

Title 38 Decision Paper
VAMC Hampton, Virginia

FACTS:

In a letter dated January 6, 2010, [REDACTED], M.D., Chairperson, Professional Standards Board ("PSB") at the VA Medical Center, Hampton, VA ("HVAMC"), notified [REDACTED], M.D., that a summary review would be held on February 1, 2010, to conduct a review of her probationary employment and to make a recommendation on whether she should be retained or separated. (Attachment A)

The summary review was conducted in accordance with the procedures set forth in VA Handbook 5021, Part III, Chapter 1, Paragraph 3. During the course of the summary review proceedings, the PSB interviewed Dr. [REDACTED] and four bargaining unit employees. (Attachment B) Management did not offer the witnesses union representation, but one of the employees, [REDACTED], requested and was allowed to be represented by the American Federation of Government Employees, Local 2328 ("AFGE" or "Union"). Upon receiving this request from Ms. [REDACTED] management asked the other three witnesses if they wanted representation, and they all declined. (Attachment C)

On January 13, 2010, AFGE filed a Step 2 grievance alleging that the HVAMC failed to follow the provisions of Article 21, Sections 2B and 2D of the Master Agreement between the Agency and the Union.¹ (Attachment D) Section 2B provides that "[t]he Department will inform the local union in advance of a formal administrative investigation when a bargaining unit employee is the subject of the investigation or inquiry." Section 2D provides, in pertinent part, that "[e]mployees have the right to be represented by the Union while being questioned in a formal investigation or while being required to provide a written or sworn statement." Specifically, the Union alleged that "[m]anagement failed to make provisions necessary to make sure that the employee is apprised of his/her rights and that the rights of the Union are provided for." AFGE did not include a remedy request in the grievance.

In a memorandum dated March 19, 2010, [REDACTED], Director, Human Resources, denied the grievance based on the summary review provisions of VA Handbook 5021 and an earlier 38 U.S.C. § 7422 determination by the Under Secretary for Health ("USH") that only the employee who is the subject of a summary review is entitled to representation. (Attachment E)

On March 23, 2010, AFGE filed a Step 3 grievance with the Director, again asserting that management failed to inform the employees of their right to a

¹ The parties' submissions refer to the 1997 VA-AFGE Master Agreement. On March 15, 2011, VA and AFGE approved a new Master Agreement. All Master Agreement citations herein refer to provisions of the 1997 Master Agreement.

representative during the summary review and to notify the Union in advance of a formal administrative investigation when a bargaining unit employee is the subject of the investigation. The Union also appeared to argue that the Agency violated VA Handbook 5021, Part III, Chapter 1, Paragraph 3(f)(9), which provides that “[o]nly Board members are entitled to be present when an individual is being interviewed, except that an employee’s representative may be present while the employee is being interviewed.” In addition, the Union claimed that no local management official has the authority to make a section 7422(b) determination, as this right is reserved exclusively for the Secretary and delegated to the USH. As in the Step 2 grievance, the Union did not request a remedy. (Attachment F)

In his response to the Step 3 grievance, dated May 4, 2010, the HVAMC Associate Director, _____, denied the grievance, citing VA Handbook 5021, Part III, Chapter 1, Paragraph 3(d)(5), which states that, “[b]ecause summary reviews deal with issues related to professional competence or conduct and peer review, a union representative is not entitled to be present at a summary review except when serving as the employee’s personal representative.” Furthermore, the Associate Director responded that management would continue to provide written notification to the Union and bargaining unit employees when there is a formal investigation or fact-finding. (Attachment G)

AFGE invoked arbitration in a memorandum to the Director dated April 26, 2010. (Attachment H) By memorandum dated May 27, 2010, the HVAMC Director, _____, requested that the USH determine that the issues raised in the grievance are excluded from collective bargaining under 38 U.S.C. § 7422(b). (Attachment B)

In a letter to the USH dated July 30, 2010, the attorney representing the Union responded to the Director’s request for a determination. The Union argued that management’s claim that it could interview bargaining unit employees who might be witnesses without affording them Union representation “abrogates the ability to represent the employee before the PSB and also confounds the individual bargaining unit employee’s personal right to representation.” (Attachment I)

APPLICABLE VA REGULATIONS

The Agency has promulgated regulations pertaining to the PSB summary review process and the use of such summary reviews in determining whether to separate or retain probationary title 38 employees. These regulations are set forth in VA Handbook 5021, Part III, Chapter 1. In pertinent part, these regulations provide the following:

3. Summary Board Reviews

- a. Summary reviews are limited to situations where summary separation from Federal service may be justified. Officials identified