



DEPARTMENT OF VETERANS AFFAIRS  
UNDER SECRETARY FOR HEALTH  
WASHINGTON DC 20420

JAN 06 2005

Sanford M. Garfunkel  
Director(00)  
VAMC Washington DC  
50 Irving Street, NW  
Washington, D.C. 20422

Dear Mr. Garfunkel:

I am responding to the issue raised in your memorandum of September 16, 2005, concerning three grievances filed by the American Federation of Government Employees (AFGE), Local 2798, relating to the proficiency report, privileging, and request for extended sick leave of [redacted] M.D.

Pursuant to delegated authority, I have determined, on the basis of the enclosed decision paper, that the issues presented by first two grievances are matters concerning or arising out of professional conduct or competence. As a result, those issues are non-grievable pursuant to 38 U.S.C. § 7422(b). However, the issues raised by the grievance regarding Dr. [redacted]'s sick leave request do not fall within the grievance exclusions of 38 U.S.C. §7422(b).

I have also determined that a related allegation of constructive discharge may not be asserted through the negotiated grievance procedure as an alternative basis for the arbitrator to award the remedies requested in the proficiency report grievance or the privileging grievance.

Please provide this decision to your Regional Counsel as soon as possible.

Sincerely yours,

A handwritten signature in cursive script, appearing to read "Jonathan B. Perlin".

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

Enclosure

Title 38 Decision Paper  
VA Medical Center- Washington, D.C.  
VA – 06-01

FACTS<sup>1</sup>

Dr. [REDACTED], MD, was employed by the VA Medical Center in Washington, D.C. (DC VAMC) from 1978 until he retired on October 1, 2003.

Doctor [REDACTED], whose specialty is oncology radiology, was employed in the Radiology Therapy Services division of the VAMC. He was named Acting Chief of Radiology in 1997. From 1997 to 2001, Dr. [REDACTED] was the only physician in the Radiation Therapy Service and was responsible for treating cancer patients undergoing radiation therapy.

In October 2000, DC VAMC management merged the Radiation Therapy Service with the larger Imaging Service to create a new Radiology Service. Dr. [REDACTED] MD, was named Chief of the newly created Radiology Service and Dr. [REDACTED] remained Acting Chief of Radiology Therapy.

In July 2001, Dr. [REDACTED], MD, joined the DC VAMC as an additional staff physician in the Radiology Therapy Division of the Radiology Service. Thereafter, Drs. [REDACTED] and [REDACTED] encountered a number of problems with Dr. [REDACTED]'s clinical care.

On June 28, 2002, the Chief of Oncology, Dr. [REDACTED], MD, sent a memorandum to the Chief of Staff, Dr. [REDACTED], commenting on the quality of Dr. [REDACTED]'s medical services. (Attachment 1). Among Dr. [REDACTED]'s comments were that "Dr. [REDACTED]'s ... [patient chart] notes reveal minimal interaction" with patients and that "Dr. [REDACTED] performs little follow up care for radiotherapy patients." (Attachment 1, paragraphs 3 and 4).

In July 2002, Dr. [REDACTED] completed an appraisal of Dr. [REDACTED]'s proficiency for the period beginning on July 30, 2001 and ending July 30, 2002. (Attachment 2.) In this Proficiency Report Dr. [REDACTED] rated Dr. [REDACTED]'s overall proficiency as "satisfactory" but his administrative competence as "low satisfactory." In the narrative summary portion of the Proficiency Report, Dr. [REDACTED] commented that Dr. [REDACTED] "[h]as not implemented consistent record keeping that complies with current standards of practice ... [and] does not communicate with the Oncology staff to their satisfaction." (Attachment 2.)

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<sup>1</sup>The events underlying this rather complicated matter have been litigated in a number of forums, including the United States District Court for the District of Columbia, in which Dr. [REDACTED] has a pending employment discrimination claim. In a published decision, *[REDACTED] v. Principi*, 344 F. Supp. 2d 86(2004), that court summarized many of the facts that are pertinent to this 38 U.S.C. §7422 determination. For the sake of simplicity, the court's recitation of background facts is reiterated here, while the facts of specific relevance to the 38 U.S.C. §7422 analysis are drawn from the referenced attachments.