion in the medical record of [the appointing authority].

N.T. p. 560; AA Ex. 1 (p. 2).

Additionally, Sowizral testified the presence or absence of a consumer who is currently, voluntarily committed at the appointing authority is not considered part of the medical record. N.T. pp. 473-474; AA Ex. 1 (p. 2). However, Sowizral stated that, if a person called and asked if "Joe Smith" was a patient at the facility, she would not release that information, but she noted she does have discretion to release a patient's name for a legitimate purpose. N.T. pp. 550-552.

B. Disparate Treatment Claim

Appellant suggests she was treated differently than Sowizral in that Sowizral was not removed for similar misconduct. Ramirez testified Sowizral was disciplined for providing information in an email that was not sent from a secure network. N.T. p. 361. Indeed, during the hearing on the instant matter, Sowizral acknowledged that, when she was the Chief Nurse Executive, she violated HIPAA by transmitting records via her personal email account. N.T. pp. 505-506. Sowizral explained she had taken home a flash drive containing a CSP[35] to ensure it was completed prior to her vacation. N.T. pp. 506, 508, 538-539. After completing the

[35] CSP is an acronym for community support plan. N.T. p. 366.

CSP, Sowizral transmitted it from her home computer using an email account that she shares with her husband.[36] N.T. p. 506. Sowizral stated that she immediately deleted the record of the email after sending it. N.T. pp. 506-507.

Sowizral testified she was the facilitator for the development of the CSP and sent the email in the course of her duties. N.T. p. 531. Sowizral further noted the recipients were all people who attended the meeting regarding the CSP. N.T. p. 531. Ramirez corroborated this statement. Ramirez explained most of the recipients of the email were the appointing authority employees and included: the person who recorded the meeting minutes; the patient's consumer advocate; the county caseworker; a representative from the Lancaster County Office of the Aging; the appointing authority's treating psychiatrist, medical physician, and social worker; as well as a person who works for OMHSAS, which oversees facilities such as the appointing authority. N.T. pp. 365, 386-389; Ap. Ex. 2. Ramirez testified the persons to whom the email was sent had legitimate business purposes for having the information.[37] N.T. p. 390.

Sowizral also noted none of the recipients responded to her personal email address. N.T. pp. 508-509. However, Sowizral noted she did receive responses at her work address. N.T. p. 509. Additionally, Ramirez noted there was

[36] Ramirez testified the CSP contained identifiable consumer information. N.T. p. 366; Ap. Ex. 2.

[37] On cross-examination and redirect, Boyer testified the recipients of Sowizral's email were all persons involved in the patient's treatment, had a treatment reason to receive the information, and were authorized to receive it. N.T. pp. 177-182; Ap. Ex. 2. Boyer noted all of the employees who received that email were listed on the attachment that she was shown. N.T. p. 177; Ap. Ex. 3. Boyer testified the attachment was a sign-in page for the persons who are required to attend the CSP. N.T. p. 156; Ap. Ex. 3. Boyer also noted the consumer is present when the sign-in page is circulated. N.T. p. 157.

no evidence to suggest the Sowizral's husband had access to or viewed the information that was sent. N.T. p. 390. As indicated above, Sowizral noted she immediately deleted the email after sending it. N.T. pp. 506-507.

Ramirez testified the email sent by Sowizral came to light when appellant filed her response to her PDC. N.T. p. 390. At the time the email came to light, Sowizral held the position of CEO. N.T. pp. 369, 505. Ramirez noted Sowizral was disciplined for the email three weeks before appellant was terminated. N.T. pp. 369-370.

Sowizral acknowledged she received a written reprimand, which may be expunged if there are no other infractions. N.T. pp. 509-510. Sowizral was not terminated, suspended, or docked pay. N.T. p. 509. However, Sowizral distinguished her disciplinary action from appellant's removal by explaining she only emailed the information to persons who were authorized to have it, whereas appellant did not. N.T. p. 538.

C. Retaliation Claim

Appellant testified she believes she is being retaliated against for reporting patient abuse and racial discrimination. N.T. pp. 646-647. Appellant claims the following persons retaliated against her: Sowizral, John Deacon, Thompson, Frank Botto, Jim Heldon, Daniel Basin, Sheila Ilner, Valerie M. Holland,

Ramirez,[38] Carmen Diaz, and Andrew Rissen. N.T. pp. 651-652; Ap. Ex. 12. Appellant also feel she was retaliated against because her mentor filed an ethics complaint. N.T. pp. 647-648.

Appellant testified the acts of retaliation included being removed from her unit and sex offender group in 2013. N.T. p. 648. Appellant claims she was removed from the sex offender group because she reported that a patient in the sex offender group was being abused by the nurses. N.T. p. 649.

Appellant further argues she was retaliated against when she was instructed to copy her supervisor on any emails. N.T. pp. 653-654. By way of background, appellant explained that, around October 4, 2016, at her request, she met with Thompson and Ramirez to ask two clarifying questions about her midterm review. N.T. pp. 654, 657. Appellant stated that, during this meeting, she was asked to review three emails she had written or been a part of, with which Thompson had taken issue. N.T. p. 654. Appellant was unable to intelligibly articulate the issues Thompson raised with these emails. N.T. pp. 654-656. Appellant initially claimed Thompson's explanation did not make sense to her, and she did not believe it was a "big deal." N.T. pp. 655-656. Later in her testimony, appellant claimed Thompson merely told her to figure out for herself what the problem was with the emails, which appellant claimed she was unable to do. N.T. p. 658.

[38] Ramirez testified that, at the time of appellant's termination, she was aware appellant had made a discrimination complaint involving her. N.T. p. 350. However, Ramirez could not remember if she was aware of the complaint in October 2016 because she could not recall if the complaint was made in 2016 or 2017. N.T. p. 350. Ramirez further noted it was someone in Harrisburg who made the decision to terminate appellant. N.T. p. 356. Ramirez testified she believes Erica Flagg is the person who directed that appellant be terminated. N.T. p. 356. Ramirez stated Flagg was the head of Human Relations. N.T. p. 356. Ramirez further stated it is her understanding that the sole reason for appellant's termination was the disclosure of medical records. N.T. p. 356.

Appellant testified that, based on these three emails, she was directed to copy Thompson on every email that she sent. N.T. pp. 655-656. Appellant asserted copying Thompson on her emails was demeaning and such a requirement had never been imposed within the Department of Psychology. N.T. pp. 655-656. However, appellant noted Thompson stopped supervising her around the end of November 2016. N.T. p. 661.

Notwithstanding the above, appellant admitted none of the persons who were involved in her removal determination were named in the mandatory abuse reports. N.T. pp. 727-729. Appellant also stated she did not provide copies of the mandatory abuse reports to persons who were named as perpetrators in the reports. N.T. pp. 730-732. Appellant also stated she is not aware of the alleged perpetrators being disciplined for the abuse allegations contained in the reports. N.T. p. 732. However, appellant stated she believes the perpetrators did know about the reports because the reports are given to the CEO and Ramirez spoke to the perpetrators regarding a grievance filed by appellant in September 2015.[39] N.T. pp. 733-736.

III. Just Cause for Removal

To show just cause for the removal of a regular status civil service employee, the employer must show the actions resulting in the removal are related to an employee's job performance and touch in some rational and logical manner upon the employee's competence and ability. *Mihok,* 147 Pa. Commw. at 348, 607 A.2d at 848. Having carefully reviewed the evidence, we find the appointing

[39] Alexander testified appellant never discussed any concerns with her about discrimination in the workplace. N.T. p. 593.

authority has established Charge 1 against appellant and established just cause for her removal.[40] In support of our conclusion, we find credible[41] the testimony provided by the appointing authority's witnesses.

Here, appellant was charged with emailing mandatory abuse reports, which identified five patients by name and gave details of the patients' PHI, to her private email address and her union business agent, in violation of the IM 200 and HIPAA. *See* Finding of Fact 2. There is no dispute appellant e-mailed mandatory abuse reports to her personal email and her union business agent. *See* Finding of Fact 16. There is also no dispute that the following patient information was in the reports: (1) the patients' names; (2) patient consumer numbers; (3) statements made by two patients during group therapy; and (4) the type of treatment provided to three patients—group therapy, individual therapy, and anger management. *See* Findings of Fact 17-21. The issue is whether appellant's disclosure of this information is related to her job performance and touches in some rational and logical manner upon her competence and ability.

As an employee of the appointing authority, appellant was responsible for protecting the confidentiality of patient information and prohibited from improperly disclosing such information to unauthorized persons. *See* Findings of Fact 34, 45-47. There is undisputed credible evidence, as detailed above, that

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[40] Where the appointing authority bases a removal action upon several charges and some, but not all of the charges are proven, the Commission may uphold the removal if there is just cause based upon the charges that are proven. *Lewis v. Commonwealth of Pennsylvania, Department of Health (Lewis II),* 70 Pa. Commw. 531, 534, 453 A.2d 713, 714 (1982). Here, we find the appointing authority established the substance of Charge 1 against appellant—violations of the IM 200 and HIPAA. Therefore, we find that the appointing authority presented sufficient evidence to demonstrate just cause for removal.

[41] It is within the purview of the Commission to determine the credibility of the witnesses. *State Correctional Institution at Graterford, Department of Corrections v. Jordan,* 505 A.2d 339, 341 (Pa. Commw. Ct. 1986).

appellant disclosed patient information to a union business agent, who was not authorized to receive this information. *See* Findings of Fact 15, 17-21, 23. The appointing authority's CEO and the AAA are the persons to whom mandatory abuse reports are submitted, not union business agents. *See* Findings of Fact 9, 12, 13. Appellant's union does not conduct patient abuse investigations. *See* Findings of Fact 14, 15. Moreover, before patient information may be disclosed, the Medical Records Department must be consulted. *See* Finding of Fact 35. Appellant failed to notify the Medical Records Department before disclosing the patient information to the union business agent. *See* Findings of Fact 23, 35. Therefore, we find that by disclosing the patient information to an unauthorized person, appellant failed to fulfill her duty to protect the confidentiality of that information. Thus, we find sending the patient information to the union business agent alone is sufficient to establish just cause for appellant's removal because it is clearly related to her job performance and rationally and logically touches upon her competence and ability.

Likewise, we find appellant failed to safeguard the confidentiality of the patient information when she sent it to her private email address because the appointing authority does not have a means by which it can track the dissemination of information from a private email address. *See* Finding of Fact 25. Thus, this action also supports our finding that the appointing authority established just cause for appellant's removal.

Furthermore, the patients whose information was disclosed were not notified prior to the disclosure, nor was their consent obtained. *See* Finding of Fact 24. Pursuant to section (V)(H)(1)(a)-(k) of IM 200, the patient's consent is required, unless there is an applicable exception. *See* Findings of Fact 37-38. There are no exceptions applicable to the instant matter. *See* Findings of Fact 37-38.

Additionally, pursuant to section (V)(K)(1) of IM 200, electronic transmission of consumer health information, including email attachments, is to be limited to consumer care emergency situations. *See* Finding of Fact 39. This clearly was not an emergency care situation because the incidents referenced in the reports occurred approximately one year before appellant sent the November 22, 2016 email. *See* Findings of Fact 17-21. Accordingly, dissemination of the patients' PHI was prohibited under IM 200.

Nevertheless, appellant argues the appointing authority failed to establish just cause for her removal because: (1) the mandatory abuse reports did not contain PHI; and (2) the appointing authority has previously disclosed such information to the union during PDCs. Ap. Brief, pp. 3-8. Appellant further argues she was justified in emailing the reports to her union because the appointing authority failed to investigate the reports.[42] Ap. Brief, p. 9. We are not persuaded by appellant's arguments for the reasons discussed below.

First, contrary to appellant's claim, the reports contained PHI as that term is defined by IM 200 and HIPAA.[43] Section IV(C) of IM 200 defines PHI as "individually identifiable health information that is transmitted or maintained in any

[42] Appellant also argues she was justified in emailing the reports to the Equal Opportunity Investigator and that doing so did not violate any rule or regulation. Ap. Brief, pp. 4-5, 9. The appointing authority did not charge appellant with any such violation. Comm. Ex. A. Therefore, the Commission will not address this argument as it was not a basis for appellant's removal.

[43] The reports also contained medical records information; the privacy of which appellant is responsible for protecting under section (V)(D)(1) of IM 200. *See* Finding of Fact 34. Furthermore, section (V)(I)(1) of IM 200 specifically prohibits the release of medical record information without first notifying the Medical Records Department. *See* Finding of Fact 36. We find appellant violated these sections of IM 200 when she disclosed medical records information, to include the type of treatment provided and statements made by the patients during treatment, to an unauthorized person, the union business agent, without notifying the Medical Records Department. *See* Finding of Fact 17-21, 23, 32. Furthermore, even if the information had not been part of the consumers' medical records, appellant still had a duty under IM 200 to respect the consumer's privacy and confidentiality by acting responsibly in using or discussing such information. *See* Finding of Fact 32. We find appellant failed to uphold this duty.

medium, including oral statements." *See* Finding of Fact 33. Similarly, section 160.103 of the HIPAA Privacy Rule defines PHI as individually identifiable health information that is transmitted or maintained in electronic media or any other form or medium.[44] 45 C.F.R. § 160.103. Individually identifiable health information includes information that:

> Relates to the past, present, or future physical or mental health or condition of an individual; the provision of health care to an individual; or the past, present, or future payment for the provision of health care to an individual; and
>
> (i) That identifies the individual; or
>
> (ii) With respect to which there is a reasonable basis to believe the information can be used to identify the individual.

45 C.F.R. § 160.103. Health information is further defined as:

> any information, including genetic information, whether oral or recorded in any form or medium, that:
>
> (1) Is created or received by a health care provider, health plan, public health authority, employer, life insurer, school or university, or health care clearinghouse; and
>
> (2) Relates to the past, present, or future physical or mental health or condition of an individual; the provision of health care to an individual; or the past, present, or future payment for the provision of health care to an individual.

45 C.F.R. § 160.103.

[44] There are several exclusions to this definition; however, none of the exclusions are applicable to the instant matter. *See* 45 C.F.R. § 160.103.

Here, there is no dispute health information, including the type of treatment provided to the patients, was contained in the reports attached to appellant's November 22, 2016 email, nor is there any dispute that the health information was individually identifiable because the names of the patients and the patients' consumer numbers were included in the reports, along with the address of the hospital where the patients were being treated. *See* Findings of Fact 17-21. Therefore, we reject appellant's argument and find the reports contained PHI as that term is defined by IM 200 and the HIPAA Privacy Rule. Nonetheless, it makes no difference whether the information contained in the reports is classified as PHI or simply patient information. Appellant has a duty to protect patient information generally and, for the reasons discussed above, she failed to fulfill this duty. Thus, there is sufficient credible evidence to establish just cause for appellant's removal.

Additionally, we are not persuaded by appellant's claim that she was permitted to disclose patient information to a union business agent because union business agents are privy to such information during PDCs. Ap. Brief, p. 5. The appointing authority is required to disclose the treatment of a patient during PDCs if it is the basis for the discipline to comply with the employee's due process rights as set forth in *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985).[45] There is no evidence the patient information disclosed by appellant was part of a PDC. Rather, as discussed in detail above, the evidence establishes appellant

[45] In *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985), the Supreme Court indicated a tenured public employee is entitled to have a PDC prior to being terminated. The PDC "need not definitively resolve the propriety of the discharge," but "it should be an initial check against mistaken decisions – essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action. The tenured public employee is 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." *Loudermill*, 470 U.S. at 546-547.

unilaterally disclosed the patient information to her union business agent without adhering to any of the procedures set forth in IM 200, particularly the requirements to notify the Medical Records Department and consumer.

Finally, we are not persuaded by appellant's belief that she was justified in disclosing the patient information to the union business agent because she believed the appointing authority previously ignored the reports. Ap. Brief, p. 9. While there are several exceptions under IM 200 as to when patient information may be released without consent, none of these exceptions include the non-consensual release of patient information to a business agent for the employee's union. *See* Findings of Fact 37-38. Nor is there an exception for when an employee believes the submitted mandatory abuse reports are being ignored. *See* Finding of Fact 37.

Moreover, appellant's union is not responsible for conducting patient abuse investigations. *See* Finding of Fact 15. If appellant truly believed the appointing authority had failed to investigate the alleged patient abuse, she could have provided the reports directly to the AAA, which is the agency responsible for receiving those reports. *See* Findings of Fact 12-13.

Based on the above, we find the appointing authority had just cause to remove appellant. The appointing authority presented credible evidence that appellant emailed mandatory abuse reports containing patient information to her union business agent and private email address. It was appellant's responsibility to protect the confidentiality of patient information. The credible testimony of the appointing authority's witnesses established appellant failed to satisfactorily discharge this duty. We find appellant's failure to perform this responsibility reflected negatively upon her competence and ability to perform her duties as a PSA,

thereby providing just cause for the removal. *Mihok, supra.* Having determined the appointing authority demonstrated just cause, it is necessary to evaluate appellant's claims of discrimination.

IV. Appellant's Discrimination Claims

Appellant alleges discrimination based on race and non-merit factors. Comm. Ex. B; Ap. Brief, pp. 10-11. Specifically, appellant alleges she was treated differently based on her race because Sowizral, who is Caucasian, engaged in similar misconduct and was not removed. Comm. Ex. B; Ap. Brief, p. 10. Additionally, appellant alleges her removal was based on a non-merit factor—appellant's filing of discrimination and patient abuse complaints. Comm. Ex. B; Ap. Brief, pp. 10-11. Each of appellant's claims are discussed below.

A. Disparate Treatment Based on Race

We are not persuaded by appellant's claim of disparate treatment. There is no credible evidence that appellant and Sowizral were similarly situated. *See Nwogwugwu*, at 141 Pa. Commw. at 40, 594 A.2d at 851 (1991)(holding an employee claiming disparate treatment must demonstrate that he or she was treated differently than others who were similarly situated). While both appellant and Sowizral utilized private email addresses, that is where the similarity ends.

Appellant retained un-redacted copies of the mandatory abuse reports within her private email account and on her personal computer; whereas, Sowizral immediately deleted her email after sending it. N.T. pp. 716-717, 720; 506-507. Additionally, unlike appellant, Sowizral did not make an unauthorized disclosure of patient information. The recipients of Sowizral's email were persons who had

legitimate business purposes for having the patient information attached to the email. N.T. pp. 177-182, 365, 386-390, 531; Ap. Ex. 2. Conversely, there is no evidence that appellant's union business agent had a legitimate business purpose for having the patient information that appellant emailed to her. While union business agents may be privy to such information during PDCs, there is no evidence of a pending disciplinary action against appellant based on the patient information that appellant emailed to her union business agent. Likewise, there is no evidence establishing that appellant's disclosure of the patient information was permitted under one of the exceptions set forth in IM 200. *See* Findings of Fact 15, 37-38.

Considering the above, we find appellant has failed to meet her burden of establishing a *prima facie* case of disparate treatment based on race. *Henderson, supra*. While we recognize the burden of establishing a *prima facie* case cannot be an onerous one, *Nwogwugwu, supra.*, in this matter, appellant's evidence is not enough to meet her burden to show that her removal was more likely than not motivated by discrimination.

Furthermore, the appointing authority established there was a legitimate non-discriminatory reason for the removal. Extensive credible evidence, as detailed above, was presented by the appointing authority establishing that the removal was based upon appellant's disclosure of patient information to an unauthorized person. Appellant has failed to present any evidence which would establish the appointing authority's reason was pretextual.

B. Retaliation

While appellant's evidence that the appointing authority removed her in retaliation for engaging in protective activity is not overwhelming, it is sufficient to make out a *prima facie* case. *See Henderson,* 126 Pa. Commw. at 616, 560 A.2d at 864 (holding "the *prima facie* case cannot be an onerous one"). Here, appellant's testimony is sufficient, if believed and otherwise unexplained by the appointing authority, to show that shortly before she was removed, she engaged in a protected activity—reporting discrimination and patient abuse. AA Ex. 7; Ap. Ex. 12. Thus, appellant has established a temporal connection between her complaints and her removal that could indicate retaliation.

Although appellant met her initial burden of proof, the appointing authority presented credible evidence which establishes a legitimate non-discriminatory reason for removing appellant from her position as a PSA.[46] Specifically, the appointing authority established appellant was removed for emailing patient information to her private email account and to her union business agent. As explained in detail above, it was appellant's responsibility to protect the confidentiality of patient information. Appellant failed to satisfactorily discharge this duty and it was for this reason that appellant was removed. Thus, we find the appointing authority successfully rebutted the presumption of discrimination raised by appellant's *prima facie* case. Further, appellant has failed to present any credible evidence that the appointing authority's reason for removing her is pretextual. Accordingly, we enter the following:

[46] When the initial burden of proving a *prima facie* case of employment discrimination is met, the burden of production shifts to the appointing authority to clearly advance a legitimate non-discriminatory reason for the employment action through the introduction of admissible evidence. *Nwogwugwu,* 594 A.2d at 850.

CONCLUSIONS OF LAW

1. The appointing authority has presented evidence sufficient to establish just cause for removal under Section 807 of the Civil Service Act, as amended.

2. Appellant has failed to present evidence establishing discrimination violative of Section 905.1 of the Civil Service Act, as amended.

ORDER

AND NOW, the State Civil Service Commission, by agreement of two of its members,[47] dismisses the appeal of Angella D. Egwaikhide challenging her removal from regular Psychological Services Associate, MH, employment with Wernersville State Hospital, Department of Human Services, and sustains the action of the Wernersville State Hospital, Department of Human Services, in the removal of Angella D. Egwaikhide from regular Psychological Services Associate, MH, employment, effective April 6, 2017.

State Civil Service Commission

_____

Gregory M. Lane
Commissioner

_____

Bryan R. Lentz
Commissioner

Officially Mailed: September 3, 2019
Emailed: September 3, 2019

[47] Chairman Teresa Osborne, who took office March 22, 2019, did not participate in the discussion of or decision for this appeal.