



DEPARTMENT OF VETERANS AFFAIRS
Under Secretary for Health
Washington DC 20420

June 17, 2016

Mr. John J. Rohrer
Acting Director
Tomah VA Medical Center
2215 Fuller Road
Tomah, WI 54660

Dear Mr. Rohrer:

I am responding to your request for a 38 U.S.C. § 7422 decision regarding AFGE Local 0007's grievance concerning the Medical Center's decision to remove a registered nurse.

I have determined that the issue presented addresses matters or questions that concern or arise out of professional conduct or competence and are thus exempted from collective bargaining by 38 U.S.C. § 7422(b). Please review the enclosed Decision Paper for a more complete explanation of my decision.

Sincerely,

A handwritten signature in black ink that reads "David J. Shulkin, M.D." The signature is written in a cursive style.

David J. Shulkin, M.D.

Enclosures

Title 38 Decision Paper
Department of Veterans Affairs
Tomah VA Medical Center, Tomah, Wisconsin

FACTS

On August 21, 2014, the Tomah VA Medical Center (Medical Center) issued a notice of proposed discharge to one of its registered nurses (nurse). Exhibit 1. The proposed discharge included two charges, "Endangering the safety of patients" (Charge 1) and "Failure to follow orders" (Charge 2). Each charge included a number of specifications relating to care of the nurse's patients. Id.

Charge 1 specified that the nurse failed on a number of occasions to provide proper patient care by: failing to access the Medical Administration Record prior to administering medications; failing to provide critical information in progress reports of patients leaving the medical facility; and failing to obtain current blood pressure and current heart rate vital readings before administering medications. Id. Charge 2 included specifications that stated the nurse failed to follow orders when she: pulled medications from Omnicell¹ for administration by other nurses; administered a narcotic medication to a patient without pulling the medication from Omnicell; and documented that a patient had taken his medication when he had not. Id.

The American Federation of Government Employees, Local 0007 (Union), filed a written response to management's proposal to discharge the nurse, and the Union and the nurse provided an oral reply. The Union addressed each of the charges and accompanying specifications, contending that the charges were all "invalid or flawed." Exhibits 2 and 3.

On December 1, 2014, the Director issued a notice of discharge to the nurse, effective December 2, 2014. Exhibit 4. The Director sustained four of the nine specifications in Charge 1 and six of the seven specifications in Charge 2. Id. The notice also alerted the nurse that the sustained charges involved questions of professional conduct or competence, and as a result, she had the right to appeal the decision to a Disciplinary Appeals Board (DAB). Id.

Rather than appeal the decision to a DAB, the Union filed a Step 3 grievance on behalf of the nurse on December 29, 2014. Exhibit 5. The Union argued that the nurse's discharge was unwarranted for a number of reasons and requested, among other things, that the Medical Center rescind her discharge. Id. On January 9, 2015, the Medical Center responded to the grievance, stating that, because the charges involved professional conduct or competence, the nurse's appeal options were limited to filing a discrimination claim or filing an appeal to a DAB. Exhibit 6.

¹ Omnicell is a medication dispensing system

On January 27, 2015, the Union invoked arbitration on its grievance. Exhibit 7. In light of the Union's allegations, the Medical Center submitted a request for a 38 U.S.C. § 7422 determination on July 15, 2015. Exhibits 8-10. The Union submitted a response to the Medical Center's request on August 5, 2015. Exhibit 11.

AUTHORITY

The Secretary of the Department of Veterans Affairs has the final authority to decide whether a matter or question concerns or arises out of professional conduct or competence, peer review, or employee compensation within the meaning of 38 U.S.C. § 7422(b).²

ISSUE

Whether a grievance claiming that the Medical Center failed to follow the parties' national and local agreements when challenging the discharge of a nurse for endangering the safety of patients and failing to follow orders is a matter or question concerning or arising out of professional conduct or competence within the meaning of 38 U.S.C. § 7422(b).

DISCUSSION

The Department of Veterans Affairs Labor Relations Improvement Act of 1991, codified in part at 38 U.S.C. § 7422, granted limited collective bargaining rights to Title 38 employees but specifically excluded from the collective bargaining process matters or questions concerning or arising out of professional conduct or competence, peer review, or employee compensation, as determined by the Secretary.³

The Union's response challenges management's decision to discharge the nurse, asserting a violation of the VA-AFGE Master Agreement, Article 14 Discipline and Adverse Actions, for removing her without fair and just cause.⁴ The Union asserts that the nurse did not endanger the safety of patients nor did she intentionally fail to follow orders. Exhibit 11.

If the charges are determined to be matters concerning direct patient care or clinical competence, the nurse may not, based on 38 U.S.C. § 7422, pursue an appeal of her discharge through the parties' negotiated grievance procedure. The Secretary has

² On August 23, 2015, the VA Secretary delegated the responsibility to issue final 38 U.S.C. § 7422 determinations to the Under Secretary for Health. Exhibit 12.

³ "Professional conduct or competence" is more fully described as "direct patient care" and "clinical competence." 38 U.S.C. § 7422(c).

⁴ Additionally, the Union asserts that the nurse was harassed and discriminated against, though provided no evidence to support this claim. The Union seeks a change to staffing methodologies and to have nurse vacancies filled, but doesn't cite this specifically as an intervening cause to the underlying action.

provided an avenue to appeal a discharge decision when the underlying matter involves the professional conduct or competence of a nurse. Exhibit 14. The prescribed administrative appeal process, which involves presenting the nurse's case before a DAB, was provided in the Medical Center's December 1, 2014, notice of discharge. Exhibit 4.

The Secretary has already determined in a similar case that a medical center's decision to discipline a nurse for his interactions with a patient "involves issues concerning or arising out of professional conduct and competence. VA Tennessee Valley Healthcare System/AFGE (January 23, 2008). Similarly, in Southern Arizona VA Healthcare System (August 29, 2013), which involved a nurse who was suspended for administering a blood transfusion to a patient without first obtaining the patient's consent and sleeping on duty, the Secretary concluded that the nurse's conduct concerned or arose out of professional conduct and care and held the grievance was excluded from collective bargaining under 38 U.S.C. § 7422. Exhibit 13.

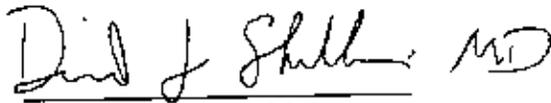
The charges sustained by the Director include endangering the safety of patients by administering medications without first documenting vital signs, and failing to follow orders relating to administration of medication, including narcotic medications; all matters concerning the nurse's direct care of patients, as well as her clinical competence. As a result, application of 38 U.S.C. § 7422's professional conduct or competence exclusion precludes the matter from being appealed through the collective bargaining grievance process.

CONCLUSION

I conclude that the charges which formed the basis of the Medical Center's decision to discharge the nurse are matters concerning direct patient care and clinical competence, and a challenge to the Medical Center's decision may not be advanced through the parties' negotiated grievance procedure.

DECISION

A grievance claiming that the Medical Center failed to follow the parties' national and local agreements when discharging a nurse for endangering the safety of patients and failing to follow orders is a matter or question concerning or arising out of professional conduct or competence within the meaning of 38 U.S.C. § 7422(b).



David J. Shulkin, M.D.
Under Secretary for Health


Date



DEPARTMENT OF VETERANS AFFAIRS
Under Secretary for Health
Washington DC 20420

June 17, 2016

Mr. David P. Dechant
President, AFGE Local 0007
Tomah VA Medical Center
2215 Fuller Road
Tomah, WI 54660

Dear Mr. Dechant:

I am responding to the request for a 38 U.S.C. § 7422 decision from the Director of the Tomah VA Medical Center, regarding AFGE Local 0007's grievance concerning the Medical Center's decision to remove a registered nurse.

I have determined that the issue presented addresses matters or questions that concern or arise out of professional conduct or competence and are thus exempted from collective bargaining by 38 U.S.C. § 7422(b). Please review the enclosed Decision Paper for a more complete explanation of my decision.

Sincerely,

A handwritten signature in black ink that reads "David J. Shulkin, M.D." with a stylized flourish at the end.

David J. Shulkin, M.D.

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Tomah VA Medical Center, Tomah, Wisconsin

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AUTHORITY

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ISSUE

Whether a grievance claiming that the Medical Center failed to follow the parties' national and local agreements when challenging the discharge of a nurse for endangering the safety of patients and failing to follow orders is a matter or question concerning or arising out of professional conduct or competence within the meaning of 38 U.S.C. § 7422(b).

DISCUSSION

The Department of Veterans Affairs Labor Relations Improvement Act of 1991, codified in part at 38 U.S.C. § 7422, granted limited collective bargaining rights to Title 38 employees but specifically excluded from the collective bargaining process matters or questions concerning or arising out of professional conduct or competence, peer review, or employee compensation, as determined by the Secretary.³

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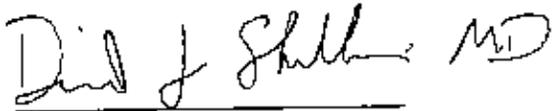
The charges sustained by the Director include endangering the safety of patients by administering medications without first documenting vital signs, and failing to follow orders relating to administration of medication, including narcotic medications; all matters concerning the nurse's direct care of patients, as well as her clinical competence. As a result, application of 38 U.S.C. § 7422's professional conduct or competence exclusion precludes the matter from being appealed through the collective bargaining grievance process.

CONCLUSION

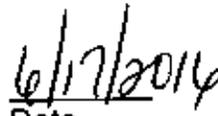
I conclude that the charges which formed the basis of the Medical Center's decision to discharge the nurse are matters concerning direct patient care and clinical competence, and a challenge to the Medical Center's decision may not be advanced through the parties' negotiated grievance procedure.

DECISION

A grievance claiming that the Medical Center failed to follow the parties' national and local agreements when discharging a nurse for endangering the safety of patients and failing to follow orders is a matter or question concerning or arising out of professional conduct or competence within the meaning of 38 U.S.C. § 7422(b).



David J. Shulkin, M.D.
Under Secretary for Health


Date

