

HIPAA-Protecting Patient Confidentiality or Covering Something Else?

A case of a physician fired from the Veterans Administration (VA) for violation of the Health Care Portability and Accountability Act of 1996 (HIPAA) illustrates a problem with both the law and the VA. Anil Parikh, a VA physician at the Jesse Brown VA in Chicago, was dismissed on a charge of making unauthorized disclosures of confidential patient information on October 19, 2007. On January 3, 2011 the Merit Systems Protection Board (MSPB) reversed Dr. Parikh's removal.

Dr. Parikh's initially made disclosures to the VA Office of Inspector General and to Senator Barack Obama and Congressman Luis Gutierrez, in whose district the Jesse Brown VA lies. Dr. Parikh alleged that there were systematic problems within the Jesse Brown VA that resulted in untimely and inadequate patient care. The confidential patient information Parikh disclosed included examples of the misdiagnoses and misdirection of patients within the hospital. Specifically, Dr. Parikh alleged that a physician failed to diagnose a patient's rectal abscess and sent him home rather than refer him for proper surgical treatment. Two patients who should have been accepted in the emergency room were improperly directed to the urgent care area. One of these patients who should have been admitted to the intensive care unit was improperly placed on the general medical floor, resulting in the eventual deterioration of his condition to the point where he required intubation. Parikh later testified that he made these disclosures out of concern for patient health and safety.

The IG referred the matter to Mr. James Jones, director of the Jesse Brown VA for investigation. Mr. Jones assigned Dr. Jeffrey Ryan, Associate Chief of Staff, to investigate the allegations. Dr. Ryan concluded that there was no evidence of mismanagement or misdiagnosis and the IG closed their case. Dr. Parikh then disclosed the information to Denise Mercherson, his own attorney; Dr. Fred Zar, the director of the internal medicine residency program at Loyola, the American College of Graduate and Medical Education (ACGME) and other members of Congress serving on Congressional VA oversight committees. After these disclosures, Parikh was fired by Mr. Jones.

After exhausting his appeals to be reinstated with the VA Office of Special Counsel, Parikh filed an individual right of action (IRA) with the MSPB contending that his disclosures were protected under the Whistleblower Protection Act (WPA), and that the VA removed him based on those protected disclosures. The administrative judge hearing the case found that Parikh failed to establish MSPB jurisdiction over his appeal because "he failed to make a nonfrivolous allegation that any of his disclosures were protected under the WPA". Parikh then filed a petition for review by the full board, and the MSPB reversed the initial decision. The issue for MSPB was whether Parikh's disclosures were protected under the WPA. Although the administrative judge initially hearing the case found that Parikh failed to establish that he reasonably believed these disclosures were

evidence of a substantial and specific danger to public health or safety, the full MSPB disagreed. They found that the nature of the harm that could result from patient care and management issues that Parikh disclosed was "severe" that could result in patient death.

The VA argued that Parikh's disclosures were prohibited under HIPAA. According to Lisa Yee and Timothy Morgan, lawyers for the Chicago VA General Counsel, Parikh's disclosures were not covered by the WPA because the WPA and the Privacy Act of 1974 excludes disclosures prohibited by law. The VA also argued that Dr. Parikh's disclosures were prohibited by HIPAA. The MSPB had little trouble rejecting both these arguments, finding that one of the exceptions is a disclosure to a Congressional committee. The VA lastly argued that Dr. Parikh's disclosures were prohibited by VA policy since the VA had not approved disclosure of the information. However, the MSPB found that the VA's policy in question was not a "substantive" rule, but merely a reference to the HIPAA and the Privacy Act. The MSPB found that the disclosures were a factor to his removal and ordered him reinstated with back pay.

Physicians considering a career with the VA should carefully examine this case. The MSPB concluded that the VA retaliated against Dr. Parikh, not for disclosing confidential patient information, but whistleblowing. After over 3 years, Dr. Parikh has his job back but his work situation is probably not "friendly". And what has become of the VA administrators and their lawyers who violated WPA by retaliating against Dr. Parikh-to my knowledge, nothing.

The adversarial relationship between the VA administrators and physicians appears to be a one-way street. A physician can have their career destroyed by the VA, but if the accusations are unjustified, there are no consequences to the accusers. On the other hand, physicians that voice concerns for patient care and safety can have their professional reputation ruined by the VA. Particularly concerning is the misuse of HIPAA by VA attorneys as a weapon against physicians.

Dr. Parikh's case would not appear to be an isolated event. A quick review of the news reveals a VA nurse in Albuquerque was charged with sedition for criticism of the Bush administration's handling of hurricane Katrina and Iraq (2). In Phoenix a VA physician was fired after forwarding an e-mail from a Senator John McCain staffer suggesting physicians go to a McCain political rally and lobby for a new VA research building (3). The Phoenix VA chief of hematology/oncology resigned after his name was placed in the National Practitioner Databank; an action he felt was unjustified (4). Most recently the Phoenix VA public relations director was demoted after giving unfavorable testimony about VA administrators (5). If the VA is having trouble recruiting as their recent TV advertising suggests, they might consider a different approach. A good start would be the use of HIPAA to protect patient confidentiality rather than cover something else.

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