DEPARTMENT OF VETERANS AFFAIRS
UNDER SECRETARY FOR HEALTH
WASHINGTON DC 20420

MAR 31 2010

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Dear Mr. Kleinglass and Mr. Cohen:

As a result of the memorandum opinion and order issued on August 28, 2009, by the United States District Court for the District of Columbia in Civil Action 08-1722, enclosed is a 38 U.S.C. § 7422 decision paper that addresses the issues raised in your memoranda of February 20, 2008, and March 12, 2008, concerning the Unfair Labor Practice charges (ULPs) filed by AFGE Local 3669 concerning testimony that , R.N. and , R.N. provided on behalf of AFGE Local 3669 at a December 12, 2007, arbitration. The enclosed 38 U.S.C. § 7422 decision paper replaces the decision paper that was previously issued on September 2, 2008.

Pursuant to delegated authority, I have decided on the basis of the enclosed decision paper that the at-issue ULPs: (1) qualify as "collective bargaining" within the meaning of 38 U.S.C. § 7422(b); (2) constitute matters arising out of professional conduct or competence within the meaning of 38 U.S.C. § 7422(b) to the extent that management's letters to and investigative meetings with Ms. and Ms. concerned the professional conduct or competence of 38 U.S.C. § 7421(b) employees at the Minneapolis VA Medical Center; and, (3) do not constitute matters arising out of professional conduct or competence within the meaning of 38 U.S.C. § 7422(b) to the extent that management's letters to and investigative meetings with Ms. and Ms. addressed issues that did not concern the professional conduct or competence of 38 U.S.C. § 7421(b) employees at the Minneapolis VA Medical Center.

Sincerely yours,

Robert A. Petzel, M.D.
Under Secretary for Health

Enclosure

Title 38 Decision Paper[1]
VAMC Minneapolis, MN

On December 12, 2008, an arbitration hearing was held concerning the termination of , a Respiratory Therapist at the Minneapolis VA Medical Center (MN VAMC or agency). (Attachment A, ¶ 2). During the arbitration, two nurses, (Staff Nurse and Steward of AFGE Local 3669) and (Staff Nurse in Medical Intensive Care Unit and Steward of AFGE Local 3669), allegedly made statements about the clinical competence of a fellow nurse, , who also testified during the arbitration. (Attachment A, ¶ 2). Ms. allegedly stated that Ms. was lazy and not a good nurse, or words to that effect. (Attachment B, ¶ 2). Ms. allegedly stated that she believed Ms. practiced below the standard of care. (Attachment B, ¶ 3).

The staff attorney who represented the MN VAMC at the arbitration, , claims that he contacted the Nurse Executive, to inform her of the statements that were allegedly made by Ms. and Ms. during the arbitration and to suggest that an investigation be conducted because a nurse practicing below the standard of care places patients at risk. (Attachment A, ¶¶ 2-3). MN VAMC management alleges that Ms. later expressed concern about the failure of Ms. and Ms. to notify management about Ms. allegedly substandard nursing practices. (Attachment A, ¶ 3). Specifically, MN VAMC management alleges that Ms. believed that Ms. and Ms. may have violated VHA Handbook 1100.18, *Reporting and Responding to State Licensing Boards,* by failing to promptly notify VAMC management that another nurse was providing substandard care. (Attachment A, ¶ 3).

Ms. allegedly began an investigation by meeting with Ms. and her nurse manager. (Attachment A, ¶ 3). On December 18, 2007, Ms. sent separate letters to Ms. and Ms. informing them of their reporting obligations and asking to discuss the allegations that were allegedly made during the arbitration. (Attachments C and D). Specifically, Ms. letters referred to the reporting requirements of the Minnesota Board of Nursing[2] and VHA Handbook 1100.18, *Reporting and Responding to State Licensing Boards.* (Attachments C and D, ¶ 2). The letters further stated that "[i]f you have knowledge that a RN is incompetent, unprofessional, unethical or unable to practice safely, you have an obligation to report that information to me or a

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[1] This decision paper replaces the Title 38 decision paper that was previously issued on September 2, 2008, concerning this same issue.

[2] Minn. Stat. § 148.263(3)(2007) provides: "A person licensed by a health-related licensing board as defined in section 214.01, subdivision 2, shall report to the board personal knowledge of any conduct the person reasonably believes constitutes grounds for disciplinary action under sections 148.171 to 148.285 by any nurse including conduct indicating that the nurse may be incompetent, may have engaged in unprofessional or unethical conduct, or may be mentally or physically unable to engage safely in the practice of professional, advanced practice registered, or practical nursing."

manager so that procedures outlined in VHA Handbook 1100.18...may be initiated." (Attachments C and D, ¶ 2b). The letter further advised that "failure to report practice as noted above is grounds for disciplinary action." (Attachments C and D, ¶ 3).

On January 10, 2008, AFGE Local 3669 (union and/or AFGE) filed an Unfair Labor Practice charge (ULP) (CH-CA-08-0214) against the MN VAMC with the Federal Labor Relations Authority (FLRA). (Attachment E). The union alleged that MN VAMC management's demands to meet with Ms. to discuss the testimony she provided under oath during the arbitration and the reference to possible disciplinary action are "reprisal for Ms. testimony on behalf of the Union and is an attempt to intimidate all employees."

On January 11, 2008, the union filed a second ULP (CH-CA-08-0213) on behalf of Ms. , making the same allegations that were made in the ULP filed on behalf of Ms. . (Attachment F).

On January 30, 2008, MN VAMC management submitted its response to the ULPs filed by AFGE. (Attachment G). MN VAMC management argued that it had a duty to investigate the allegations of poor clinical practice against a nurse for patient safety reasons. (Attachment G, ¶ 3). Management specifically alleged that the letters sent to Ms. and Ms. had a two-fold purpose: "1) to notify the employees that the agency had been advised of and an inquiry made of their statements given during their testimony and the requirements of the agency and the employee in this situation; [and] 2) to inform the employees that time would be scheduled to meet with them on their specific allegations, so that the agency may take action should it be warranted." (Attachment G, ¶ 4).

On February 19, 2008, Ms. sent additional letters to Ms. and Ms. , as a follow-up to discussions held on February 1 and February 6, 2008, respectively, with each nurse. (Attachments H and I) In these letters, Ms. stated that she had "completed a review of reported allegations that a RN's practice is below standard...[and] there were no substantive findings." (Attachments H and I, ¶ 2).

On February 20, 2008, the Director of the MN VAMC submitted a request for a determination that the issues raised in the union's ULPs were covered by 38 U.S.C. § 7422 and were therefore excluded from collective bargaining. (Attachment A). In that request, MN VAMC management explained that the purpose of the language in Ms. December 18, 2007, letter, which referred to the possibility of disciplinary action, was to notify Ms. and Ms. of their right to bring union representation to the meetings pursuant to Article 13, section 10 of the VA/AFGE Master Agreement. (Attachment A, ¶ 4). Management further explained that no disciplinary action was ever proposed against either Ms. or Ms. based on their testimony at the December 12, 2007, arbitration. (Attachment A, ¶ 5). In addition, management provided the

following argument to justify the need for the investigation referred to in Ms. letters to Ms. and Ms.

> Under 38 USC § 5711 (a)(5), Department personnel shall have the power to make investigations and examine witnesses upon any matter within the jurisdiction of the Department. The clinical practice of a nurse was brought into question by the testimony of two nurses during the subject arbitration. Management responded to the allegations by undertaking an investigation (See VHA Handbook 1100.18).
>
> We believe an investigation into the clinical practice of a nurse, stemming from allegations of fellow nurses of substandard practice, is clearly a matter involving professional conduct or competence as defined by 38 USC § 7422.

(Attachment A, ¶¶ 6 and 7). Further, the MN VAMC request included a declaration by , in which he stated that he "heard Ms. state that a fellow nurse was lazy and otherwise not a good nurse or words to that effect" and Ms. state that the same nurse "practices below the standard of care." (Attachment B, ¶ 2 and 3).

On March 12, 2008, the union submitted a letter to the USH arguing against a determination that the issues raised in the ULPs are outside the scope of collective bargaining under 38 U.S.C. § 7422. (Attachment J) The union alleged, in part, that the letters Ms. sent to Ms. and Ms. were issued in reprisal for the latter nurses' testimony in support of the union, and that the issuance of such letters constituted an "interference with, and restraint and coercion of, the rights of the unit employees to form, join or assist AFGE Local 3669." (Attachment J, page 1). The union further argued that the USH is without legal authority to issue a ruling applying any 38 U.S.C. § 7422(b) exclusion to the subject ULPs because they do not involve a negotiability or grievability issue. (Attachment J, page 1-2). The union further stated that such a decision would be unlawful and in excess of the VA's legal authority. (Attachment J, page 1).

The union specifically stated the following:

> Under the plain language of Section 7422(b), the scope of the Section 7422(b) exclusions [and therefore the scope of the Under Secretary's authority pursuant to Section 7422(d)] is limited to 'collective bargaining' and 'grievance procedures.' In other words, the Under Secretary can issue a Section 7422 (d) finding if a substantive collective bargaining proposal or collective bargaining provision covers the area covered by one of the Section 7422(b) exclusions. The Under Secretary may also issue a Section 7422(d) finding if a grievance covers one of the areas covered by a Section 7422(b) exclusion.

> However, one of the matters clearly unaffected by the Section 7422(b) exclusions is the right of any federal employee, including a VA professional employee, 'to form, join, or assist any labor organization' under 5 U.S.C. 7102. In turn, the unfair labor practice provisions under 5 U.S.C. 7116(a)(1) or (2) are unaffected by Section 7422 in the event that an interference, restraint, coercion and/or reprisal of a Section 7102 right is committed by a VA medical Center.
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> ...What the VAMC, Minneapolis is not entitled to is to have the Under Secretary issue a Section 7422 ruling on an unfair labor practice charge that does not concern the substantive negotiability of a bargaining proposal or provision or the grievability of a grievance under the negotiated agreement. Because the matter before the FLRA regional office is not a matter within the scope of the Section 7422(b) exclusions, the Under Secretary is without authority to issue a finding that any Section 7422(b) exclusion is applicable. (Attachment J, page 2-3).

The union included a declaration by , the attorney who represented AFGE Local 3669 during the arbitration, when the alleged clinical competence allegations were made against Ms. . (Attachment K) In his declaration, Mr. stated that neither Ms. Ms. testified at the arbitration that the competency of Ms. was substandard; or that she failed to provide the requisite care for any patient; or that she was a 'bad nurse'. (Attachment K, ¶ 3). He further declared that he believed Ms. and Ms. testimony "has been inaccurately twisted in the VAMC Minneapolis' presentation to the Under Secretary for Health." (Attachment K, ¶ 3).

On September 2, 2008, the USH determined that the ULPs filed by AFGE Local 3669 alleging reprisal for testimony provided by Ms. and Ms. on behalf of the union arose out of professional conduct or competence within the meaning of 38 U.S.C. § 7422(b). (Attachment L).

On October 10, 2008, the union filed a *Complaint for Injunctive and Declaratory Relief* in the United States District Court for the District of Columbia concerning the USH's September 2, 2008, decision. AFGE, AFL-CIO, Local 3669 v. James B. Peake, et al., Case No. 08-01722 (RBW)). (Attachment M). In relevant part, the union's Complaint argued (Count I) that by issuing the decision paper on an issue that does not pertain to either "collective bargaining" or to "grievance procedures provided under a collective bargaining agreement" within the meaning of 38 U.S.C. § 7422 (b), the agency violated, misinterpreted, and misapplied 38 U.S.C. § 7422 (b) and (d). (Attachment M, ¶¶ 45-46). In addition, the union argued (Count II) that applying the 38 U.S.C. § 7422 exclusions to the present matter was arbitrary and capricious, an abuse of discretion, and otherwise in violation of the law, all in violation of 5 U.S.C. § 706(2)(A). (Attachment M, ¶ 48).

On December 15, 2008, the VA filed a *Motion to Dismiss* (MTD). (Attachment N) In relevant part, the MTD addresses the union's Counts I and II of the Complaint by stating that "[w]hile the ULP process is a critical part of the enforcement mechanisms available under the [Federal Service Labor-Management Relations Statute] FSLMRS, it cannot be used to address matters or concerns that arise out of any of the three exceptions set forth in 38 U.S.C. § 7422(b), including the exception for professional conduct or competence. Moreover, multiple courts have upheld 7422 decisions concerning matters that were the subject of ULPs.

VA further argued that Congress specified that, in the case of any conflicts between the Title 38 provisions and the general Title 5 rights applicable to Federal employees, which includes rights set forth under [Civil Service Reform Act] CSRA, the provisions of Title 38 control. 38 U.S.C. § 7425 (b). Because the Section 7422 exclusion was applied to a ULP grievance arising out of the investigation into a VA nurse's clinical competence, the USH's September 2, 2008 decision is within the scope of his Section 7422 (d) authority and, therefore, the general Title 5 rights do not apply." (Citations omitted) (Attachment N, pages 11-12).

On January 21, 2009, the union filed *Plaintiff's Memorandum in Opposition to Defendants' Motion to Dismiss*, *Plaintiff's Motion for Summary Judgment (MSJ)* and *Plaintiff's Memorandum in Support of Plaintiff's Motion for Summary Judgment*. (Attachments O, P and Q). The union argued in part that because the ULP charges do not pertain to "collective bargaining (and grievance procedures provided under a collective bargaining agreement)," the Agency has no statutory authority to issue a section 7422 (d) ruling on Counts I and II of the Complaint. (Attachment O, page 19). The union also argued that "...one of the matters clearly unaffected by the Section 7422(b) exclusions is the right of any federal employee, including a VA professional employee, 'to form, join, or assist any labor organization' under 5 U.S.C. 7102. In turn, the unfair labor practice provisions under 5 U.S.C. 7116(a)(1) or (2) are unaffected by Section 7422 in the event that an interference, restraint, coercion and/or reprisal of a Section 7102 right is committed by a VA medical center." (Attachment O, page 20). As relief, the union requested that the "Court issue an order declaring that the ... September 2, 2008 decision paper was issued without legal authority and is an unlawful application of 38 U.S.C. 7422(b) and (d)", that the Agency be "ordered to withdraw and reverse their finding that a Section 7422(b) exclusion is applicable to the subject unfair labor practice charges", and that the Agency "be permanently enjoined from applying any section 7422(b) exclusion to either the unfair labor practice charges at issue...or to any unfair labor practice charges where at issue is whether employer statement(s) to employees constitute violations of 5 U.S.C. 7116(a)(1)." (Attachment Q, page 35).

On March 6, 2009, the Agency filed *Defendant's Reply in Support of its Motion to Dismiss and Opposition to Plaintiff's Motion for Summary Judgment.* (Attachment R). In the reply, the Agency specifically argued that ULPs constitute an enforcement mechanism available to labor management parties under the

FSLMRS and as such, are part of the collective bargaining process. (Attachment R, page 4). The Agency further argued that "[b]ecause the Union's ULP arises from collective bargaining, the Secretary correctly made a determination under § 7422(d) whether the matter concerned professional conduct or competence." (Attachment R, page 5).

On March 13, 2009, the union filed *Plaintiff's Reply Memorandum in Support of Plaintiff's Motion for Summary Judgment*. (Attachment S). In the reply, the union reaffirmed its previous arguments and further states that "...had Congress intended the Section 7422(b) exclusions to pertain beyond either substantive bargaining proposals or the substance of grievances under a negotiated agreement, Congress would have used language such as 'rights under chapter 71 of title 5' rather than the terms 'collective bargaining' and grievance procedures' in section 7422(b)." (Attachment S, page 3).

In a *Memorandum Opinion and Order*, dated August 28, 2009, the United States District Court denied the Agency's Motion to Dismiss; granted in part and denied in part as moot the Union's Motion for Summary Judgment; granted summary judgment in favor of the Union with respect to Count II of the Complaint; stayed and administratively closed the case; and, directed the parties to file joint status reports every ninety days until otherwise ordered by the Court. (Attachments T and U). Specifically, the Court reversed the USH's decision and remanded the case to the VA for a determination as to whether the ULPs filed by the union with the FLRA qualify as "collective bargaining" or "grievance procedures provided under a collective bargaining agreement" within the meaning of 38 § 7422(b).

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 (i.e., direct patient care or clinical competence), peer review or employee compensation within the meaning of 38 U.S.C.§ 7422(b).

ISSUES:

Whether the ULPs filed by the union alleging reprisal for testimony provided by two nurses on behalf of the union qualify as "collective bargaining" within the meaning of 38 U.S.C. § 7422(b).

Whether the ULPs filed by the union alleging reprisal for testimony provided by two nurses on behalf of the union are matters or questions concerning or arising out of professional conduct or competence.

DECISION:

The FSLMRS generally governs labor management relations in the Federal sector. See 5 U.S.C. §§ 7101 *et seq.* (1988). The Federal Service Labor-Management Relations Statute (FSLMRS) is part of the Civil Service Reform Act (CSRA), Public Law 95-454, 92 Stat. 111, which was enacted as a comprehensive collective bargaining program for most Federal employees. 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 the FSLMRS 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.

ULPs are filed under the FSLMRS and are a vital enforcement mechanism available to agencies, unions, and employees. See 5 U.S.C. § 7116. An employee or union's right to file an ULP under 5 U.S.C. § 7116 is tied to collective bargaining as set forth in 38 U.S.C. § 7422 (a) and (b) just like an employee's right to "join, form, or assist any labor organization..." under 5 U.S.C. § 7102 is tied to collective bargaining as set forth in 38 U.S.C. § 7422 (a) and (b). Therefore, while 38 U.S.C. § 7421(b) employees may file grievances, ULPs, and otherwise engage in collective bargaining as set forth in 38 U.S.C. § 7422 (a) and pursuant to 38 U.S.C. § 7422 (b), they may not engage in collective bargaining concerning "any matter or question concerning or arising out of (1) professional conduct or competence, (2) peer review, or (3) the establishment, determination, or adjustment of employee compensation under this title." 38 U.S.C. § 7422 (b).

Although the union argues that "...one of the matters clearly unaffected by the Section 7422(b) exclusions is the right of any federal employee, including a VA professional employee, 'to form, join, or assist any labor organization' under 5 U.S.C. 7102" and that the "ULP provisions under 5 U.S.C. 7116(a)(1) or (2) are unaffected by Section 7422 in the event that an interference, restraint, coercion and/or reprisal of a Section 7102 right", this argument lacks merit for two reasons. (Attachment J). First, ULPs cannot be used to address matters or questions concerning or arising out of any of the three exceptions set forth in 38 U.S.C. § 7422(b) because ULPs are part of the general collective bargaining process established by the FSLMRS as explained above. See 5 U.S.C. § 7116; 38 U.S.C. § 7422. This issue was previously addressed in AFGE Local 446 v. Nicholson, where the D.C. Circuit noted that "a decision under § 7422(d) will settle a dispute over an arbitrator's jurisdiction, or...a dispute over the FLRA's authority to enforce an award in a ULP proceeding." 475 F.3d 341, 354 (2007). There are also multiple pre-38 U.S.C. § 7422 cases that address ULPs. See, e.g. VAMC Amarillo, TX v. FLRA,1 F.3d 19 (D.C. Cir. 1993)(holding that the FLRA's order, related to a ULP charge concerning the VA Medical Center's refusal to provide the union with medical staff meeting minutes, was unauthorized under the FSLMRS because the VA medical personnel had no

statutory right to engage in bargaining)(Amarillo); AFGE, AFL-CIO v. FLRA, 850 F.2d 782 (D.C. Cir. 1988)(holding that the VA Medical Center did not commit a ULP by refusing to comply with an arbitrator's award); VAMC Northport, N.Y. v. FLRA, 732 F.2d 1128 (2d Cir. 1984)(holding that the general requirement of collectively bargained grievance procedures in the CSRA did not apply to disciplinary matters involving VA medical personnel and that VA's refusal to bargain over such procedures did not constitute a ULP). Second, the provisions of the FSLMRS cannot trump 38 U.S.C. § 7422 because where, as here, the provisions of the FSLMRS conflict with the provisions of Title 38, the Title 38 provisions control. 38 U.S.C. § 7425(b); AFGE Local 446 v. Nicholson, 475 F.3d 354 ("38 U.S.C. § 7425(b) expressly provides that "no provision of title 5 ... which is inconsistent with any provision of ... [chapter 74 of title 38] shall be considered to supersede, override, or otherwise modify" any provision under chapter 74 of title 38. The plain text of this statute requires that, to the extent 38 U.S.C. § 7422(d) creates a conflict with 5 U.S.C. § 7122, the latter provision must give way.").

38 U.S.C. § 7422 (a) states "...the authority of the Secretary to prescribe regulations under section 7421 of this title is subject to the right of Federal employees to engage in collective bargaining with respect to conditions of employment...." In Amarillo, the union and FLRA argued that "'subjects within the scope of collective bargaining' means all subjects within the statutory definition of 'collective bargaining,' even if no collective bargaining is mandated, and no collectively-bargained agreement exists, in the particular case." 1 F.3d 19, 22 (D.C. Cir. 1993)[3]. However, although "collective bargaining" is defined as the "mutual obligation of employer and union to bargain on 'conditions of employment," 5 U.S.C. § 7103(a)(12), and "conditions of employment" is defined as "personnel policies, practices, and matters...affecting working conditions," 5 U.S.C. § 7103(a)(14), Section 7103(a)(14) specifically limits the definition of "conditions of employment" to exclude "policies, practices, and matters... specifically provided for by Federal statute.'" Amarillo, 1 F.3d 19, 22 (D.C. Cir. 1993). As the D.C. Circuit noted in Amarillo, Title 38 is such an overriding statute. Id. In fact, given the way that 38 U.S.C. § 7422 (a) is worded, if ULPs were not considered to be part of the collective bargaining process, unions would not be able to file ULPs concerning 38 U.S.C. § 7421(b) employees at all. Compare Amarillo, 1 F.3d at 23 (holding that the union's representational right to information under 5 U.S.C. § 7114(b)(4)(B) was tied to collective bargaining). Therefore, the at-issue ULPs qualify as "collective bargaining" within the meaning of 38 U.S.C. § 7422(b).

Per VHA Handbook 1100.18, on which the VAMC primarily relies to support its assertion that Ms. and Ms. had an obligation to report a fellow nurse's incompetent, unprofessional, or unethical practice, the Department of Veterans Affairs, Veterans Health Administration (VHA), has an obligation to report any VHA professional "whose behavior or clinical practice so substantially

[3] Plaintiff's Counsel, Kevin Grile, was also counsel of record in the Amarillo matter.

fail[s] to meet generally-accepted standards of clinical practice as to raise reasonable concern for the safety of patients."[4] The facility Director is responsible for facility initiated reporting.[5] The policy does not require individual employees to report such information to their State Licensing Boards or to report any questionable behavior or questionable clinical practice, by another nurse, directly to their supervisors or anyone else in their facility. In addition, the VAMC has not identified any other policy that imposes such an obligation. However, the Minnesota Board of Nursing reporting obligations do require individual nurses to report personal knowledge of any conduct by another nurse that might be evidence of incompetence, unprofessional and/or unethical conduct, or evidence that another nurse is unable to practice safely.[6]

VHA Handbook 1100.18 establishes that management has a right and an obligation to investigate allegations of the clinical incompetence of a nurse. Mr. communication to Ms. – that he heard Ms. state that Ms. was "lazy" and "not a good nurse or words to that effect" and Ms. state that Ms. "practices below the standard of care" – and a resulting investigation concerning Ms. clinical practice clearly relate to Ms. professional competence within the meaning of 38 U.S.C. § 7422 (b). The subject ULPs concern management's requests to meet with Ms. and Ms. concerning their alleged statements about Ms. professional competence and management's notice that "failure to report practice as noted above [the incompetence, unprofessional or unethical conduct, or mental or physical incapacity of a nurse] is grounds for discipline." Specifically, Attachments C and D state that Ms. would like "to discuss the specific allegations" Ms. and Ms. made during the arbitration and Attachments H and I state that Ms. had "completed a review of reported allegations that a RN's practice is below standard...[and] there were no substantive findings."[7] Pursuant to 38 C.F.R. § 0.735-12, Ms. and Ms. were required to cooperate with Ms. investigation and to furnish information to her. 38 C.F.R. § 0.735-12 ("[VA] Employees will furnish information and testify freely and honestly in cases respecting employment and disciplinary matters."). And, other than the letters themselves, neither party submitted evidence to support a finding that Ms. investigation did not concern or arise out of Ms. professional conduct or competence. Therefore, the investigation into whether Ms. and Ms. had knowledge of shortcomings regarding either the quality of direct patient care being provided by or the clinical competence of Ms. is a matter concerning or arising out of professional conduct or competence.[8] See AFGE, AFL-CIO, Local 3306 v. FLRA, 2 F.3d 6 (1993).

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[4] VHA Handbook 1100.18, Paragraph 5a.
[5] VHA Handbook 1100.18, Paragraph 8.
[6] See Footnote 2.
[7] Neither Ms. nor Ms. was subjected to any disciplinary action as a result of Ms. investigation. (Attachment A, ¶ 5).
[8] The union's assertion that the factual basis underlying the MN VAMC's 7422 request is false has no bearing on the USH's determination of whether an investigation into allegations

Attachments C and D state that Ms. Lund investigative meetings with Ms. and Ms. will address their arbitration testimony, which allegedly called into question the clinical practice of a MN VAMC nurse. However, the union's objection to the inclusion of the following language in the letters - "failure to report practice as noted above is grounds for discipline" – warrants further consideration. Specifically, the union alleges that the threat of discipline in the letters was reprisal for Ms. and Ms. testimony on behalf of the union.[9] (Attachment K, pg. 2). In contrast, MN VAMC management argues that the purpose of the language was to notify Ms. and Ms. of their right to bring union representation to the investigative meetings pursuant to Article 13, section 10 of the VA/AFGE Master Agreement. (Attachment A, ¶ 4). To the extent that Ms. Lund's letters to and subsequent investigative meetings with Ms. and Ms. concerned Ms. Krehnke's professional competence, or the professional conduct or competence of Ms. and Ms. themselves, they are matters or questions concerning or arising out of professional conduct or competence within the meaning of 38 U.S.C. § 7422 (b) for the reasons set forth above. However, to the extent that Ms. letters to and subsequent investigative meetings with Ms. and Ms. addressed issues beyond their and Ms. s professional conduct or competence, the subject ULPs did not concern or arise out of professional conduct or competence within the meaning of 38 U.S.C. § 7422 (b) and may be evaluated by the FLRA.[10]

RECOMMENDED DECISION

The Unfair Labor Practice charges filed by AFGE Local 3669 alleging reprisal for testimony provided by , R.N. and , R.N. on behalf of the union on December 12, 2007, qualify as "collective bargaining" within the meaning of 38 U.S.C. § 7422(b).

APPROVED ✓ DISAPPROVED _____

concerning the professional conduct or competence of a nurse is covered by 38 U.S.C. § 7422. Whether Mr. account of the nurses' arbitration testimony is accurate, or Mr. is accurate, or both attorneys' accounts are inaccurate is beside the point because the investigation itself is a matter or question concerning or arising out of professional conduct or competence under 38 U.S.C. § 7422(b).

[9] 5 U.S.C. § 7116(b)(3) prohibits reprisal for union activities.

[10] This decision does not evaluate the merit of the allegations in the union's ULPs. If the FLRA determines that Ms. letters to Ms. and Ms. addressed issues other than the professional conduct or competence of Ms. , Ms. , or Ms. , it may assert jurisdiction over the ULPs. In addition, if the FLRA determines that during her investigative meetings with Ms. or Ms. , Ms. addressed subjects other than the professional conduct or competence of Ms. , Ms. , or Ms. , it may assert jurisdiction over the ULPs. However, the FLRA may not render a decision that addresses or impacts the MN VAMC's ability to investigate, evaluate, and/or take any action concerning any 38 U.S.C. § 7421(b) employee's professional conduct or competence, peer review, or establishment, determination, or adjustment of their compensation. 38 U.S.C. § 7422 (b).

To the extent that the Unfair Labor Practice charges relate to [redacted], R.N.'s letters to and investigative meetings with [redacted], R.N. and [redacted], R.N. concerning the professional conduct and competence of 7421(b) employees at the Minneapolis VA Medical Center, the Unfair Labor Practice charges concern or arise out professional conduct or competence within the meaning of 38 U.S.C. § 7422(b).

APPROVED ✓ DISAPPROVED _____

To the extent that the Unfair Labor Practice charges relate to [redacted], R.N.'s letters to and investigative meetings with [redacted], R.N. and [redacted], R.N. concerning issues that were unrelated to the professional conduct and competence of 7421(b) employees at the Minneapolis VA Medical Center, the Unfair Labor Practice charges do not concern or arise out professional conduct or competence within the meaning of 38 U.S.C. § 7422(b).

APPROVED ✓ DISAPPROVED _____

Robert A. Petzel, M.D.
Under Secretary for Health

3/31/10
Date