



DEPARTMENT OF VETERANS AFFAIRS  
Veterans Health Administration  
Washington DC 20420

DEC 03 2004

In Reply Refer To:

Director (00)  
Hunter Holmes McGuire Medical Center  
1201 Broad Rock Boulevard  
Richmond, VA 23249

Dear Mr.

I am responding to the issue raised in your predecessor's memorandum of April 28, 2004, and your memorandum of August 30, 2004 concerning a grievance and ULP filed by AFGE Local 2145 regarding a five-day suspension imposed upon \_\_\_\_\_, RN, and the union's request for information relating thereto.

As explained in the attached decision paper, 38 U.S.C. § 7422(b) does not bar arbitration of the subject grievance because your predecessor determined that Ms. Daniels' suspension did not involve professional conduct and competence and, on that basis, informed her when the suspension was imposed that she had a right to appeal through the negotiated grievance procedure. Thus, although the grievance and related union request for information would ordinarily fall within the professional conduct and competence exclusion of 38 U.S.C. § 7422(b), that exclusion is inapplicable under the particular circumstances of this case.

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

Sincerely yours,

A handwritten signature in cursive script, reading "Jonathan B. Perlin, M.D.", is positioned above the typed name.

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

Enclosure

Title 38 Decision Paper – VAMC, Richmond, VA  
VA 04-10

**FACTS**

By memoranda dated April 28, 2004 (Attachment A) and August 30, 2004 (Attachment B), the prior and current Directors of the Richmond VAMC requested a determination that the issues raised by a grievance (Attachment C) and related unfair labor practice (ULP) complaint (Attachment D) involve a matter or question concerning or arising out of professional conduct or competence and are therefore outside the scope of bargaining under 38 U.S. C. § 7422.

The grievance and ULP both arose out of the same set of facts. On November 20, 2003, Richmond management imposed a five-day suspension on RN, for allegedly leaving her worksite in the cardiac catheterization lab without supervisory approval.<sup>1</sup> At the time of her suspension, management apparently determined that the matter did not involve professional conduct or competence (i.e. clinical competence or patient care), as the then-Director of the Richmond VAMC notified Ms. that she had the right to grieve her suspension through the negotiated grievance procedure.<sup>2</sup>

Ms. and AFGE Local 2145 grieved the suspension in a third-step grievance filed on November 24, 2003. In responding to the grievance, management argued that the five-day suspension was warranted because Ms. unauthorized departure negatively impacted patient care. The matter was arbitrated on April 13, 2004. In a decision issued on June 2, 2004 (Attachment E), the arbitrator determined that Ms. actions “do not necessarily support a charge of insubordination” and reversed the five-day suspension on that basis.

In preparation for the grievance arbitration, the union filed a request with management under 5 U.S.C. § 7114(b) (Attachment F), seeking information regarding staffing levels in the Medical Intensive Care Unit (MICU), Cardiac Care Unit (CCU) and Surgical Intensive Care Unit (SICU). The union sought this information to rebut management’s assertion that Ms. absence delayed patient care by showing that there were other staff nurses available to cover Ms. shift and, therefore, that patients need not have been impacted by her

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<sup>1</sup> The grievance alleges that Ms. had requested and been granted annual leave to attend union training on the day in question, but that Ms. supervisor had telephoned her the night before to cancel her leave and order her to report for work. It is unclear from the record whether management properly established a patient care-related need to cancel her leave.

<sup>2</sup> As is noted below, had management determined Ms. conduct to involve professional conduct or competence, her sole avenue of appeal would have been to a Professional Standards Board.

absence. Management declined to provide the requested information, arguing that it was covered by 38 U.S.C. § 7422, which bars negotiation and negotiated grievances over issues of professional conduct and competence, including direct patient care and clinical competence. The union filed a ULP charge over management's refusal to provide the requested information. The Federal Labor Relations Authority issued a complaint on the ULP on May 27, 2004; that matter is still pending.

### **PROCEDURAL HISTORY**

The Secretary has delegated to the USH the authority to determine whether a matter or question concerns or arises out of professional conduct or competence (direct patient care, clinical competence), peer review or employee compensation within the meaning of 38 U.S.C. § 7422(b).

### **ISSUE**

Whether the grievance over Ms. \_\_\_\_\_ suspension for leaving her work site without authorization, and/or the ULP relating to the union's request for information about the availability of other nurses to cover Ms. \_\_\_\_\_ shift, raise issues involving professional conduct or competence within the meaning of 38 U.S.C. § 7422.

### **DISCUSSION**

Title 38 statutory authorities and related VA regulations lay out several distinct avenues through which Title 38 employees may appeal adverse actions. Under 38 U.S.C. §§ 7461(b)(1) and 7462 (and related regulations in VA Directive 5021, Appendix B, and VA Handbook 5021, Part II, Chapter 1), a major adverse action involving an issue of professional conduct or competence may be appealed only to a Disciplinary Appeals Board. Under 38 U.S.C. § 7461(b)(2)(A), a lesser adverse action involving professional conduct or competence (or an action taken against an employee who is not a member of a bargaining unit) may be appealed only through the agency grievance procedure set forth in VA Directive 5021, Appendix A, Section B. Under 38 U.S.C. § 7461(b)(2)(B), an employee who is a member of a collective bargaining unit may appeal an action that does not involve professional conduct or competence through either the agency grievance procedure or a negotiated grievance procedure.

In this case, VAMC Richmond management asserted in its response to the grievance and during the arbitration that Ms. \_\_\_\_\_ unauthorized absence from her workplace interrupted patient care. If that were the case, management should have processed her suspension under 38 U.S.C. §§ 7461(b)(1) and 7462, which apply to suspensions for misconduct involving professional conduct or competence. Consistent with that provision, management should have notified Ms. \_\_\_\_\_ that her sole avenue of appeal was to a Disciplinary Appeals Board. At the time of her suspension, however, the then-Director of the Richmond VAMC chose to treat the matter as one involving simple insubordination rather

than professional conduct or competence, and on that basis notified Ms. that she had the right to appeal her suspension via the negotiated grievance procedure. Ms. followed the then-Director's instruction and grieved her suspension through the grievance procedure provided in the AFGE Master Agreement. Under these circumstances, it would be inequitable to deem the matter non-grievable under 38 U.S.C. § 7422 based on management's belated assertion that her absence impacted patient care. Moreover, such a determination would block Ms. exercise of the appeal rights that Richmond management expressly provided to her.

It is important to note that in ruling on the grievance, the arbitrator made no findings with respect to the impact of Ms. conduct on patient care. Rather, consistent with management's initial characterization of the case, he reviewed the matter as a simple insubordination case. Finding that Ms. supervisor's instructions were less than clear, the arbitrator determined that Ms. actions in leaving her post "do not necessarily support a charge of insubordination," and reversed the five-day suspension on that basis. As such, nothing in the arbitration award compels a different outcome than that articulated above.

The union's request for information must similarly be viewed in context. As a general rule, 38 U.S.C. § 7422 would bar negotiation and/or negotiated grievances over nurse staffing assignments or staffing levels determined by VAMC management, as such matters directly impact patient care. Accordingly, the information requested by AFGE regarding nurse staffing levels in the MICU, CCU and SICU generally would not fall within the union's representational rights or responsibilities, and management would not be obligated to provide the union with such information. In the instant case, however, VAMC management raised the issue of nurse staffing in response to the grievance by arguing that Ms. deserved to be suspended because her absence from the unit delayed patient care. AFGE then requested staffing information to rebut management's argument and to "prove that management did not explore all staffing options so that Ms. could attend the approved training on March 6, 2003 and March 7, 2003." Under these circumstances, it would again be inequitable to invoke 38 U.S.C. § 7422 to block the union's use of the information. Under the unique circumstances presented by this case, the information requested should have been provided to the union to use in rebutting management's assertion that Ms. absence delayed patient care. In any event, given the arbitrator's ruling, the information request now appears to be moot.

DECISION:

Because VAMC Richmond management specifically determined that the underlying facts did not involve professional conduct or competence and, based on that determination, provided Ms. \_\_\_\_\_ with the right to appeal her suspension through the negotiated grievance procedure, 38 U.S.C. § 7422 cannot be invoked to bar the grievance after the fact. Similarly, and for the same reasons, 38 U.S.C. § 7422 does not bar the union's request for patient care-related information to rebut management's argument at the subject grievance arbitration that the suspension was warranted because Ms. \_\_\_\_\_ absence delayed patient care.



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

10-26-04

Date