



DEPARTMENT OF VETERANS AFFAIRS
UNDER SECRETARY FOR HEALTH
WASHINGTON DC 20420

DEC 17 2004

Acting Director
VA Sierra Nevada Health Care System
1000 Locust Street
Reno, NV 89502

Representative
AFGE Local 2152
1000 Locust Street
Reno, NV 89520

Dear Ms. _____ and Mr. _____ :

I am responding to the issues raised in Ms _____ memorandum of October 22, 2004, concerning a grievance filed by AFGE Local 2152 regarding management's decision to remove _____ M.D. during his probationary period, and based on a Professional Standards Board's findings of unacceptable performance after a summary review. I am also responding to the Request for Arbitration submitted by Mr. _____ on behalf of Dr. _____.

As explained in the attached decision paper, the issues raised by the subject grievance concern or arise out of professional conduct or competence and peer review. As such, they are non-grievable under 38 U.S.C. § 7422(b).

Please provide this decision to your Regional Counsel as soon as possible.

Sincerely yours,

A handwritten signature in cursive script, reading "Jonathan B. Perlin", is written in black ink.

Jonathan B. Perlin, MD, PhD, MSHA, FACP
Acting Under Secretary for Health

Enclosure

**Title 38 Decision Paper – VASNHCS, Reno, NV
VA 04-11**

FACTS

On August 10, 2003, [redacted] M.D. was appointed as a staff physician (Ophthalmologist) at the VA Sierra Nevada Health Care System, Reno, Nevada (VASNHCS). (Exhibit A). His appointment was subject to a two-year probationary period in accordance with 38 U.S.C. § 7403(b)(1) and VA Handbook 5005, Part II, Chapter 3, Section F, paragraph 2. Later that year, Dr. [redacted]

Chief of Staff, and several other VASNHCS staff expressed concerns about Dr. [redacted] surgical competency as well as his clinical errors in diagnosis and treatment and the quality of his patient relationships. As a result, on April 19, 2004, Dr. [redacted] was informed that a Summary Review Board (Professional Standards Board)¹ (hereafter "Board") would conduct a summary review to determine if he should be retained in his position or terminated during his probationary period. (Exhibit B). Because Dr. [redacted] was the only Ophthalmologist on staff at the VASNHCS, the Board members were selected from outside of the VASNHCS and VISN 21. The composition of the Board consisted of one Chief of Ophthalmology, one Staff Ophthalmologist and the Chair, who was a Chief of Pathology and an experienced board chair.

In an e-mail message dated May 13, 2004, and via letter dated May 18, 2004, [redacted] Chief of Human Resources Management Service, informed Dr. [redacted] Hope that the Board would conduct the summary review on May 27. (Exhibit C). After reviewing Dr. [redacted] work records, interviewing Dr. [redacted] as well as several of his patients and other VASNHCS staff, the Board concluded that Dr. [redacted] eye surgery is "of extremely poor quality with a complication rate far in excess of the norm." The Board also found, *inter alia*, the following problems with Dr. [redacted] performance: (1) inadequate documentation for operative and postoperative notes; (2) practice of cataract surgery not in accordance with standard of care; and (3) callous disregard for well-being of patients. Based on its findings, the Board recommended that Dr. [redacted] not be retained in the VA system. (Exhibit D, Board Action report, VA Form 10-2543). In a memorandum, dated June 22, 2004, [redacted], Acting Director of the VASNHCS, notified Dr. [redacted] that based on the recommendations of the Board, he would be separated during his probationary period effective July 9, 2004. (Exhibit E). Ms. [redacted] informed Dr. [redacted] that if he felt his separation was based on discrimination, he could appeal the decision within the VA by contacting the Office of Resolution Management.

¹ One function of "Professional Standards Boards" is to conduct summary reviews of probationary employees to determine if summary separation from Federal service is justified. As such, there are references to the "Summary Review Board" in the Board Action report and other related documentation. To avoid any confusion, it should be noted that these entities are one and the same. The terms "Professional Standards Board" ("PSB") and "Summary Review Board" can be used interchangeably in a case such as this where a PSB was established to conduct a summary review of a probationary employee.

DISCUSSION

The Department of Veterans Affairs Labor Relations Act of 1991, 38 U.S.C. 7422, granted collective bargaining rights to Title 38 employees in accordance with Title 5 provisions, but specifically excluded from the collective bargaining process matters or questions concerning or arising out of professional conduct or competence, peer review and employee compensation as determined by the USH. Section 7422(c) defines "professional conduct or competence" as "direct patient care" or "clinical competence."

In the instant case, management decided to terminate Dr. [redacted] employment due to his sub-standard performance, particularly in the area of performing cataract surgery. The Board found that Dr. [redacted] quality of surgery was "extremely poor" and "below the standard that is currently acceptable." (See Board Action report, VA Form 10-2543, pp. 7-8). The decision to terminate Dr. [redacted] employment with the VA because of his unacceptable performance is clearly a matter concerning his professional conduct and competence. In addition, management's decision to conduct a summary review to evaluate Dr. [redacted] performance and the manner in which the review was conducted are matters of peer review within the meaning of 38 U.S.C. § 7422(b). Accordingly, Dr. [redacted] may not use the negotiated grievance procedure to challenge management's decision to remove him pursuant to 38 U.S.C. § 7422(b).³

The fact that Dr. [redacted] may not grieve this issue does not, however, leave him without recourse. Where an employee believes management has used professional conduct or competence as a pretext to mask an unlawful personnel action, the employee may – and should – challenge the action through other available procedures, but not through a grievance procedure. Here, management informed Dr. [redacted] that if he believed his separation was

³ Furthermore, it should be noted that Dr. [redacted] was a probationary employee. Accordingly, even if his termination had not been based on a 7422 matter such as professional competence or peer review, he still would not be eligible to challenge his separation through the negotiated grievance process. See Dept. of Justice, INS and FLRA, 709 F.2d 724 (D.C. Cir. 1983) (finding that proposal to include probationary employees within grievance procedures of collective bargaining agreement to be inconsistent with applicable law); see also Bremerton Metal Trades Council and Naval Supply Center, 32 FLRA 643, 661-62 (1988) (finding that proposal to include the removal of probationary employees under the parties' negotiated grievance procedure to be nonnegotiable because it is inconsistent with applicable law and Government-wide regulation); NFFE Local 29 and Army Corps of Engineers, Kansas City Dist., 20 FLRA 788, 790-91 (1985) (same). Moreover, the fact that Dr. [redacted] has couched his allegations in the form of a discrimination complaint does not mean that he can avail himself of the negotiated grievance procedure. To the contrary, because Dr. [redacted] was a probationary employee, he cannot pursue his discrimination claim through the negotiated grievance procedure. See NTEU and Dept. of Agric. Food and Nutrition Service, 848 F.2d 1273 (D.C. Cir. 1988) ("To allow the mere allegation of discrimination to give a discharged probationary employee access to the grievance procedure, with the concomitant power of the arbitrator to order reinstatement, would substantially thwart Congress's intention to allow summary termination of probationary employees.").

discriminatory, he should report his claim to the Office of Resolution Management.⁴ Dr. _____ grievance is not saved by the fact that he has alleged discrimination. To the contrary, Dr. _____ may not circumvent the mandates of Section 7422 simply by alleging that his separation was discriminatory.⁵

RECOMMENDED DECISION:

That the subject grievance regarding Dr. _____ claims of discrimination, due process violations and violations of the Master Agreement involve issues concerning or arising out of professional conduct or competence and peer review within the meaning of 38 U.S.C. § 7422(b).

APPROVED ✓

DISAPPROVED _____

Jonathan B. Perlin
Johnathan B. Perlin, M.D.
Under Secretary for Health

12/15/04
Date

⁴ However, Dr. _____ HCQIA claim, if pursued as a civil action, would fail as a matter of law as the HCQIA does not create a private cause of action for physicians. See Bok v. Mutual Assurance Inc., 917 F. Supp. 778, 780 (M.D. Ala. 1996).

⁵ Moreover, none of the additional allegations, causes of action or legal arguments articulated in Dr. _____ "Request for Arbitration" alter or disturb the determination that Dr. _____ grievance is barred by 38 U.S.C. §7422(b). The subject matter of the grievance arises out of Dr. _____ professional conduct or competency and the peer review process. Accordingly, Dr. Hope may not use the negotiated grievance process to challenge his termination. Moreover, in his Request for Arbitration, Dr. _____ argues that "Section 7422 does not bar the Union from prosecuting grievances for protected procedural matters." (Request for Arbitration at p. 9). While, under certain circumstances, Section 7422(b) may not bar grievances based on violations of VA's own procedures, 7422(b) does bar grievances alleging due process violations based on authorities other than VA policy. Here, while Dr. _____ has made a vague reference to the Medical Staff Bylaws in connection with his discrimination/due process claim, the Bylaws do not set forth the appropriate procedures for a PSB's summary review of a probationary employee. Rather, such procedures are set forth in VA Handbook 5021, Part III, Chapter 1. Dr. _____ has not alleged any violations of these procedures.