



DEPARTMENT OF VETERANS AFFAIRS
UNDER SECRETARY FOR HEALTH
WASHINGTON DC 20420

NOV 21 2005

Director, VA Puget Sound Health Care System
1660 S. Columbian Way
Seattle, WA 98108

President, AFGE Local 3197
VA PSHCS, Seattle Division
1660 S. Columbian Way
Seattle, WA 98108

Dear Mr. and Ms.

I am responding to the issue raised in your memoranda of October 11 and 17, 2005, respectively, concerning two grievances filed by the American Federation of Government Employees (AFGE), Local 3197, relating to the proficiency report and reprivileging of . Pursuant to delegated authority, I have determined, on the basis of the enclosed decision paper, that the issues presented by these grievances are matters concerning or arising out of professional conduct or competence. As a result, the issues are non-grievable pursuant to 38 U.S.C. § 7422(b).

Sincerely yours,

A handwritten signature in black ink, appearing to read "Jonathan B. Perlin".

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

Enclosure

Title 38 Decision Paper
VA Puget Sound Health Care System
VA – 05-10

The grievances in this matter challenge the proficiency report provided to an advanced registered nurse practitioner (ARNP) and validity of a local Nursing Service policy requiring ARNPs with prescriptive authority to complete 100 hours of continuing education during each two-year privileging period. For the reasons set forth below, I find that both grievances involve issues of professional conduct and competence within the meaning of 38 U.S.C. § 7422(b) and are therefore excluded from the negotiated grievance procedure.

RELEVANT LOCAL AND NATIONAL PRIVILEGING POLICIES

In February 1999, the Director and Chief Executive Officer (CEO) of the VA Puget Sound Health Care System (VAPSHCS) issued Medical Center Memorandum MS-01, *Credentialing and Privileging Program*, which stated policy and procedures for the facility's credentialing and privileging program. (Attachment A.) This memorandum stated that all "positions requiring independent judgment resulting in the provision of clinical diagnosis, treatment or therapy ... shall require approved clinical privileges," and further stated that the facility's Clinical Executive Board (CEB) had determined that ARNPs with state licensed prescriptive authority would be privileged. (Attachment A, ¶2.b.) The memorandum further provided that each "independent practitioner practicing independently at [VAPSHCS] shall, in connection with such practice, be entitled to exercise only those clinical privileges requested by the practitioner, recommended by the Service Line Executive Director, endorsed by the [CEB] and specifically approved by the [VAPSHCS CEO]." (Attachment A, ¶ 2.d.) The memorandum provided that the credentialing and privileging processes for "[a]ll Medical/Dental Staff positions (physicians, dentists, podiatrists and optometrists) and all allied health staff positions approved for privileges" would be managed by the Medical Staff Office (MSO), but that credentialing and privileging for other groups of positions would be administered by different organizational elements. (Attachment A, ¶¶ 3.a., 3.a.(3).) More specifically, the memorandum provided that "registered nurses without state licensed prescriptive authority shall be subject to similar requirements under a credentialing program developed and administered by the Nurse Executive, endorsed by the [CEB], and specifically approved by the [VAPSHCS CEO]." (Attachment A, ¶ 3.a.(1).) The memorandum delineated certain responsibilities associated with credentialing and privileging as follows:

- c. The [CEB] is responsible, either directly or through designated Service committees, for ... the determination of acceptable qualifications for all privileges requested....
- d. Service Line Executive Directors are responsible for supporting all requirements of the credentialing and privileging process by ensuring compliance with established procedures and providing appropriate supervision to ensure practitioners practice within the scope of their approved clinical privileges. In addition, Service Line Executive

Directors will establish service credentialing and privileging committees and submit applicant specific minutes of these meetings indicating their findings and recommendations regarding the privileges requested.

(Attachment A, ¶¶ 5.c., 5.d.)

In February 1999, contemporaneously with the VAPSHCS' issuance of MS-01, the VAPSHCS Nurse Executive issued Nurse Executive Services (NES) Policy #40, *Credentialing and Clinical Privileging for Nurses in Advanced Practice Roles, Including Scope of Practice* (Attachment B). This policy provided that clinical privileges would be provided to ARNPs "who function in expanded roles and are licensed in Washington State as an ARNP with prescriptive authority," while "[a]ll other Registered Nurses in an expanded role will function under a scope of practice statement...." (Attachment B, ¶ 2.) The policy provided that the Nursing Service Subcommittee for Credentialing and Privileging would review applications for clinical privileges and make privileging recommendations to the Nurse Executive, who would in turn refer such recommendations through the CEB to the Medical Center Director for approval. The policy provided for renewal of clinical privileges as follows:

- (1) Bi-annual reappraisal of each ARNP with clinical privileges will be initiated by the MSO office notifying the individual of the need for renewal at least 90 days in advance of expiration of current privileges.
- (2) Individual [provider] will complete request for renewal, including statement of physical and mental status, continuing education completed within last 2 years, two peer references, and any modification of privileges requested with documentation of training provided.

(Attachment B, ¶ 3.d.)

NES Policy #40 did not specify a particular continuing education requirement for renewal of privileges for ARNPs with prescriptive authority. However, the section of the policy relating to Scope of Practice renewal for ARNPs without prescriptive authority provided that a minimum of 100 hours of documented continuing education credits would be required for renewal every two years. (Attachment B, ¶ 4.c.(2).) By apparent extension from that portion of the policy, VAPSHCS established an informal practice of requiring ARNPs with prescriptive authority to complete 100 continuing education units (CEUs) during each two-year repriviling period. That practice has been in place at the facility from approximately 1999 to the present.¹

¹ During the processing of the subject grievance, the union submitted a version of NES Policy #40 that appeared to require 30 CEUs rather than 100 for Scope of Practice renewal for ARNPs without prescriptive authority. In an effort to reconcile this apparent inconsistency and to determine whether the facility had consistently applied a 100 CEU requirement to ARNPs with prescriptive authority, the Chief of Staff reviewed the Continuing Medical Education Reports of various ARNPs with prescriptive authority and determined that they had been completing 100 CEUs per repriviling period from at least 1999 through July 2005. See Attachment O, page 2, ¶ 7.

On March 6, 2001, the Veterans Health Administration (VHA) issued VHA Handbook 1100.19, *Credentialing and Privileging*. (Attachment C.) This Handbook set out policies and procedures for privileging of all VHA employees who provide patient care services independently, including the following general privileging criteria:

(1) **General Criteria.** General criteria for privileging will be uniformly applied to all applicants.

a. Such criteria must include, at least:

1. Evidence of current licensure;
2. Relevant training and/or experience;
3. Current competence and health status... and
4. Consideration of any information related to medical malpractice allegations or judgments, loss of medical staff membership, loss and/or reduction of clinical privileges, or challenges to licensure.

b. *Each service chief must establish additional criteria for granting of clinical privileges within the service consistent with the needs of the service and the facility. Clinical privileges must be based on evidence of an individual's current competence. ...*

* * *

(3) **Service Specific Criteria.** Each practitioner will assigned to and have clinical privileges in one clinical service and may be granted privileges in other clinical services The exercise of clinical privileges within any service will be subject to the policies and procedures of that service and the authority of that service chief.

(Attachment C, ¶ 6.c. (emphasis supplied).)

In addition, the Handbook provided that "reappraisal for the granting of clinical privileges must be conducted for each practitioner at least every 2 years" ... based on the practitioner's statements regarding any challenges to licensure or registrant, pending malpractice claims, "and any other reasonable indicator of continuing qualifications." (Attachment C, ¶ 6.f.(1)(a)1.) More specifically, the Handbook provided that the reappraisal and reprivileging process include review of each provider's "continuing medical education and continuing education unit accomplishments," but did not specify any particular continuing education unit requirement. (Attachment C, ¶ 6.f.(1)(a)2.) The Handbook provided that the service chief would make recommendations regarding providers' reprivileging requests to the Medical Staff Executive Committee, which would in turn review the documentation supporting the request and make its own recommendation to the facility Director for final action. (Attachment C, ¶6.f.(2)(c).)

In May 2004, the VAPSHCS Director issued revised Medical Staff Bylaws and Rules (Attachment D). The Bylaws and Rules, by their terms, do not apply to

ARNPs, whether with or without prescriptive authority, because nurses are not members of the facility's Medical Staff. (See Attachment D, page 1, Definitions.) However, the Bylaws do provide for "[b]iennial reappraisal of each Medical Staff member and other licensed practitioners [sic] with clinical privileges[, including] confirmation of sufficient continuing education to satisfy any minimum requirements (e.g., local Medical Staff requirements by specialty, etc.)" (Attachment D, page 12, Article V, Section 1.d.) and or "[d]ocumentation of continuing medical education related to area and scope of clinical privileges, consistent with minimum state licensure requirements or local Medical Staff specialty requirements." (Attachment D, page 13, Article V, Section 3.d.(4).) Of more specific applicability to ARNPs is Rule J of the Rules portion of the Bylaws and Rules, which sets out procedures and policies for privileging and reprivileging of non-Medical Staff members with clinical privileges or scope of practice as follows:

Health care practitioners who are not members of the Medical Staff may hold clinical privileges, e.g. ... nurse practitioners with state licensed prescriptive authority In order to be clinically privileged, these practitioners must meet all applicable guidelines set forth by their respective Service Line Leaders, recommended by the Clinical Executive Board and approved by the [VAPSHCS] Director.

(Attachment D, Rule J.2, pages 33-34.)

In 2004, the VAPSHCS Director convened an ARNP Task Force to create an ARNP Orientation Guide and Reference Book for the facility. That document, which was issued in or about October 2004, includes a 'Checklist for Clinical Privileges Requests for Advanced Practice Nurses' which provides that "ARNPs need 100 contact hours [of continuing education] every 2 years to renew privileges." ² (Attachment E, page 35, item 2.e.)

FACTS

Valerie O'Meara, an ARNP with state licensed prescriptive authority assigned to various units within VAPSHCS' Primary Care & Specialty Medicine Service Line³, met the facility's 100 CEU requirement during the 1999-2001 and 2001-2003 reprivileging periods. She then went out on extended maternity leave from October 2003 through October 2004. Upon returning to duty, she inquired of Nursing Service management whether, in light of her extended absence, she needed to fulfill her entire CEU requirement for the 2003-2005 reprivileging period. She was told that she would need to complete 100 by April 2005, just as she had completed 100 CEUs during the two previous reprivileging periods.

² As noted above, ARNPs without prescriptive authority function under a Scope of Practice rather than clinical privileges. As a result, this "Checklist for Clinical Privileges Requests" can only apply to ARNPs with prescriptive authority.

³ The Functional Statement for Ms. [redacted] position reflects that ARNPs assigned to Primary Care & Specialty Medicine are jointly accountable to the Director of Nursing/Primary Care & Specialty Medicine and the Medical Director of clinical assignment. (Attachment F.)

In January 2005, filed a grievance alleging that VAPSHCS had no official 100 CEU requirement for ARNPs and if it did, that requirement did not apply to her. The grievance was denied.

In March 2005, the VAPSHCS Director issued a revised version of Medical Staff Policy # MS-01, which did not substantively change the provisions of the 1999 version of MS-01 cited above. (Attachment G.)

On March 7, 2005, Ms. supervisor, , RN, Director of Nursing for the Puget Sound Medical Center, issued an interim Proficiency Report for Ms. , giving her a satisfactory rating in nursing practice and a low satisfactory rating in interpersonal relationships. (Attachment H.) In the narrative portion of the evaluation, Ms. reported that Ms. "has not always been able to be compassionate and accommodate patient needs in extenuating circumstances" (Attachment H, page 3) and "has difficulty conducting collegial conversation with her co-workers and with senior management." (Attachment H, page 4.)⁴ Ms. disagreed with Ms. assessment in this regard and submitted a written statement to that effect, alleging that Ms. committed an unfair labor practice in scheduling a meeting to present the evaluation to Ms. without a union representative present. (Attachment H, pages 5-9.) Ms. further alleged in her written statement that Ms. negative comments about her in the Proficiency Report constituted retaliation for her protected union activity and/or whistleblower reprisal for Ms. disclosure of "the apparent discrepancy between Medical Staff Bylaw [sic] and Nursing Policy on the CEU issue" to an agent of the VA Office of Inspector General. (Attachment H, pages 8-9).

On a recurrent basis between January and April 2005, Nursing Service officials reminded that if she did not complete 100 CEUs before her privileges expired on April 30, 2005, her privileges would expire and she could not continue to practice as an ARNP. (Attachment I.)

In mid-April 2005, the Nursing Service Subcommittee for Credentialing and Privileging recommended against renewing Ms. clinical privileges because Ms. had not completed 100 hours of continuing education units (CEUs) during the biennial privileging period. (Attachment J.)

On April 30, 2005, Ms. clinical privileges expired.

On May 2, 2005, VAPSHCS's Acting Associate Director, Nursing Service, informed Ms. that because her ARNP privileges had expired, she could not continue to practice as an ARNP and would

⁴Ms. Proficiency Report reflects the signatures of Ms. , the Director of Nursing, as the rating official and of , Director of ER/Urgent Care, as the approving official. (Attachment H, page 2.)

be reassigned to a staff nurse position but would retain her ARNP salary pending final determination of her repriviliging eligibility. (Attachment K.)

On May 16, 2005, Ms. _____ responded in writing to Ms. _____ May 2 memorandum, restating her prior allegation that the 100 CEUs requirement did not apply to ARNPs with prescriptive authority. (Attachment L.) More specifically, Ms. _____ contended that she was not subject to Nursing Service Policy # 40 but was instead subject to repriviliging under the facility's Medical Staff Bylaws and Rules and MS-01, which authorized the Associate Director of the Nursing Service to develop and administer a credentialing program for ARNPs *without* prescriptive authority but not for those *with* prescriptive authority. Ms. _____ further contended that MS-01 authorized only the Medical Staff Office, not the Nurse Executive, to establish privileging and credentialing procedures applicable to ARNPs *with* prescriptive authority. In the absence of a properly authorized VA-specific standard, Ms. _____ argued, she was subject only to the Medical Staff Bylaws and Rules' general requirement of continuing medical education consistent with minimum state licensure requirements, which for Washington State ARNPs with prescriptive authority is 45 CEUs. (Attachment L, citing Attachment D, Article V, ¶ 2.d(4).)

On May 18, 2005, AFGE Local 3197 filed a Step 2 Grievance on Ms. _____ behalf, alleging that the Nurse Executive lacked the authority to take away Ms. _____ clinical privileges and demanding that her privileges be reinstated. (Attachment M.)

On June 1, 2005, the VAPSHCS Chief of Staff (COS), _____ notified Ms. _____ through her union representative, that she would be "temporarily reassigned to administrative duties, if available ... pending resolution of her repriviliging." (Attachment N.)

On July 15, 2005, the COS issued a written decision denying the Step 2 grievance. (Attachment O.) In his written decision, the COS stated that VAPSHCS had required ARNPs to complete 100 CEUs for repriviliging since at least 1999; that such requirement was stated in the facility's Nurse Executive services Policy #40 and in the 2004 ARNP Orientation Guide & Reference Book; that the facility's other ARNPs with prescriptive authority had been complying with the 100 CEUs standard since at least 1999; and that Ms. _____ herself had met the 100 CEUs requirement in the 1999-2001 and 2001-2003 repriviliging periods. The COS further stated that requiring Ms. _____ to complete 100 CEUs for repriviliging was consistent with guidelines issued by the National Council of State Boards of Nursing, which "not only [contain] a requirement for continuing education, but also maintaining a minimum number of hours on duty at the work site has long been determined to be an important indicator of continuing competency." (Attachment O, page 3, ¶12.) In this regard, the COS determined that

One could infer that a long leave of absence from active practice may have a negative influence on one's competence; therefore, meeting the CEU criteria becomes more critical. Ms. _____ had a responsibility to

meet the 100 CEU criterion in order to be repriviledged. Two factors made it even more imperative for her to meet this criterion: one is the fact that she is a part-time employee normally scheduled to work two days per week. Of even more importance is the fact that Ms. [redacted] was off work for one year. It is my decision that it is clinically important that the requirement of 100 CEUs be met.

(Attachment O, page 3, ¶ 12.)

By memorandum dated July 20, 2005, Ms. [redacted] raised her grievance to Step 3. (Attachment P.) In that memorandum she informed the VAPSHCS Director that she was "disputing the authority of the Nurse Executive Office (NEO) to require 100 contact [sic] hours of continuing education per biennium as a credential for reprivileging [and] to administer a credentialing and privileging program from ARNPs, and [also disputing the authority] of a registered nurse to write my performance review." (Attachment P, page 1.) More specifically, she asserted that VAPSHCS leadership had "repudiated" MS-01, VHA Handbook 1100.19, and the Joint Commission on Accreditation of Healthcare Organizations (JCAHO) Comprehensive Manual for Hospitals (CAMH) medical staff standards by subjecting ARNPs with prescriptive authority to credentialing and privileging through the Nursing Service rather than the Medical Staff process. In this regard, Ms. [redacted] alleged that although Rule J of the VAPSHCS Medical Staff Bylaws and Rules requires ARNPs to meet privileging guidelines set by their Service Line leaders, the Nurse Executive was not her service line leader⁵ and lacked authority to set privileging guidelines relating to ARNPs with prescriptive authority. (Attachment P, page 2.) For that reason, Ms. [redacted] contended, "the Chief of Staff is incorrect in his assertion that 100 contact hours of continuing education has been established, accepted, and approved practice for ARNP reprivileging because the nurse executive has no authority to establish the criteria, the Service Line leader has not established the criteria, Bylaw Article V clearly states [that] the criteria [has] to be consistent with minimum state licensure requirements, and Rule J is written incorrectly." (Attachment P, page 2.) In sum, Ms. [redacted] stated, "ARNPs with prescriptive authority who exceed [the Washington State licensure minimum of] 45 contact hours per biennium do so at their pleasure." (Attachment P, page 3.) As a remedy for the Nurse Executive's allegedly unauthorized refusal to reprivilege her, Ms. [redacted] demanded that she be repriviledged based on her completion of 45 CEUs and "made whole with restoration of all applicable back pay and benefits under Title 5 USC section 5596 Back Pay Act." (Attachment P, page 5.)

On September 8, 2005, the VAPSHCS Director denied the Step 3 grievance, stating:

⁵ Ms. [redacted] stated that "Dr. [redacted], Director of Primary and Specialty Medical Care, is my service line leader [and he] has not set forth guidelines for continuing education" applicable to ARNPs with prescriptive authority. (Attachment P, page 2.) In truth, ARNPs at VAPSHCS are jointly accountable to the Director of Nursing/Primary Care & Specialty Medicine and to the Medical Director of clinical assignment. (See Attachment F and discussion at page 9 below.)

You knew the requirements to demonstrate your competence to be reprivileged. You had met those requirements in the past and were reminded of them in mid-December 2004 and again on January 4, 2005. You failed to meet the requirements for reprivileging with respect to continuing education and, therefore, cannot be reprivileged as a nurse practitioner.

(Attachment Q.)

On September 9, 2005, the union provided VAPSHCS management with a written notice of intent to invoke arbitration on the reprivileging grievance. (Attachment R.)

On September 29, 2005, the Federal Mediation and Conciliation Service provided the parties with a panel of arbitrators for the subject grievance. (Attachment S.)

On October 11, 2005, the VAPSHCS Director submitted a written request to the Under Secretary for Health (USH) for a determination that the subject grievance is excluded from the negotiated grievance procedure pursuant to 38 U.S.C. § 7422. (Attachment T.) On the same date, the Director notified the union that the arbitration on the reprivileging grievance should be postponed pending the USH's determination, and further reminded the union that the grievance relating to Ms. proficiency report was untimely. (Attachment U.)

On October 17, 2005, the union submitted a written request that the USH find the matter to be not excluded from the negotiated grievance procedure under 38 U.S.C. § 7422. (Attachment V.) Whereas the VAPSHCS Director's request had covered only the grievance relating to Ms. reprivileging, the union's request also discussed a grievance relating to the negative comments in Ms. proficiency report, which was apparently contained or subsumed in the reprivileging grievance. (Attachment V, paged 3-4, ¶¶ 16-18.)

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).

ISSUES:

1. Whether the grievance over VAPSHCS' decision not to reprivilege Ms. because she did not complete 100 CEUs during the biennial reprivileging period involves issues concerning or arising out of professional conduct or competence within the meaning of 38 U.S.C. § 7422(b).
2. Whether the grievance over Ms. proficiency report involves issues 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 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.

A. The repriviliging grievance.

Clinical privileging is the process by which a practitioner is granted permission by an institution to independently provide medical or other patient care services. As a result, clinical privileging decisions are, by their nature, determinations of providers' clinical competence to perform specified medical procedures. The substantive criteria by which providers are privileged or reprivilinged represent management's determination of the minimum indicia of competence necessary to support the granting or renewal of clinical privileges. Substantive privileging criteria 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. Privileging criteria also involve clinical competence within the meaning of 38 U.S.C. §7422 because the criteria represent objective measures by which the facility presumes providers to be competent.

In this case the union asserts that the VAPSHCS Nurse Executive lacks the authority to set substantive privileging criteria for ARNPs with state licensed prescriptive authority, and that Ms. _____ cannot be held to the Nursing Service's 100 CEU requirement on that basis. This assertion mischaracterizes the Nurse Executive's role in privileging and supervising ARNPs with prescriptive authority. The nationally controlling VA privileging policy, VHA Handbook 1100.19, sets only general privileging criteria, leaving it to local Service Line chiefs to establish specific criteria for granting clinical privileges to providers who practice within the service. Consistent with that national rule, VAPSHCS' local Medical Staff privileging policies -- set forth in MS-1 and in the facility's Medical Staff Bylaws and Rules -- task Service Line leaders with recommending to the CEB service-specific privileging criteria. Because advanced practice nurses are jointly accountable to Nursing Service and to the Service Line leader of their area of clinical assignment, privileging criteria for ARNPs assigned to Primary Care & Specialty Medicine could, consistent with the local and national privileging policies, be provided by either the Nurse Executive or the Director of the Primary Care & Specialty Medicine Service (or both). Nursing Service provided such recommendations to the CEB through Nursing Executive Service Policy #40.⁶ Consistent with VHA Handbook 1100.19, the VAPSHCS Nurse Executive does not make final privileging decisions, but merely forwards the recommendations of the Nursing Service Subcommittee for

⁶ While the Director of Primary Care & Specialty Medicine Service has not set official CEU requirements for ARNPs practicing in that area, Ms. _____ noted in her July 20, 2005 Step 3 grievance that physicians in the Primary and Specialty Medical Care Service are subject to a similar 100 CEU requirement. (Attachment Q, pages 2-3.)

Credentialing and Privileging to the CEB, which in turn makes recommendations to the Director. There is no policy at either the national or VAPSHCS Medical Staff level that prohibits the Nurse Executive from supporting the privileging process in this way, and in fact Handbook 1100.19, the VAPSHCS Medical Staff Bylaws and Rules, and MS-1 all contemplate that Service Line leaders will serve such a role.

Nor does any VA policy, either national or local, prohibit VAPSHCS from applying of an informal 100 CEU requirement to ARNPs with prescriptive authority. As noted above, there is no formal policy in this regard, as Nursing Executive Policy #40, by its terms, sets out a 100 CEU requirement only for ARNPs *without* prescriptive authority. However, it appears from the documents submitted by both parties that the facility had informally extended that same criterion to ARNPs with prescriptive authority since at least 1999, and that Ms. [redacted] and her colleagues knew of and complied with that informal policy. This policy was not in conflict with VHA Handbook 1100.19, with MS-1, with the facility's Medical Staff Bylaws and Rules, or with any other formal policy applicable to ARNPs with prescriptive authority. The Clinical Executive Board, which the Chief of Staff chairs, endorsed this policy in general by recommending reprivileging of ARNPs with prescriptive authority based on 100 CEUs per privileging period, as did the Director when he approved ARNPs' privileges on that basis. The Chief of Staff also endorsed the application of the 100 CEU requirement to Ms. [redacted] in his Step 2 grievance response, as did the Director in responding to the grievance at Step 3. Moreover, the Chief of Staff determined that it was "clinically important" that Ms. [redacted] meet the 100 CEU requirement. (Attachment P, page 3, ¶ 12.)⁷ Under these circumstances, the facility's determination that Ms. [redacted] could not be repriviledged unless she completed 100 CEUs for the 2003-2005 reprivileging period involved issues of direct patient care and clinical competence and is properly excluded from the negotiated grievance procedure pursuant to 38 USC 7422(b).

To avoid confusion in the future, VAPSHCS is strongly encouraged to formalize all privileging criteria and to ensure that all Service Line chiefs formally concur in the criteria to be applied to practitioners within their areas of clinical assignment.

B. The proficiency report grievance.

Proficiency reports reflect supervisors' assessment of nurses' clinical abilities and performance. In Ms. [redacted] supervisor's assessment, Ms. [redacted] poor interpersonal skills negatively impacted her performance of patient care duties on at least two occasions, including one instance in which she told a triage nurse to turn away a patient who had traveled some distance to be seen in ER/Urgent Care for pain management but whom she believed should have made an appointment with his Primary Care provider instead. The supervisor recounted that the Director of

⁷ Although the grievance challenged the 100 CEU policy on grounds that could be viewed as procedural, the remedy requested went straight to the substance of the policy by demanding that Ms. [redacted] be repriviledged based on the minimum state licensure requirement of 45 CEUs. Given that the Chief of Staff expressly found it to be "clinically important" that Ms. [redacted] complete 100 CEUs, the grievance clearly raises substantive issues of clinical competence within the meaning of 38 U.S.C. §7422 .

Nursing had to specifically instruct _____ to see that patient.⁸ On another occasion, the supervisor recounted, Ms. _____ was slow to respond to a patient complaint. Such assessments in a proficiency report necessarily involve issues of direct patient care and clinical competence and are excluded from the negotiated grievance procedure under 38 USC 7422(b).⁹

This decision is consistent with prior USH decisions relating to the content of nurses' Proficiency Reports. Such decisions include Manchester, NH, September 9, 1992; Fayetteville, NC, August 2, 1993; and Fayetteville, NC, May 16, 1994.

⁸ Ms. _____ submitted a "rebuttal" to her proficiency rating that termed her supervisor's comments on this incident "libelous." (Attachment H, page 7.) However, she did not specific rebut her supervisor's factual account of the event.

⁹ If Ms. _____ and/or her union representative believe the negative comments in Ms. _____ proficiency report were made in retaliation for her protected union activity or in reprisal for protected whistleblower disclosures, they may pursue those allegations through appropriate administrative channels, but not through the negotiated grievance procedure or related means. See AFGE v. FLRA, 2 F.3d 6 (2d. Cir. 1993) (holding 38 U.S.C. §7422 precludes FLRA consideration of unfair labor charge alleging VAMC lodged patient abuse charges against 2 VA nurses in retaliation for protected union activities).

RECOMMENDED DECISION:

1. That the grievance over VAPSHCS' decision not to reprivilege Ms. because she did not complete 100 CEUs during the biennial reprivileging period involves issues concerning or arising out of professional conduct or competence within the meaning of 38 U.S.C. § 7422(b).

APPROVED ✓

DISAPPROVED _____

2. That the grievance over the content of Ms. proficiency report involves issues concerning or arising out of professional conduct or competence within the meaning of 38 U.S.C. § 7422(b).

APPROVED ✓

DISAPPROVED _____



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

11-21-05

Date