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**BEFORE THE WASHINGTON STATE
EXECUTIVE ETHICS BOARD**

In the matter of:

██████████

Respondent.

OAH NO. 04-2017-AGO-00011
EEB NO. 2016-034

FINDINGS OF FACT, CONCLUSIONS
OF LAW AND FINAL ORDER

I. PROCEDURAL HISTORY

1.1 On February 26, 2016, the Executive Ethics Board (Board) received a referral from the State Auditor’s Office (SAO) alleging that ██████████, a former Medical Assistant Specialist with the Health Care Authority (HCA), may have violated the Ethics in Public Service Act, chapter 42.52 RCW.

1.2 On November 18, 2016, the Board found reasonable cause to believe a violation of the Ethics in Public Service Act occurred.

1.3 A prehearing conference, with all parties participating, was held on May 30, 2017, with an Administrative Law Judge (ALJ) presiding pursuant to RCW 42.52.500.

1.4 After due and proper notice, a hearing was held before the Board. The hearing was held at the Board offices at Bristol Court in Olympia, Washington. It convened on November 16, 2017. ALJ TJ Martin from the Office of Administrative Hearings conducted the proceedings, and Board Chair Anna Dudek Ross and members Shirley Battan, Lisa Marsh, and John Ladenburg were present. Also present was Bruce L. Turcott, Assistant Attorney General, legal advisor to the Board.

1 1.5 Board staff was represented by Chad C. Standifer, Assistant Attorney General.
2 The Board's Executive Director Kate Reynolds and other Board staff members were present.

3 1.6 [REDACTED] was present and represented herself *pro se*.

4 1.7 Board staff offered Exhibits 1-9. All were admitted into evidence at hearing.

- 5 1. Preliminary Investigation and Board Determination relating to [REDACTED]
6 [REDACTED] dated October 27, 2016 (6 pages);
- 7 2. State Auditor's Office Whistleblower Referral relating to [REDACTED]
8 dated December 9, 2015 (3 pages);
- 9 3. State Auditor's Office notes of interviews with [REDACTED] dated
10 December 29, 2015 and January 6, 2016 (4 pages);
- 11 4. State Auditor's Office Whistleblower Report relating to [REDACTED] dated
12 February 18, 2016 (5 pages);
- 13 5. Health Care Authority Investigative Report dated January 11, 2016 with
14 attachments A, B, D, E, F, G, K, L, M, N, P, Q, R, S, T, U, V, W, X, Y,
15 Z, AA, BB, CC, DD, EE, FF, GG, HH, II, JJ, and KK (99 pages);
- 16 6. E-mail between Health Care Authority employees dated January 4, 2016
17 (1 page);
- 18 7. Health Care Authority report of trainings for [REDACTED] dated January 4,
19 2016 (5 pages);
- 20 8. Washington Personnel Resources Board - Findings, Conclusions and
21 Order, Case No. R-DISM-16-001, dated January 19, 2017 (10 pages); and
- 22 9. Summary of the HIPAA Privacy Rule, United States Department of
23 Health and Human Services-Office of Civil Rights, last revised May,
24 2003 (25 pages).

25 1.8 [REDACTED] offered Exhibit A. It was admitted into evidence at hearing.

26 A. Attachments to Prehearing Statement of Appellant, pp. 4-16, consisting
of the following (13 pages total):

Excerpts from Cooperative Agreement between the Washington State
Health Care Authority and the Washington State Department of Social
and Health Services, pp. 1-2, 11, 16, 60, 62 (6 pages);

Excerpt from unidentified document with heading "George Taylor, May
4, 2016, Page 2 of 12, Basis for Discipline" (1 page);

Excerpts from DSHS HIPAA Breach Risk Assessment dated January 27,
2015, pp. 1, 3 (2 pages);
Document titled "HCA HIPAA121313 - HIPAA Overview training" (1
page)

1 Slide from unidentified power point titled, "1.5 HealthCare Operations"
(1 page)

2 Slide from unidentified power point titled, "Technical (Slide Layer)" (1
3 page)

4 Slide from unidentified power point titled, "1.7 When Things go Wrong"
(1 page)

5
6 The Board was provided with copies of documents that were admitted as exhibits.

7 1.9 [REDACTED] submitted a prehearing brief. Board staff did not submit a prehearing
8 brief; instead, it submitted proposed findings of fact and conclusions of law.

9 1.10 The proceedings were recorded. They were open to the public.

10 1.11 The Board heard the testimony of Kerri Kallay, Steve Dotson, David Killeen, and
11 [REDACTED]

12 1.12 The hearing was adjourned the same day, on November 16, 2017.

13 Based on the evidence presented, the Board enters the following Findings of Fact,
14 Conclusions of Law and Final Order.

15 **II. FINDINGS OF FACT**

16 2.1 [REDACTED] was employed as a Medical Assistance Specialist by HCA starting in
17 1994. Testimony of Huong Mai; Exhibit (Ex.) 5, p.20; Ex. 8, p.2.

18 2.2 [REDACTED] completed HCA Health Insurance Portability and Accountability Act
19 (HIPAA) Online training on March 29, 2014 and March 30, 2015. Testimony of Kerri Kallay;
20 Ex. 7, p.4.

21 2.3 While investigating an issue at the Department of Social and Health Services
22 (DSHS), (SAO) found the subject of the investigation, Mr. Khoi Mai, had 57 HCA documents
23 saved on his state computer that contained confidential provider and client information. The
24 SAO found that these documents were sent to the DSHS employee by his sister, [REDACTED], who
25 worked for HCA, through the state email system. Ex. 2, p.3; Ex. 4, p.3.

1 2.4 As authorized by state law, RCW 42.40.040(4), the SAO self-initiated a
2 whistleblower investigation to determine if [REDACTED] had committed an improper governmental
3 action by disclosing confidential information. Ex. 2.

4 2.5 The SAO obtained Ms. Mai's emails for the period of December 2014 through
5 December 2015. A review of those emails revealed 80 emails with 133 attachments (Excel
6 spreadsheets) sent to her brother at DSHS requesting some technical assistance with the
7 spreadsheets. Ex. 4, p.3.

8 2.6 The information emailed by [REDACTED] included spreadsheets containing the full
9 names, dates of birth, Social Security numbers, past and current addresses, citizen status, client
10 ID numbers, diagnostic codes, and provider information for tens of thousands of HCA clients.
11 In one email, [REDACTED] sent a text file that contained information for more than 44,000 clients.
12 Ex. 4, p.3; Ex. 6.

13 2.7 At an interview on December 29, 2015, [REDACTED] told the SAO investigator that
14 she sent the documents to her brother, Khoi Mai (Mr. Mai), so he could help with the Excel
15 scripts needed to complete her job [REDACTED] indicated that she did not believe sending the
16 documents to her brother violated confidentiality laws because he was a state worker and that
17 the request for help was work related. She acknowledged that she did not receive approval from
18 her supervisor to have her brother, a DSHS employee, assist her with her work. Ex. 3.

19 2.8 Kerri Kallay is a Human Resources Operations Supervisor with HCA. Ms. Kallay
20 testified regarding the internal investigation she conducted of [REDACTED] disclosure of
21 confidential information. See Ex. 5. Ms. Kallay testified that [REDACTED] access to the agency
22 computer system called ACES should have been turned off when she transferred to the position
23 that she held when she made the unauthorized disclosures, because [REDACTED] had no need or
24 authority to access the ACES database in that position. Testimony of Kerri Kallay.

25 2.9 Steve Dotson is a Deputy Assistant Director in the HCA Division of Legal
26 Services. Mr. Dotson testified regarding a separate HCA investigation into the data breach

1 resulting from [REDACTED]'s disclosure of confidential information, notifications to affected
2 individuals and the U.S. Office of Civil Rights, and the financial impact of [REDACTED] conduct
3 on HCA. Mr. Dotson also testified that Khoi Mai was not an authorized recipient of confidential
4 client information under the Cooperative Agreement between HCA and DSHS concerning data
5 sharing. Ex. A; Testimony of Steve Dotson.

6 2.10 David Killeen is a Senior Investigator with the Board. He testified regarding
7 Board staff's investigation of this matter, including his review of the investigations conducted
8 by the SAO and HCA.

9 2.11 [REDACTED] testified on her own behalf. She testified regarding her dedication to her
10 job, job duties, and her feeling of obligation to the public. [REDACTED] testified that she thought her
11 brother was an authorized recipient of client information. In her testimony, she questioned how
12 much harm was caused by her disclosures. [REDACTED] testified in response to a Board member's
13 question that she knew clients' Social Security numbers and addresses were confidential.
14 Testimony of [REDACTED]

15 2.12 [REDACTED] testified regarding a Cooperative Agreement between HCA and DSHS
16 concerning data sharing, in support of sending client information to Mr. Mai. [REDACTED] also
17 admitted, in response to a Board member's question, that she obtained a copy of the Cooperative
18 Agreement only after she was terminated from HCA employment. Testimony of [REDACTED].

19 2.13 [REDACTED]'s briefing asked the Board to reinstate her employment with HCA, but
20 she testified in response to a Board member's question that she did not know if the Board had
21 the ability to do so. Prehearing Statement of Appellant; Testimony of [REDACTED]

22 2.14 As a result of the SAO investigation, the HCA initiated its own internal
23 investigation to determine if [REDACTED] had inappropriately disclosed confidential client
24 information. The HCA investigation was initiated after a December 29, 2015 meeting with the
25 SAO Whistleblower Investigator, and it concluded with a report dated January 11, 2016. Ex. 5,
26 pp. 2, 21. The HCA investigation revealed that on ten occasions from December 2014 through

1 October 2015, [REDACTED] emailed, to Mr. Mai at DSHS, Excel spreadsheets containing confidential
2 information for thousands of HCA clients. Ex. 5, p.15; Testimony of Kerri Kallay.

3 2.15 Mr. Mai was not an authorized recipient of the confidential information. He
4 uploaded some of the data sent by his sister, including client names, to a thumb drive that was
5 not recovered by HCA. The unrecovered thumb drive put confidential information and HCA at
6 risk and was a factor in the agency's decision to follow standard/official protocol for reporting a
7 data breach of confidential patient information to affected individuals and the U.S. Office of
8 Civil Rights. Testimony of Steve Dotson.

9 2.16 In total [REDACTED] shared the confidential information of approximately 144,000
10 HCA clients with Mr. Mai. Testimony of Steve Dotson; Ex. 8, p.8-9.

11 2.17 The HCA investigation also determined that, on three occasions from January
12 2015 through October 2015 [REDACTED] accessed an agency computer system, ACES, to obtain
13 confidential information about her relatives and disclosed that information to other relatives.
14 She emailed confidential client information about her uncle to Mr. Mai on January 7, 2015 and
15 August 31, 2015. She emailed confidential client information about her cousin to her nephew at
16 his personal email address on October 15, 2015. [REDACTED] did not have authorization as a
17 representative of HCA to disclose this information – nor did she have authority to access the info
18 at all in her current position. Mr. Mai had a power of attorney, but the nephew did not. [REDACTED]
19 should have known, based on her training, that the information in ACES was confidential and
20 that she was not authorized to disclose it to others, under the agency ethics policy. Ex. 5, pp. 13,
21 15, 76-79; Testimony of Kerri Kallay.

22 2.18 As a result of HCA's investigation, the agency determined that [REDACTED] conduct
23 was unauthorized and violated HCA Administrative Policy No. 1-02, *Privacy and Compliance*
24 *with HIPAA* and HCA Administrative Policy No. 1-06, *Protecting Personal/Confidential*
25 *Information*. Ex. 5, pp.17-19; Testimony of Kerri Kallay.

1 (2) No state officer or state employee may make a disclosure of confidential
2 information gained by reason of the officer's or employee's official position or
3 otherwise use the information for his or her personal gain or benefit or the gain or
4 benefit of another, unless the disclosure has been authorized by statute or by the
5 terms of a contract involving (a) the state officer's or state employee's agency and
6 (b) the person or persons who have authority to waive the confidentiality of the
7 information.

8 (3) No state officer or state employee may disclose confidential information to any
9 person not entitled or authorized to receive the information.

10 RCW 42.52.020(5) defines "confidential information" as:

11 (a) specific information, rather than generalized knowledge, that is not available to
12 the general public on request or (b) information made confidential by law.

13 HIPAA protects "individually identifiable health information," defined as:

14 demographic information collected from an individual, and:

15 (1) Is created or received by a health care provider, health plan, employer, or health care
16 clearinghouse; and

17 (2) Relates to the past, present, or future physical or mental health or condition of an
18 individual; the provision of health care to an individual; or the past, present, or future
19 payment for the provision of health care to an individual; and

20 (i) That identifies the individual; or

21 (ii) With respect to which there is a reasonable basis to believe the information can be
22 used to identify the individual.

23 45 C.F.R. § 160.103.

24 HIPAA protects individually identifiable health information held or transmitted by a
25 covered entity or its business associates, in any form or media, whether electronic, paper, or oral.

26 Ex. 9, p.5. HIPAA identifies this information as "protected health information (PHI)." *Id.*

PHI is not available to the general public upon request and is deemed confidential by
HIPAA. PHI therefore, is "confidential information" under RCW 42.52.050.

DISCLOSURES TO UNAUTHORIZED RECIPIENT

3.4 Based on the above findings of fact, the Board concludes that [REDACTED] repeatedly
violated RCW 42.52.050(2) and (3) when, on ten occasions from December 2014 through
October 2015 [REDACTED] emailed Mr. Mai, at DSHS, Excel spreadsheets containing the
confidential PHI of thousands of HCA clients. Finding of Fact 2.10.

1 3.5 [REDACTED] does not dispute that she disclosed the confidential information discussed
2 above. Rather, in summary, she argues that she was trying to perform her job duties more
3 efficiently, and she was not aware that her brother, Mr. Mai, was not authorized to receive the
4 confidential information. Prehearing Statement of Appellant. For the reasons discussed below,
5 neither argument is a defense to her violations of RCW 42.52.050.

6 3.6 It may be that [REDACTED] was attempting to more efficiently perform her job duties.
7 As a result, she sent the spreadsheets to Mr. Mai because she believed he was more capable of
8 creating scripts in Excel that would reduce the time it would take her to process HCA data.
9 Nevertheless, [REDACTED] had an obligation, under HIPAA and RCW 42.52.050, not to disclose
10 confidential information except to individuals specifically authorized to receive it. Regardless of
11 her motive, [REDACTED] repeatedly violated RCW 42.52.050 by sending the spreadsheets containing
12 PHI to her brother. In doing so, she compromised the privacy of thousands of HCA clients. Ms.
13 [REDACTED] argument that she was not aware that Mr. Mai was not an authorized recipient of the
14 confidential information is likewise not persuasive. [REDACTED] took training relating to HIPAA
15 and should have known that Mr. Mai was not authorized to receive the information.

16 ACCESSING INFORMATION ABOUT RELATIVES

17 3.7 Based on the above findings of fact, the Board further concludes that [REDACTED]
18 violated RCW 42.52.050(2) and (3), when on three occasions from January 2015 through
19 October 2015, [REDACTED] accessed the ACES computer system to obtain confidential information
20 about her relatives and disclosed that information to other relatives without authorization to do
21 so. Finding of Fact 2.12.

22 SANCTION

23 3.8 The Board may impose a civil penalty of up to \$5,000 per violation, or three times
24 the economic value of anything received or sought in violation of the Ethics in Public Service
25 Act, whichever is greater. RCW 42.52.480; WAC 292-120-020. The Board does not have
26 authority under the Ethics in Public Service Act or Board rules to reinstate a terminated

1 employee, a [REDACTED] requested. Instead, in appropriate cases, the Board may recommend
2 suspension or removal from a position. RCW 42.52.360(3)(f).

3 3.9 Each time [REDACTED] sent confidential information to Mr. Mai, a person not
4 authorized to receive the information, she violated RCW 42.52.050(2) and (3). She did so on at
5 least ten occasions.

6 3.10 Each time [REDACTED] accessed the ACES computer system to obtain confidential
7 information about her relatives and disclosed that information to other relatives without
8 authorization, she also violated RCW 42.52.050(2) and (3). She did so on three occasions.

9 3.11 In determining the appropriate sanction, the Board considered all of the criteria
10 for determining sanctions under WAC 292-120-030.

11 3.12 The Board determined, under WAC 292-120-030(1)(a) and (c), that the monetary
12 cost of the violations included significant costs to HCA, which expended a significant amount
13 of time and money to investigate the matter and ensure affected individuals were notified of the
14 breach and given the opportunity to monitor their credit for one year without any cost to the
15 affected individuals. HCA's insurance policy for data breaches included a deductible of
16 \$100,000. Approximately 144,000 individuals were affected by [REDACTED] disregard of their
17 privacy rights. These individuals were also obligated to expend their own time and energy to
18 ensure their credit rating was not impacted. Testimony of Steve Dotson.

19 3.13 The Board determined that the nature of the violations, under WAC 292-120-
20 030(2)(a), (d), and (e), were continuing in nature, impaired a function of the agency, and tended
21 to reduce public respect for or confidence in state government or state government officers or
22 employees. See Testimony of Steve Dotson.

23 3.14 In addition, the Board determined that the nature of the violations, under WAC
24 292-120-030(f), with respect to accessing information about relatives and disclosing it to others
25 without authorization, involved a special privilege to [REDACTED] See Testimony of [REDACTED]
26

1 3.15 The Board determined, as an aggravating circumstance under WAC 292-120-
2 030(3)(a), with respect to accessing information about relatives and disclosing it to others
3 without authorization, that [REDACTED] intentionally committed the violation with knowledge that
4 the conduct constituted a violation. Testimony of Kerri Kallay; Testimony of [REDACTED] Ex. 5.

5 3.16 The Board determined, as a mitigating circumstance under WAC 292-120-
6 030(4)(a), that [REDACTED] employer took corrective action against her by terminating her
7 employment. Ex. 8.

8 IV. ORDER

9 4.1 Based upon the foregoing Findings of Fact and Conclusions of Law, it is hereby
10 ordered that [REDACTED] is assessed a total monetary civil penalty of \$50,000, calculated as
11 follows:

12 4.1.1 For sending confidential information to an unauthorized recipient on at
13 least ten occasions, the Board imposes a \$35,000 penalty (\$3,500 per violation x 10
14 violations).

15 4.1.2 For accessing the ACES computer system to obtain confidential
16 information about relatives and disclosing that information to others without
17 authorization, the Board imposes a \$15,000 penalty (\$5,000 per violation x 3 violations).

18 4.2 The total amount of \$50,000 is payable in full within 90 days of the effective date
19 of this Order.

20 DATED this 8th day of January 2018.

21 WASHINGTON STATE EXECUTIVE ETHICS BOARD

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23 
24 _____
25 Anna Dudek Ross, Chair
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1 **APPEAL RIGHTS**

2 **RECONSIDERATION OF FINAL ORDER – BOARD**

3 Any party may ask the Executive Ethics Board to reconsider a Final Order. The request
4 must be in writing and must include the specific grounds or reasons for the request. The request
5 must be delivered to Board office within 10 days after the postmark date of this order.

6 The Board is deemed to have denied the request for reconsideration if, within 20 days
7 from the date the request is filed, the Board does not either dispose of the petition or serve the
8 parties with written notice specifying the date by which it will act on the petition.
9 RCW 34.05.470.

10 The Respondent is not required to ask the Board to reconsider the Final Order before
11 seeking judicial review by a superior court. RCW 34.05.470.

12 **FURTHER APPEAL RIGHTS – SUPERIOR COURT**

13 A Final Order issued by the Executive Ethics Board is subject to judicial review under
14 the Administrative Procedure Act, chapter 34.05 RCW. See RCW 42.52.440. The procedures
15 are provided in RCW 34.05.510 - .598.

16 The petition for judicial review must be filed with the superior court and served on the
17 Board and any other parties within 30 days of the date that the Board serves this Final Order on
18 the parties. RCW 34.05.542(2). Service is defined in RCW 34.05.542(4) as the date of mailing
19 or personal service.

20 A petition for review must set forth:

- 21 (1) The name and mailing address of the petitioner;
- 22 (2) The name and mailing address of the petitioner’s attorney, if any;
- 23 (3) The name and mailing address of the agency whose action is at issue;
- 24 (4) Identification of the agency action at issue, together with a duplicate copy,
25 summary, or brief description of the agency action;
- 26

1 (5) Identification of persons who were parties in any adjudicative proceedings that
2 led to the agency action;

3 (6) Facts to demonstrate that the petitioner is entitled to obtain judicial review;

4 (7) The petitioner's reasons for believing that relief should be granted; and

5 (8) A request for relief, specifying the type and extent of relief requested.

6 RCW 34.05.545.

7 **ENFORCEMENT OF FINAL ORDERS**

8 If there is no timely request for reconsideration, this is the Final Order of the Board. The
9 Respondent is legally obligated to pay any penalty assessed.

10 The Board will seek to enforce a Final Order in superior court and recover legal costs
11 and attorney's fees if the penalty remains unpaid and no petition for judicial review has been
12 timely filed under chapter 34.05 RCW. This action will be taken without further order by the
13 Board.