



DEPARTMENT OF VETERANS AFFAIRS
UNDER SECRETARY FOR HEALTH
WASHINGTON DC 20420

DEC 17 2004

Director, Alaska VA Healthcare System & Regional Office
2925 DeBarr Road
Anchorage, AK 99508-2989

President, AFGE Local 3028
2925 DeBarr Road
Anchorage, AK 99508

Dear Mr. [redacted] and Mr. [redacted]:

I am responding to the issues raised in your memoranda of October 18 and October 20, 2004, concerning a grievance filed by AFGE Local 3028 regarding management's limitation of a union steward's access to the proceedings of a Professional Standards Board conducting a summary review of a probationary nurse.

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

Please provide a copy of the decision paper to your Regional Counsel as soon as possible.

Sincerely yours,

A handwritten signature in cursive script, reading "Jonathan B. Perlin".

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

Enclosure

**Title 38 Decision Paper – VAMROC, Anchorage, AK
VA 04-14**

FACTS:

On September 22, 2004, the Alaska VA Healthcare System & Regional Office (AVAHSRO) Nurse Professional Standards Board (PSB) convened a summary review in accordance with the procedures outline in VA Handbook 5021, Part III, Chapter 1, Paragraph 3. The summary review was conducted to review the performance and conduct of _____, RN, a probationary nurse. During the course of the summary review, the PSB interviewed a number of witnesses other than Mr. _____, some of whom were bargaining unit employees. AFGE Local 3028 (the Union) claimed a right to attend the interviews of all bargaining unit employees as an observer to the proceedings.¹ Management, citing VA policy, permitted the Union to attend and provide representation only during the PSB's interview of Mr. _____. As a result of the PSB's findings, management terminated Mr. _____ employment on October 5, 2004.

On September 27, 2004, the Union filed a Step 3 grievance (Exhibit A), alleging that AVAHSRO management had misinterpreted the provisions of Article 55 of the VA-AFGE Master Agreement² and that the Union should have been permitted to attend the PSB summary review proceeding as an observer, not simply as a representative for Mr. _____. As a remedy, the Union requested that the Chief of the facility's Human Resource Management Service (HR Chief) "be instructed in the proper procedures for allowance of representation of unit employees at boards or hearings;" that the facility director provide a written response to the Union conceding that the HR Chief "failed to adhere to the Master Agreement, specifically, Article 55 as it pertains to the Union's right to be a representative of unit employee [sic] at boards or hearings and/or present as an observer;" that the facility director provide a written apology to the Union "for denying unions [sic] contractual right to be present at Title 38 Board or Hearing [sic];" and that the facility director provide written notification to the unit employees who were required to testify at the subject PSB proceeding "that the agency was in error by denying the union the opportunity to be present as an observer."

¹ There is some debate as to how much access to the proceedings the Union sought. The VAMROC Director stated in his October 18, 2004 memo to the Under Secretary for Health that the Union "claimed a right to attend all interviews as an observer to the proceedings." (See Exhibit C, paragraph 2.) By contrast, the Union stated in its October 20, 2004 memo that it "was not attempting to extend the union's rights to attend the entire Summary Board process[,] only that portion that involved unit employees."

 (See Exhibit D) For purposes of this decision, the Union's characterization of events is assumed to be accurate.

² The specific terms of Article 55 and of the other provisions of the Master Agreement cited by the Union are set forth at pages 6-7 below.

By memorandum dated October 18, 2004 (Exhibit B), the facility director denied the Union's grievance.

By memorandum dated October 18, 2004 (Exhibit C), the facility director requested that the Under Secretary for Health (USH) determine that the issues raised in the grievance are excluded from collective bargaining and the negotiated grievance procedure by 38 USC § 7422.

By memorandum dated October 20, 2004 (Exhibit D), the Union requested that the USH deny the facility director's request for a 38 USC § 7422 determination. In this memorandum, the Union insisted that the parties' Master Agreement afforded it the right to be an observer at all portions of the PSB's summary review that involved bargaining unit employees. More specifically, the Union stated in its memo that the facility "required that unit employees appear before the Summary Board and provide oral/written testimony," but that "there is no proof that these unit employees were ever informed of their rights under the Master Agreement prior to providing oral and/or written testimony."³

APPLICABLE VA REGULATIONS:

VA has promulgated regulations pertaining to the summary review processes of Professional Standards Boards and the use of such summary reviews in determining whether to separate or retain probationary Title 38 employees. These regulations are set forth in VA Handbook 5021, Part III, Chapter 1. The pertinent portions of these regulations include the following:

3. SUMMARY BOARD REVIEWS

- a. Summary reviews are limited to situations where summary separation from Federal service may be justified. Officials identified

³ In addition to this argument, the Union cited in its memo several points not raised in the grievance itself. First, it argued that AVAHSRO violated the Master Agreement by failing to provide Mr. [redacted] and/or his Union representative copies of the "investigative file ... [and] copies of any and all written and/or oral statements" taken by the PSB. Because the entitlement of Mr. [redacted] and/or the Union to such documentation was not raised in the subject grievance, it need not be resolved here. However, to the extent that the Union relies upon the language in Article 21 of the Master Agreement to support its alleged entitlement, its reliance is misplaced. As is discussed at pages 8-9 below, Article 21 addresses administrative investigations, not peer review processes, and employees' entitlement to documentation in the context of the latter is governed by VA Handbook 5021, Part III, Chapter 1, paragraphs 3.d.(2) and 3.g., not by the Master Agreement. Second, the Union asserted in its memo that management "committed a prohibited personnel practice" by providing Mr. [redacted] notice of his termination in the form of a letter signed by the Chief of the Human Resources Management Service rather than the facility director. Again, this issue was not raised in the grievance and need not be resolved here, except to note that VA regulations permit facility directors to delegate the authority to take action on the recommendations made by Professional Standards Boards after summary reviews. See VA Handbook 5021, Part III, Chapter 1, paragraph 3.h.(1)(b).

in paragraph 2a-2e above⁴ are responsible for deciding whether to conduct a summary review of an employee's services. Supervisors may initiate requests for summary reviews at any time during the probationary period.

* * *

d. Employee Rights. Employees subject to summary Board review have the right to:

- (1) Advance written notice of the Board review.
- (2) Review documents relied upon by officials in initiating or recommending a summary Board review, subject to applicable disclosure requirements.
- (3) Impartial review by the Board.
- (4) Reply orally and/or in writing to the Board concerning the reasons for the review.
- (5) Be represented by an individual of the employee's choice, provided the choices would not create a conflict of interest. A summary review is not an adversarial procedure. The representative's role is limited to assisting the employee in exercising the right to reply orally and/or in writing to the reasons for the review. Any responses to requests for information by the Board during the review process are considered part of the employee's reply. Accordingly, the employee's representative may assist in such matters. **NOTE: Because summary reviews deal with issues related to professional competence and conduct and peer review, a union representative is not entitled to be present at a summary review except when serving as the employee's personal representative.**

* * *

f. Conduct of Board Review

- (1) The primary purpose of the Board in conducting a summary review is to obtain the available facts and determine whether the employee is fully qualified and satisfactory. Interviews with the employee, supervisors, and others should be conducted in an informal manner.

⁴ Per Handbook 5021, Part III, Ch. 1, paragraph 2.d.(1), "Appropriate Service Chiefs" are responsible for authorizing summary review of field employees other than Assistant/Associate Chiefs, Nursing Service.

(2) Oaths or affirmations are not required in connection with the Board review.

* * *

(7) To obtain essential facts, the Chairperson may call persons before the Board to answer questions that may assist the Board in its review. This includes persons who are believed to possess pertinent information about the employee or the circumstances which led to the review.

* * *

(9) Only Board members are entitled to be present when an individual is being interviewed, except that an employee's representative may be present while the employee is being interviewed. Employees or others who may be called upon to furnish information will not be subject to cross-examination, and the Chairperson of the Board will ensure that this does not occur.

* * *

g. Findings and Recommendations of Board. Upon completion of the review, the Board will meet in closed session to discuss its findings and make its recommendations. The Board may recommend separation or retention of the employee. Findings and recommendations of the Board will be recorded on VA Form 10-2543, Board Action. The Board Action form will be prepared in triplicate to include a brief, but concise summary of information obtained through interviews and records that the Board determines to be directly relevant to the service or conduct of the employee, a copy of any recorded transcript of the proceeding, and other pertinent documents or exhibits. The employee, upon request, will be furnished a copy of the summary report of the Board proceedings, along with a transcript of any verbatim recording.

MASTER AGREEMENT PROVISIONS

In the grievance, the Union alleged that AVAHSRO management violated Article 1, Section 3B, and Article 55 of the Master Agreement by limiting the Union's access to the PSB's Summary review proceedings. In addition, the Union alleged in its October 20, 2004 memorandum to the USH that the facility had violated that portion of the Master Agreement affording "the employee as well as the union ... the right to receive copies of all documentation and/or testimony used in making the determination to remove the employee, i.e. investigative file." The cited provisions of the Master Agreement are as follows:

Article 1 – Recognition and Coverage

* * *

Section 3 – Employee Representation

* * *

B. The Union will be given the opportunity to be represented at all formal discussions (including those held with other employee organizations) affecting personnel policies, practices, or working conditions. ...

Article 21 – Investigations

* * *

Section 2 – Investigations

* * *

D. Employees have the right to be represented by the Union while being questioned in a formal investigation or while being required to provide a written or sworn statement. ...

* * *

G. Upon request, the subject of the investigation and the Union will be furnished a copy of the complete investigation file (not just the evidence file) and all other relevant and pertinent information which would be provided under the Freedom of Information Act (FOIA) or 5 USC Section 7114, which would normally include the Administrative Investigation Board (AIB) report findings.

* * *

J. An employee's representative shall receive a complete copy of all evidence used to support the Department's action. This includes, but is not limited to, copies of all tapes, testimony/transcripts, recommendations and/or findings, and photographs.

* * *

Article 55 – Title 38 Representation at Boards or Hearings

A. The Union will be allowed to represent any unit employee at any hearing before a Title 38 Disciplinary Board or whenever a probationary employee appears before a Professional Standards Board (PSB) in a termination proceeding. A representative in a PSB hearing may do those things an employee is entitled to do under regulations.

B. If the employee does not choose to have union representation, the Union may be permitted to have an observer present at hearings described in Paragraph A. The Union observer may attend the PSB hearing only during the employee's

presentation. Consistent with applicable laws and regulations, Union representatives and observers must protect the confidentiality of any information to which they have access in connection with a Board Hearing.

ISSUE:

Whether the Union's grievance over AVAHSRO management's limitation of the Union's access to the PSB's summary review proceedings, such that the Union was permitted to attend the proceedings only during the presentation of the employee who was the subject of the summary review, raises issues of peer review within the meaning of 38 U.S.C. § 7422.

PROCEDURAL HISTORY:

The Secretary has delegated to the USH the final authority in the VA to decide 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).

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.

Pursuant to 38 U.S.C. § 7421(a), the Secretary of Veterans Affairs is authorized to prescribe by regulation the hours and conditions of employment and leaves of absence of title 38 medical professionals, including registered nurses (RNs). The Secretary has exercised this authority to address peer review of probationary RNs by promulgating the regulations in VA Handbook 5021, Part III, Chapter 1 quoted above.

The Federal Labor Relations Authority has specifically acknowledged the Agency's authority to promulgate regulations governing peer review procedures for Title 38 employees without regard to the bargaining and representational rights and obligations set forth in the Federal Service Labor-Management Relations Statute (the Statute). See VA Medical Center, Leavenworth, KS, 49 FLRA 1624 (1994) and VA Medical Center, Jackson, MS, 49 FLRA 171 (1994), consolidated and aff'd, NFFE Local 598 v. FLRA, 73 F.3d 390 (D.C. Cir. 1996). Such authority includes the authority to limit union representatives' access to summary review proceedings to that portion of the proceeding at which the employee subject to the review is present. The Department has issued such

regulations in VA Handbook 5021, Part III, Chapter 1, paragraphs 3.d.(5) and 3.f.(9), and the provisions of the parties' Master Agreement must be read to be consistent with such regulations and with 38 USC §§ 7421 and 7422.

The subject VA regulations make it clear that summary review proceedings are not formal investigations. See, e.g., VA Handbook 5021, Part III, Chapter 1, paragraphs 3.f.(1), (2), (7), (9). As a result, the provisions of the parties' Master Agreement relating to administrative investigations are inapplicable to the summary review proceeding at issue in the Union's grievance. To the extent that the Union relies upon those provisions, in addition to the provisions of the Statute, to afford bargaining unit employees a greater entitlement to documentation or union representation than is provided in VA's regulations relating to summary review procedures, the Union is in error. Compare VAMC Leavenworth, KS, supra, and VAMC Jackson, MS, supra, with VAMC Hampton, VA, 51 FLRA 1741 (1996) (distinguishing administrative board of investigation proceedings from peer review processes exempted from collective bargaining and negotiated grievance procedures under 38 USC § 7422).

The provisions of the parties' Master Agreement that do specifically apply to summary review proceedings are found in Article 55. Those provisions simply restate the limited right to union representation prescribed in the Agency regulations cited above, which regulations are exempt from collective bargaining. See generally Colorado Nurses Ass'n v. FLRA, 851 F.2d 1486, 1489 (D.C. Cir. 1988) (holding VA regulations promulgated under 38 USC § 7421(a) to be exempt from bargaining under Federal Service Labor Management Relations Statute) and 38 USC § 7422(b) (preserving bargaining exemptions for issues of professional conduct or competence, peer review, and employee compensation). Read in light of the applicable statutory and regulatory authorities, section A of Article 55 allows the Union to represent only the probationary employee who is the subject of a summary review termination proceeding and, as representative, to "do those things [that the subject] employee is entitled to do under [VA] regulations." The Union's right to observe summary review proceedings under section B of Article 55 is similarly limited: "The Union observer may attend the PSB hearing only during the [subject probationary] employee's presentation." Read consistently with the governing law, these collective bargaining provisions properly permit the Union to be present at summary review proceedings – in either its representative or observer role – only while the employee who is the subject of the review is present. Cf. VA Handbook 5021, Part III, Chapter 1, paragraphs 3.d.(5) and 3.f.(9).

In a prior determination pursuant to 38 USC § 7422 involving similar facts, VAMC Hampton, VA (May 7, 2001), the USH determined the proceedings of a Nurse Professional Standards Board to be exempt from collective bargaining and negotiated grievance procedures. More particularly, the USH determined in that decision that allowing a union to have observers at such proceedings raises

issues of professional conduct or competence and/or peer review under 38 USC § 7422(b).

RECOMMENDED DECISION:

That the subject grievance over the limitation of the Union's access to a Professional Standards Board's summary review proceedings, such that the Union's access was restricted to the portion of the proceedings at which the employee subject to the summary review was present, raises issues of peer review within the meaning of 38 U.S.C. § 7422.

APPROVED ✓

DISAPPROVED _____



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

DEC 17 2004

Date