



DEPARTMENT OF VETERANS AFFAIRS
Veterans Health Administration
Washington DC 20420

JUL 19 2004

In Reply Refer To:

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

Dear

I am responding to the issue raised in your predecessor's memoranda of February 6, 2004, and March 24, 2004, concerning a grievance filed by AFGE Local 2145 regarding the separation from employment of RN.

As explained in the attached decision paper, the Physical Standards Board procedure that formed the basis for Ms. separation did not comply with VA policy. As a result, the issue presented is not a matter concerning or arising out of professional conduct or competence within the meaning of 38 U.S.C. § 7422(b).

Please provide this decision to your Regional Counsel as soon as possible, and take appropriate corrective action. This includes reinstating Ms. to her former position and determining her fitness for duty in accordance with the procedures set forth in VA Handbook 5019, Parts I and II, and VA Handbook 5021, Part IV.

Sincerely yours,

A handwritten signature in cursive script, appearing to read "Jonathan B. Perlin", is written over a horizontal line.

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

Enclosure

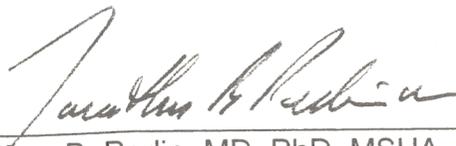
Title 38 Decision Paper – VAMC, Richmond, VA
VA 04-06

By memoranda dated February 6, 2004, and March 24, 2004, the Director of the Richmond VAMC requested a determination that the issues raised by a grievance over the separation for disability of a registered nurse involved professional conduct or competence and that the separation was non-grievable under 38 U.S.C. § 7422.

As a general rule, a determination by a Physical Standards Board that a medical professional appointed under 38 U.S.C. § 7401(1) is unfit for duty is a peer review process and involves issues of conduct or competence within the meaning of 38 U.S.C. § 7422(b). In this case, however, the determination did not comply with VA policy, in that the Physical Standards Board did not base its determination on a fitness for duty examination and referral by the Occupational Healthcare Provider as required by VA Handbook 5019, Part I, paragraphs 1, 2, 5 and 7; VA Handbook 5019, Part III, paragraph 5; and VA Handbook 5021, Part VI, paragraph 9.a. Because the Physical Standards Board's procedure in this case contravened VA policy, its disability determination did not involve issues of professional conduct and competence within the meaning of 38 U.S.C. § 7422(b).

DECISION:

That the separation for disability discussed in the February 6, 2004 and March 24, 2004 memoranda from the Director of the Richmond VAMC did not comply with VA policy and, as a result of such non-compliance, did not involve issues concerning or arising out of peer review or professional conduct or competence within the meaning of 38 U.S.C. § 7422(b).



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

7-19-04

Date

Department of
Veterans Affairs

Memorandum

Date: JUL 09 2004
From: General Counsel (023)
Subj: Concurrence: 38 USC § 7422 Decision Paper, VAMC Richmond, VA
To: Acting Under Secretary for Health (10)

1. We have reviewed the attached decision paper, which recommends that the Acting Under Secretary for Health find that the issues involved in a grievance filed by the local unit of AFGE regarding the separation for disability of a registered nurse do not concern or arise out of matters exempted from negotiated grievance procedures by 38 USC § 7422(b).
2. The subject disability separation was premised upon a determination by a Physical Standards Board (PSB) that the registered nurse was unfit for duty. Because PSB determinations are peer review processes and generally involve issues of professional conduct or competence, separations based on PSB determinations should in most cases be excluded from negotiated grievance procedures. In this case, however, the PSB was convened without a fitness for duty examination and referral by the Occupational Healthcare Provider as required by VA Handbook 5019, Part I, paragraphs 1, 2, 5 and 7; VA Handbook 5019, Part III, paragraph 5, and VA Handbook 5021, Part VI, paragraph 9.a. Because the PSB's procedure contravened VA policy, its disability determination was not a peer review process and did not involve issues of professional conduct or competence within the meaning of 38 U.S.C. § 7422(b).
3. The decision paper is accompanied by a cover letter directing VAMC Richmond management to take appropriate corrective action, including reinstating the nurse and determining her fitness for duty in accordance with VA policy.
4. These findings and their analyses are legally correct. I concur with the recommended decision.



Tim S. McClain
Attachment