DEPARTMENT OF VETERANS AFFAIRS
UNDER SECRETARY FOR HEALTH
WASHINGTON DC 20420

JAN 0 6 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 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. 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,

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[1]

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

Doctor , 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 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. MD, was named Chief of the newly created Radiology Service and Dr. remained Acting Chief of Radiology Therapy.

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

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

In July 2002, Dr. completed an appraisal of Dr. 's proficiency for the period beginning on July 30, 2001 and ending July 30, 2002. (Attachment 2.) In this Proficiency Report Dr rated Dr. 's overall proficiency as "satisfactory" but his administrative competence as "low satisfactory." In the narrative summary portion of the Proficiency Report, Dr. commented that Dr. "[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.)

[1]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. has a pending employment discrimination claim. In a published decision, 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.

On December 20, 2002, Dr. named Dr. as Chief of Radiation Therapy.

In April 2003, Dr. applied for a renewal of his clinical privileges. On May 22, 2003, Dr. as Service Chief, recommended that Dr. 's privileges be renewed with modifications. (Attachment 3). The modifications required Dr. to "document in the patient's record weekly examination results (symptoms and physical signs) related to the patient's treatment site and the patient's overall condition while on treatment and for follow-up visits." The Executive Committee of the Medical Staff recommended approval of these modifications, with the caveat that the modifications should be reviewed monthly and that Dr. 's privileges should be renewed for three months rather than the usual two year renewal period. The DC VAMC Director approved the renewal of Dr. 's privileges as modified on June 3, 2003.

On July 9, 2003, AFGE Local 2798 (union) filed a Step 1 grievance (the "privileging grievance") alleging that the renewal of Dr. s privileges with modifications violated Article 26, Section 6 of the VA/AFGE Master Agreement. (Attachment 4.) More specifically, the union alleged that Dr. was never notified of his "performance–related problems" or given at least thirty (30) calendar days to resolve the problem. As a remedy, the union requested that management "[r]emove Dr. from clinical restrictions[, r]emove all restrictions and any negative adverse actions from Dr. s file(s)[, and m]ake employee whole."

On July 14, 2003, Dr. responded to the privileging grievance as follows:

> ... Dr. alleges that he was unaware of questions about his clinical practice. It is his practice, not his skills that are in question.
>
> Dr. was officially aware of this at least since his proficiency report in July of 2002. The issue has not changed and we would all be happy to see Dr. change his style of practice to comply with national standards.

(Attachment 5.)

The Union elevated the privileging grievance to step 2 on July 22, 2003. (Attachment 6). The Chief of Staff denied the privileging grievance on August 18, 2003, clarifying that Article 26 of the Master Agreement does not apply to Title 38 employees such as Dr. , that Article 54, Proficiency, applies to performance appraisals of Title 38 employees; and that the "modifications communicated to Dr. , related to the bi-annual Credentialing process and not Dr. 's annual proficiency rating." (Attachment 7.) More particularly, the Chief of Staff's grievance response stated:

> Standards of practice were addressed upon Dr. bi-annual Physician Credentialing renewal in which Dr. eceived a copy. Dr. addressed Dr. on this and related issues via e-mail and in

verbal discussions in and around the month of April 2003. An e-mail dated April 28 has comments from Dr. that discussions were being held. In November 2002, Dr. was provided 'ACR Standards for Radiation Oncology' for reference.

Dr. was not denied credentialing. In fact, [during] the re-credentialing process, Dr. was notified and is currently being provided 90 days to show improvement.

(Attachment 7, paragraph 2.b.)

On August 22, 2003, the Union raised the privileging grievance to Step 3. (Attachment 8.)

On July 28, 2003, Dr. received his proficiency report for the period ending July 30, 2003. (Attachment 9.) This proficiency report, which was signed by Dr. and approved by Dr. , assigned Dr. an overall rating of low satisfactory with the following narrative summary:

13. Review of patient records indicates insufficient documentation of ... treatment visits with question of sufficient patient contact.

16. For the 5 month period after last year[']s evaluation continued ineffective leadership, resulting in termination as acting section head.

17. Continued to have strained relation with staff and problems in directing support personnel.

On September 11, 2003, the Union filed a Step 1 grievance relating to Dr. proficiency report (the "proficiency report grievance"). (Attachment 10.) The grievance alleged that Dr. was never informed that his clinical skills were not within the acceptable clinical practice or afforded a reasonable opportunity of at least 30 days to improve his performance as required by Article 26 of the AFGE Master Agreement. In addition, the grievance alleged that management violated Article 46, Rights and Responsibilities, by not granting Dr. request to have his union representative in the meeting held to give him his report. As a remedy, the grievance requested that Dr. overall rating be changed to satisfactory; that management "remove all negative and adverse actions from Dr. 's file(s);" and that management acknowledge the Union's right to be present at all meetings that include bargaining unit employees.

On July 29, 2003, Dr. requested "indefinite medical leave" based on medical documentation stating that he was experiencing significant job-related stress. (Attachment 11.) The documentation included a form letter from a physician that was internally inconsistent, in that it stated that Dr was totally incapacitated from July 29, 2003 to unspecified date; that "the above patient has

now recovered sufficiently to return to his/her duties;" and that Dr. [redacted] should be "placed on indefinite medical leave due to ... stress." (Attachment 12.)[2]

On August 5, 2003, Dr. [redacted] sent a letter to Dr. [redacted]'s home address asking for additional medical information to support his medical leave request. In this letter, Dr. [redacted] pointed out that the July 29, 2003 form letter from Dr. [redacted]'s physician contained internal inconsistencies that required clarification, and advised that Dr. [redacted] could not be granted sick leave beyond August 11, 2003, and would be placed on absence without leave after that date, if such clarification were not provided. (Attachment 14).

On September 15, 2003, Dr. [redacted] in provided a letter from his physician stating that his "prognosis is unchanged" and that "his condition may be permanent." (Attachment 15.) Based on this documentation, Dr. [redacted] requested that his sick leave continue "until my doctors make the professional determination that I am fit to return to work." (Attachment 16.)

On September 15, 2003, the Union filed a grievance (the "AWOL grievance") alleging that management had violated the Master Agreement, Article 32, Time and Leave, section 5, paragraph 4, by asking for additional medical information and placing Dr. [redacted] on Absence Without Official Leave (AWOL) status. (Attachment 17). As a remedy, the union demanded that management remove the AWOL charges from Dr. [redacted]'s time and attendance records; pay him back pay for the days entered as AWOL; and "[m]ake [the] employee whole."

On September 22, 2003, the Chief of Radiation Therapy responded to the AWOL grievance stating that Dr. [redacted] had "...failed to follow the proper procedures in regards to requesting leave, therefore, he is being carried and/or will continue to be carried in an Absence Without Official Leave (AWOL) status." (Attachment 18, paragraph 1.a). More particularly, the Chief stated that "[t]he service sent the employee a certified letter requesting medical documentation. On September 15, 2003, the employee submitted additional medical [documentation]; however, management has determined that this is insufficient documentation. ... Also, on September 17, 2003, the employee submitted a request for leave. However, since the employee has failed to provide sufficient medical documentation[,] this request cannot be addressed at this time." (Attachment 18, paragraphs 1.b and 1.c.)

Dr. [redacted] retired from Federal service effective October 1, 2003.

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[2]The medical documentation provided to support Dr. [redacted]'s initial medical leave request also included a letter from a psychiatrist stating that [redacted] "was evaluated ... on an emergency basis after he had received an adverse proficiency report from his supervisor[;]...was highly distraught and very much frustrated because of this report which doesn't seem justified[; and his] ... emotional state doesn't allow him to continue to be exposed to the very stressful work environment." Based on these factors, the psychiatrist recommended that Dr. [redacted] "should be given the benefit of removal from stress and therefore extended sick leave is necessary until further notice." (Attachment 13.)

By memorandum dated October 17, 2003, the union elevated the AWOL grievance to Step 2. (Attachment 19). The union's representative noted on that memorandum that "management refused to sign for or accept [the Step 2 grievance], as "Dr. , has retired." (Attachment 19.)

The Union invoked arbitration on all three grievances, and the parties selected F to arbitrate all of the subject issues. On December 16, 2004, Arbitrator e rendered a "Preliminary Decision on Arbitral Jurisdiction," in which he accepted jurisdiction of the issues of modification to renewal of clinical privileges; low satisfactory proficiency report; denial of sick leave and carrying Dr. on AWOL status; and a new issue of Constructive Termination.[3] (Attachment 20.) The arbitrator noted that Dr. had raised the same or similar issues in an appeal to MSPB, which MSPB dismissed for lack of jurisdiction, and in an employment discrimination complaint filed in the U.S. District Court for the District of Columbia.[4] However, the arbitrator did not believe those prior filings precluded Dr or the union from litigating the same issues through the negotiated grievance procedure. (Attachment 20, pages 53-57.) The arbitrator also noted that DC VAMC management had raised 38 U.S.C. §7422 as a bar to arbitration of the subject grievances, but had not procured a 38 U.S.C. §7422(d) determination by the Under Secretary for Health (USH) as was required to effectively remove the grievances from the negotiated grievance procedure under Article 42, Section 2 of the AFGE Master Agreement. (Attachment 20, pages 42-43.)[5]

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[3] As Arbitrator noted in his December 16, 2004 Preliminary Decision on Arbitral Jurisdiction, the union did not allege constructive discharge in any of the subject grievances, but did list "constructive discharge" as an arbitration issue in its November 12, 2003 request to the Federal Conciliation and Mediation Service for a panel from which to select an arbitrator. (Attachment 20, page 53.) The union explained the constructive discharge allegation in a brief submitted to the arbitrator on August 30, 2004, stating that in late July or early August 2003, "unbeknownst to him, [L s] employment was terminated/he was constructively discharged through an Agency AWOL action." (Attachment 21, page 5.) The arbitrator accepted jurisdiction over the constructive discharge issue, terming it "the lynchpin of the union's quest to restore Dr. to his previous position at the [DC VAMC]." (Attachment 20, pages 56.) It must be noted, however, that none of the grievances expressly requested as a remedy that management accept a rescission of Dr. voluntary retirement or otherwise restore his employment status.

[4] The status of that action is unclear from the record.

[5] It should be noted that the Federal Labor Relations Authority has held that there is no time limit on when a 38 U.S.C. §7422(b) decision may be issued. See *Dep't of Veterans Affairs, VAMC Asheville, NC*, 57 FLRA 681 (2002) ("Title 38 places no time limit on when the Secretary's determination must be made. Indeed, the Authority has remanded a case to an Administrative Law Judge to allow the Under Secretary to submit a determination as to whether the subject matter of the ULP proceeding constituted a 38 U.S.C. § 7422(b) topic and therefore not subject to review by the Authority. *Dep't of Veterans Affairs, Veterans Affairs Med. Ctr., Washington, D.C.*, 51 FLRA 896 (1996), *remanded to*, 53 FLRA 822 (1997) (dismissing complaint on remand as outside the Authority's jurisdiction). *See also* 38 U.S.C. § 7425(b) (providing that title 38 prevails over any conflicting title 5 provision)").

On September 16, 2005, the DC VAMC Director submitted a memorandum to the Under Secretary for Health (USH) requesting a determination that the issues raised in two of the grievances filed by Dr. [redacted] are outside the scope of collective bargaining pursuant to 38 U.S.C. § 7422. (Attachment 22.) The Director alleged that the grievances involving the renewal of Dr. [redacted]'s "clinical privileges and the low satisfactory performance appraisal involve matters arising out of professional conduct or competence" and are therefore outside the scope of collective bargaining. The Director further averred that the "underpinning of the constructive termination charge is the way in which the Agency handled the renewal of clinical privileges, the issuance of the low satisfactory proficiency rating and the denial of extended sick leave." (Attachment 22, paragraph 9.)

On October 4, 2005, DC VAMC management notified the union that it had 10 days to submit any response to the Director's 38 U.S.C. §7422 decision request or other relevant input to the USH. The Union did not submit anything to the USH within this time.

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 privileging grievance involves issues concerning or arising out of professional conduct or competence within the meaning of 38 U.S.C. § 7422(b).

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

3. Whether the AWOL grievance involves issues concerning or arising out of professional conduct or competence within the meaning of 38 U.S.C. §7422(b).

4. Whether the issue of constructive discharge as accepted by the arbitrator in his December 16, 2004 Preliminary Decision on Arbitral Jurisdiction 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 privileging grievance.

Clinical privileging is the process by which a health care facility grants a practitioner permission to independently provide medical or other patient care services. At VA facilities, the privileging process is conducted in accordance with VA regulations set forth in VHA Handbook 1100.19, *Credentialing and Privileging,* and with local policies set forth in each facility's Medical Staff Bylaws. Under these policies, VA privileging is a peer review process in which a provider's supervisor assesses peer recommendations and other information relevant to the provider's clinical performance, judgment, and skills, and on that basis of that information recommends that the provider's privileges be granted or terminated, extended or modified. Another group of the provider's peers – namely, the Executive Committee of the facility's Medical Staff – reviews the supervisor's recommendation and supporting clinical information and submits its own recommendation to the VAMC Director. Thus, privileging decisions are peer review-based determinations of providers' clinical competence to perform specified medical procedures. Privileging decisions also 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.

In this case, other clinicians raised concerns about the extent to which Dr. was complying with the facility's standards of care by examining patients and documenting each patient's signs and symptoms in the weekly patient examination record. Dr. 's supervisor informed him of these concerns in his July 2002 proficiency report. To ensure that Dr. understood and was complying with the appropriate standards of care, the supervisor recommended that his privileges be modified to require documentation of the necessary patient examinations. Dr. peers on the Executive Committee of the Medical Staff approved and clarified this modification to require monthly reviews of Dr. patient records for three months. These modifications clearly addressed Dr. supervisor's and peers' concerns about his clinical competence and/or patient care techniques. Reduced to its essence, the decision to modify Dr. privileges represented the clinical determination of Dr. supervisor and peers that he should be permitted to continue to treat VA patients only if he demonstrated compliance with applicable standards of care. As a result, the privileging grievance – through which the union seeks to have that clinical determination overturned by a non-clinician arbitrator – is barred by 38 U.S.C. §7422(b).

Nor did DC VAMC management's conduct in this regard violate the AFGE Master Agreement. The union alleged in the privileging grievance that Article 26, Section 6 of the Master Agreement required that Dr. be given 30 days' notice and an opportunity to correct his "performance" before management could modify his privileges. However, Article 26 relates to performance appraisals for Title 5 employees, not to privileging of Title 38 health care providers. While privileging decisions may sometimes involve performance deficiencies identified through the Title 38 proficiency report process, that process is addressed in Article 54 of the Master Agreement, not in Article 26, and neither Article 54 nor the VHA privileging

handbook requires that a provider receive notice or an improvement opportunity before his or her privileges may be modified.

The USH has determined in a prior 38 U.S.C. §7422 decision that the privileging of Title 38 health care providers involves issues of direct patient care and clinical competence within the meaning of 38 U.S.C. §7422(b). *See* VA Puget Sound Health Care System, VA-05-10, November 21, 2005).

B. The proficiency report grievance.

As noted above, the performance of Title 38 physicians, including Dr. is assessed through proficiency reports in which the supervisor rates the provider's demonstrated competence in five categories during the period covered by the report. To the extent that such an assessment involves the provider's performance of direct patient care duties, it necessarily involves issues of direct patient care and clinical competence. *See generally* VA Handbook 5013, Part II, paragraph 8.c.

In this case, Dr. supervisor, Dr. rated his clinical competence as well as his overall performance for the July 2002 to July 2003 performance period as "low satisfactory." Among the narrative comments supporting this rating was Dr. s statement that a "[r]eview of [Dr.] patient records indicates insufficient documentation of weekly on [sic] treatment visits with the question of sufficient patient contact." This comment clearly constituted Dr. clinical assessment of Dr. s performance of patient care duties, which assessment is exempted from the negotiated grievance procedure by 38 U.S.C. §7422.

The union alleged in the proficiency report grievance that Dr. and Dr. violated Article 26 of the AFGE Master Agreement by negatively assessing Dr. performance without first giving him 30 days notice of any performance-related problem and an opportunity to improve. This allegation is misplaced because Title 38 physicians' performance evaluations are addressed in Article 54, *Proficiency,* not in Article 26. Nothing in Article 54 requires advance notice or an improvement period before a provider may be rated low satisfactory. While supervisory physicians are required by VA policy to counsel their subordinates before issuing low satisfactory or unsatisfactory ratings, *see* VA Handbook 5013, Part II, paragraph 9.e, the facility's response to the proficiency report states that Dr. was provided the necessarily counseling.

The USH has determined on several prior occasions that substantive ratings in proficiency reports involve issues of professional conduct or competence within the meaning of 38 U.S.C. §7422(b). *See, e.g.,* Manchester, NH, September 9, 1992; Fayetteville, NC, August 2, 1993; and Fayetteville, NC, May 16, 1994.

C. The AWOL grievance.

The fundamental issue underlying the union's grievance regarding the denial of Dr. request for extended medical leave is whether the medical

within the meaning of VA's Title 38 leave regulations.[6] That issue does not fall within any of the 38 U.S.C. §7422(b) exclusions, nor does the remedy requested in the AWOL grievance impact on any of the excluded areas.

D. The constructive discharge allegation.

Because the union did not raise the allegation of constructive discharge in any formal grievance, it is difficult to determine precisely what management actions Dr. believes forced his apparently voluntary retirement. To the extent that the constructive discharge allegation arises entirely out of the issues raised in the AWOL grievance, it would seem to turn only on the adequacy of the documentation Dr. submitted in support of his request for extended medical leave, rather than on any issue excluded from the negotiated grievance procedure under 38 U.S.C. §7422(b). If, however, the union intends the constructive discharge allegation to provide an additional basis upon which the arbitrator might award the relief requested in the proficiency report and/or privileging grievances by, e.g., ordering the DC VAMC to reinstate Dr. with full, unmodified privileges and with a satisfactory (or higher) proficiency rating, then the arbitrator's resolution of this issue would necessarily involve issues of professional conduct or competence and/or peer review within the meaning of 38 U.S.C. §7422(b). This is true for the same reasons that the proficiency report and privileging grievances fall within the 38 U.S.C. §7422(b) exclusions as discussed above.

[6]Title 38 employees' leave accrual and usage entitlements are governed by VA regulations promulgated pursuant to the Secretary's authority to prescribe such employees' "hours, conditions of employment and leaves of absence." The Title 38 regulations pertinent to sick leave requests and approvals are set forth in VA Handbook 5011, Part III, Chapter 3, paragraph 5.

RECOMMENDED DECISION:

1. That the privileging grievance 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 proficiency grievance involves issues concerning or arising out of professional conduct or competence within the meaning of 38 U.S.C. § 7422(b).

APPROVED ✓ DISAPPROVED _____

3. That the AWOL grievance does not involve issues concerning or arising out of professional conduct or competence within the meaning of 38 U.S.C. §7422(b).

APPROVED ✓ DISAPPROVED _____

4. That the issue of constructive discharge as accepted by the arbitrator in his December 16, 2004 Preliminary Decision on Arbitral Jurisdiction involves issues concerning or arising out of professional conduct or competence within the meaning of 38 U.S.C. §7422(b), to the extent that the arbitrator might cite Dr. alleged constructive discharge as a basis for ordering the relief requested in the proficiency report and/or privileging grievances.

APPROVED ✓ DISAPPROVED _____

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

1-6-06
Date