



DEPARTMENT OF VETERANS AFFAIRS
UNDER SECRETARY FOR HEALTH
WASHINGTON DC 20420

OCT 02 2007

Craig Howard
Director
Canandaigua VAMC
Fort Hill Ave
Canandaigua, NY 14424

Colleen Combs, President
American Federation of Government Employees
Local 3306
400 Fort Hill Avenue
Canandaigua, NY 14424

Dear Mr. Howard and Ms. Combs:

I am responding to the issues raised in your memoranda of April 19, 2007 and May 18, 2007, concerning a grievance filed by AFGE Local 3306 regarding the repriviliging of

Pursuant to delegated authority, I have decided on the basis of the enclosed decision paper that the issue presented by this grievance is a matter concerning or arising out of professional conduct or competence and thus not subject to collective bargaining. As a result, the issues are non-grievable pursuant to 38 U.S.C. § 7422(b).

Sincerely yours,

A handwritten signature in cursive script that reads "Michael J. Kussman".

Michael J. Kussman, MD, MS, MACP
Under Secretary for Health

Enclosure

Title 38 Decision Paper
VA Medical Center- Canandaigua, NY
VA 07-04

FACTS:

M.D. is a psychiatrist at the Canandaigua VA Medical Center (VAMC). Prior to November 2006, her privileges to practice at the VAMC were granted at Level 4 for all areas requested except forensic evaluations and geriatric evaluations. (Attachment 1) Privileges in those two areas were granted at Level 2. (Attachment 1) According to the 2005 "Delineation of Clinical Privileges (Psychiatry)" form, Level 4 privileges required a board certification in a subspecialty.¹ (Attachment 2) Level 3 privileges required training, experience and competence leading to board certification in a specialty.² (Attachment 2) M.D. is not board certified in any specialty or subspecialty.

At the end of 2006, management at the Canandaigua VAMC determined that the format for describing "setting specific" clinical privileges for health care providers should be changed.³ (Attachment 3 and 4) The changes involved the description of the privileges of a health care provider as core privileges in defined settings as opposed to a list of privileges. Prior to this time, it was common practice to grant the highest level of privileges to a staff psychiatrist who had been practicing a number of years. After the format changes under SOARS, the VAMC began to more stringently adhere to the board certification requirements.

On November 22, 2006, M.D. was advised that her clinical privileges for the period November 7, 2006 through April 4, 2007, were core privileges at Level 2. (Attachment 2) Level 2 privileges are defined in the Delineation of Clinical Privileges (Psychiatry) form as:

Practitioners with these privileges are expected to request consultation in all cases in which doubt exists as to the diagnosis, where expected improvement is not apparent and when specialized diagnostic or therapeutic techniques are indicated. The practitioner has sufficient experience to manage the usual and

¹ Level 4 was defined as "[h]ighest level of competence. The practitioner is recognized as an expert in the field and serves as a consultant to others. The consultant would rarely need to seek consultation in the area, although additional opinions may be requested with difficult or unusual problems. The practitioner is board certified in a subspecialty with in depth knowledge and clinical skills."

² Level 3 was defined as "[p]ractitioners with these privileges can demonstrate training, experience and competence leading to board certification in a specialty. Such practitioners may act as consultants to others and in turn would be expected to seek consultation when the diagnosis or management is in doubt, especially in the presence of life threatening illness, unexpected complications arise, and when hazardous treatment procedures are contemplated

³ The changes were made in response to survey feedback received from the Joint Commission on Accreditation of Healthcare Organizations (JCAHO) and System-wide Ongoing Assessment and Review Strategy (SOARS).

uncomplicated case and has completed sufficient training to be board certified. (Attachment 2)

On January 16, 2007, _____ requested that her core privileges be granted at Level 3. (Attachment 5) This level is defined on the request form as:

“Practitioners with these privileges can demonstrate training, experience and competence **resulting in board certification** in psychiatry. Such practitioners may act as consultants to others and in turn would be expected to seek consultation when the diagnosis or management is in doubt, especially in the presence of life threatening illness, unexpected complications arise, and when hazardous treatment procedures are contemplated.” (Attachment 5) (emphasis added)

The definition of Level 3 is slightly different on the delineation of clinical privileges form, which defines practitioners with Level 3 privileges as those who can demonstrate training, experience and competence “leading to board certification in a specialty”. (Attachment 6) However, both forms require _____ to be board certified in order to be granted Level 3 privileges. _____ was not board certified, therefore her privileges were granted at Level 2. (Attachment 6)

On January 17, 2007, the American Federation of Government Employees, Local 3306 (AFGE or Union) filed a grievance alleging that the failure of the VAMC to grant _____ privileges at Level 3 was a classification issue that violated Article 9, Classification, Section 1E and F of the VA/AFGE Master Agreement. (Attachment 7)

On February 7, 2007, management denied the grievance stating that the issue was not negotiable pursuant to the provisions of 38 U.S.C. § 7422. (Attachment 8)

On February 8, 2007, AFGE elevated the grievance to Step 2. (Attachment 9). The Canandaigua Chief of Staff, Robert B. Babcock, M.D. responded on February 9, 2007. (Attachment 9) In his response, Dr. Babcock provided the following explanation for his privileging decision and the denial of the grievance:

In the new privileging format, the shorthand description of a ‘level’ of privileges distinguishes among physicians who are board-certified in a psychiatric subspecialty (Level 4), board-certified in general psychiatry (Level 3), and non-board-certified but fully trained in general psychiatry (Level 2). Physicians not fully trained in psychiatry would theoretically be assigned to Level 1. Qualifications for membership on the medical staff, however, preclude such appointments. Although this refinement led to an assignment of ‘Level 2’ for Dr. _____, her privileges did not increase or decrease, nor was there an impact on assignment, working conditions or compensation....I conclude that the subject of Dr. _____ grievance is a medical staff matter related to peer review and determination of clinical competence that is excluded from the grievance procedure by contractual agreement between VA and AFGE. (Attachment 10)

AFGE elevated the grievance to Step 3 on February 15, 2007, and thereafter management denied it on the same basis on March 29, 2007. (Attachments 11 and 12). On April 3, 2007, AFGE invoked arbitration. (Attachment 13)

On April 19, 2007 the Union requested that the Under Secretary for Health (USH) determine that the issues surrounding Dr. [REDACTED] privileges not be excluded from bargaining under 38 U.S.C. § 7422(b). (Attachment 14) The Union argued that the above referenced matter referred to classification and was governed by Article 9 of the Master Agreement, therefore falling outside the 7422 exemptions. (Attachment 14)

The Union further made the following argument:

In the case of Dr. [REDACTED] the decision to lower her credentialing status was determined without the benefit of peer review, depriving her of due process. The decision was reached solely on the recommendation of the physician's supervisor, a physician who has had a history of problems with Dr. [REDACTED] in the past.

Indeed all existing documentation supports her contention that her current level of practice is at Level 3 as she requested if not Level 4 by definition.

We believe that the issue grieved including the AFGE Local 3306 requested relief, is within the scope of collective bargaining and subject to the negotiated grievance procedure. Moreover[,] we believe that the delineation of Levels of Practice were incorrectly interpreted by the Lead Psychiatrist at the Canandaigua VAMC when he required Board Certification as a pre-requisite for the 'level 3' classification. It clearly states that the physicians (sic) qualifications would demonstrate training, experience and competence leading to board certification in a specialty not necessarily an acquired status, merely prepared. The physician in question is definitely prepared for that certification. (Attachment 14)

On May 10, 2007, management requested that the USH make a determination that the issues surrounding Dr. [REDACTED] privileging are excluded from collective bargaining under 38 U.S.C. § 7422(b). (Attachment 15)

PROCEDURAL HISTORY

The Secretary has delegated to the USH the final 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 granting of privileges to Dr. [REDACTED] at Level 2 involves issues concerning or arising out of professional conduct or competence (direct patient care) within the meaning of 38 U.S.C. § 7422(b).

DISCUSSION:

The Department of Veterans Affairs Labor Relations Act of 1991, codified at 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 (i.e., direct patient care and clinical competence), peer review or employee compensation as determined by the USH.

Pursuant to 38 U.S.C. § 7421(a), the Secretary has prescribed regulations (contained in VA Handbook 5005, Part II, Chapter 3 and VA Handbook 1100.19,) regarding credentialing and privileging. Section 6 (a) (3) of VA Handbook 1100.19, defines Clinical Privileging as “the process by which a practitioner is granted permission by the institution to independently provide medical and other patient care services, within the scope of the practitioner’s license and on an individual’s clinical competence as determined by peer references, professional experience, health status (as it relates to the individual’s ability to perform the requested clinical privileges), education, training, and licensure and registration. **NOTE:** *The delineation of clinical privileges must be facility specific and provider specific* (emphasis in original).” Section 6 (f) (2) defines reprivileging as “the process of granting privileges to a practitioner who currently holds privileges within the facility.”

In the instant case, management decided to grant Level 2 privileges to Dr. [REDACTED]. This determination was based on the requirement for board certification in a specialty to be privileged at Level 3 or board certification in a subspecialty to be privileged at Level 4.

As stated by the USH in a previous section 7422 decision, VA-06-01, Washington DC, dated January 6, 2005, at page 7:

Clinical privileging is the process by which a health care facility grants a practitioner permission to independently provide medical or other patient care services. At VA facilities, the privileging process is conducted in accordance with VA regulations set forth in VHA Handbook 1100.19, *Credentialing and Privileging*, and with local policies set forth in each facility’s Medical Staff Bylaws. Under these policies, VA privileging is a peer review process in which a provider’s supervisor assesses peer recommendations and other information relevant to the provider’s clinical performance, judgment, and skills, and on that basis of that information recommends that the provider’s privileges be granted or terminated,

extended or modified. Another group of the provider's peers – namely, the Executive Committee of the facility's Medical Staff – reviews the supervisor's recommendation and supporting clinical information and submits its own recommendation to the VAMC Director. Thus, privileging decisions are peer review-based determinations of providers' clinical competence to perform specified medical procedures. Privileging decisions also involve direct patient care within the meaning of 38 U.S.C. § 7422 because providers must satisfy all applicable privileging criteria to be permitted to treat patients at a VA facility. (Attachment 7)

The Union's request for a 38 U.S.C. § 7422 determination alleges that the delineation of Levels of Practice was incorrectly interpreted by the Lead Psychiatrist at the Canandaigua VAMC. However, the privileging decision by the Lead Psychiatrist regarding the level of clinical privileges granted to Dr. [REDACTED], directly involves the substance of the privileging process, an issue that inherently concerns professional conduct or competence (i.e. direct patient care).

To the extent that the Union is questioning the process by which the VAMC makes privileging decisions, such a matter concerns professional conduct or competence and peer review within the meaning of 38 U.S.C. § 7422(b). In fact, by arguing that the credentialing process was done without peer review, depriving Dr. [REDACTED] of her due process rights, the Union concedes that this is a peer review matter. The Union also claims that the decision to lower Dr. [REDACTED] privileging level was done without peer review, solely on the recommendation of her supervisor who has a history of problems with Dr. [REDACTED]. Even if this is correct, a privileging decision still involves direct patient care within the meaning of 38 U.S.C. § 7422. Moreover, if the concern of the Union is that the proper procedure was not followed, the requested remedy that Dr. [REDACTED] privileging level be increased was not proper.⁴

⁴ If the concern was procedural due process, the practitioner has the option to request modification of clinical privileges. The Canandaigua Medical Staff Bylaws, Rules and Administrative Procedures Article 6 B 6 outlines this procedure. Practitioners may submit a request for modification of clinical privileges at any time. A practitioner's request for modification or enhancement of existing clinical privileges is made by practitioner submission of a formal request for the desired change(s) with full documentation to support the change. Requests to increase privileges will be accompanied by the appropriate documentation that supports the practitioner's assertion of competence; i.e. advanced educational or clinical practice program, clinical practice information from other institution(s), references, etc. A query to the NPDB will be made at the time of any practitioner request for additional privileges. Requests for other changes should be accompanied by an explanatory statement(s). The request for modification of clinical privileges, supporting documents, and practitioner's credentialing and privileging file will be presented to the appropriate Clinical Specialty Lead for review. The Clinical Specialty Lead will consider the additional information and the entire credentialing and privileging folder before making a recommendation to the Professional Standards Board and Executive Committee of the Medical Staff. The Executive Committee of the Medical Staff will present a recommendation to the Medical Center Director for action. See Canandaigua Medical Staff Bylaws, Rules and Administrative Procedures, Article 6 B 6 (2006; 2007)

Notwithstanding the 7422 nature of the Union's challenge, it additionally lacks merit. The Union's belief that credentialing at Level 3 does not require board certification does not withstand scrutiny. If the Union's reading of the requirements for privileging is followed, neither Level 2 nor Level 3 would require board certification in a specialty, but privileging at Level 4 would require board certification in a subspecialty. This reading of the requirements is not reasonable. To avoid confusion in the future, Canandaigua VAMC is encouraged to ensure that the descriptions of the certifications for the privileging levels are consistent in

Contrary to the Union's assertion, this is not an issue of classification under Article 9 of the Master Agreement. The Title 5 Classification System does not apply to Title 38 medical professionals. Article 9, Section 1 A of the Master Agreement states that "[e]ach position covered by this agreement that is established or changed must be properly described in writing and classified to the proper occupational title, series, code and grade." The repriviliging decision has no impact on the title, series, grade or code of Dr. [redacted] position.⁵

Based on the foregoing, the decision to reprivilige Dr. [redacted] at Level 2 was based on issues concerning or arising out of professional conduct or competence and peer review, and is therefore non-grievable and non-arbitral under 38 U.S.C. §7422(b). As a result, the privileging grievance – through which the Union seeks to have that clinical determination overturned by a non-clinician arbitrator – is barred by 38 U.S.C. §7422(b).

The USH has determined in prior 38 U.S.C. §7422(b) decisions that the privileging of Title 38 health care providers involves issues of direct patient care and clinical competence as well as peer review within the meaning of 38 U.S.C. §7422(b). See VA Puget Sound Health Care System, VA-05-10 (November 21, 2005) and VAMC, Washington, VA-06-01 (January 6, 2006). (Attachments 16 and 17) See Fayetteville, VA-94-02 (May 16, 1994). (Attachment 18),

RECOMMENDED DECISION:

That the Union grievance relating to the decision of the Director of the VA Medical Center, Canandaigua, NY, regarding Dr. [redacted] repriviliging involves issues concerning or arising out of professional conduct or competence within the meaning of 38 U.S.C. § 7422(b).

APPROVED X
Michael J. Kussman
Michael J. Kussman, MD, MS, MACP
Under Secretary for Health

DISAPPROVED _____
10/2/07
Date

the request form and the form delineating the level of privilege granted, and specific as to the absolute requirement of board certification in a specialty for Level 3 or subspecialty for Level 4.

⁵ Even if this were a classification issue, Article 42, Section 2 of the Master specifically exempts from the grievance procedure the classification of any position that does not result in the reduction in grade or pay of an employee. As a result, the negotiated grievance procedure is not the appropriate venue for the Union to challenge the VAMC's determination of Dr. [redacted] privileges.