

**Title 38 Decision Paper
Department of Veterans Affairs (VA)
Milwaukee VA Medical Center**

FACTS

On May 19, 2020, the Milwaukee VA Medical Center (Medical Center) issued a notice of proposed removal dated May 15, 2020 to one of its part-time registered nurses (RN). Attachment A. The proposed removal included a single charge, “Unacceptable Conduct,” supported by one specification relating to an unacceptable interaction with a terminally ill veteran patients designated power of attorney. *Id.* The designated power of attorney informed the RN that she was going to leave for a while as she had been visiting the veteran patient “nearly the entire day and needed some rest since she was uncomfortable and tired.” *Id.* The designated power of attorney reported that the RN “gave her a strange look and stated, ‘Do you realize what stage he is in?’ and added, ‘he could die at any moment.’” *Id.*

On June 10, 2020 the Medical Center Director issued a notice of removal dated June 5, 2020 to the part-time RN, effective June 20, 2020. Attachment B. The Director sustained the single charge of “Unacceptable Conduct.” *Id.* The notice informed the RN, “[S]ince the reasons for the action as stated in the notice of proposed discharge do not involve a question of professional conduct or competence, you may appeal this action under the negotiated grievance procedure.” *Id.*

The Wisconsin Federation of Nurses and Health Professionals (Union) filed a Step 1 grievance on behalf of the part-time RN on July 5, 2020. Attachment C. The Union’s grievance charged the Medical Center with taking the action “without just cause and constitutes a continuation of longstanding harassment.” *Id.* Specifically, the Union charged that the Medical Center provided the RN “no direction or notice on how to engage with patients’ family members after the last suspension, for which she was not interviewed or followed up with from management. The investigation regarding the incident for which she was terminated failed to gather all the pertinent facts.” *Id.* As remedies, the Union requested that the Medical Center rescind the decision to remove and provide backpay, restoration of benefits, and the matter should be removed from her record. *Id.*

On July 24, 2020, the Medical Center provided a formal written response to the Union’s grievance denying the grievance in its entirety. Attachment D. The Medical Center stated “[T]he discipline in this case is progressive” and they further outlined that the RN had received other prior discipline which included an admonishment, a reprimand for similar misconduct and a 14-day suspension for similar misconduct. *Id.* Additionally, the Medical Center stated “[T]he fact that the agency took steps to correct the Grievant’s behavior is not evidence of harassment. Rather it reflects that the agency gave her several opportunities to correct her behavior but that she was unable or unwilling to do so before it resulted in her termination.” *Id.*

On August 11, 2020, the Union responded by email and invoked arbitration. Attachment E.

On July 2, 2021, the Medical Center submitted a request for a 38 U.S.C. § 7422 determination. Attachment F.

On July 16, 2021, the Union filed a response to the Medical Center's request for a 38 U.S.C. § 7422 decision. Attachment G. The Union asserted that the statements made by the RN to a third party "do not arise out of professional conduct and competence and are not exempt from the negotiated grievance procedure," and the comment to a third party is not "direct patient care." *Id.* The Union also noted that the RN's "decision letter did not include any indication that her discharge was related to an issue regarding the Professional Conduct or Competence." *Id.*

AUTHORITY

The VA Secretary has the final authority to decide whether a matter or question concerns or arises out of professional competence (i.e., direct patient care or clinical competence), peer review, or employee compensation within the meaning of 38 U.S.C. § 7422(b). This authority is delegated within VA policy. Attachment H.

ISSUE

Whether a grievance claiming that the Medical Center removed the part-time RN "without just cause" as it relates to the part-time RNs unacceptable conduct in speaking with a terminally ill veteran's close family friend and designated power of attorney regarding the terminally ill Veteran patient's health status involves a matter or question concerning or arising out of professional conduct or competence within the meaning of 38 U.S.C. § 7422(b), and thus, are excluded from collective bargaining.

DISCUSSION

The Department of Veterans Affairs Labor Relations Improvement Act of 1991, codified in part at 38 U.S.C. § 7422, granted collective bargaining rights to Title 38 employees under 38 U.S.C. § 7422(a). However, for Title 38 employees described in 38 U.S.C. 7421(b), collective bargaining may not cover any matter or question concerning or arising out of professional conduct or competence (i.e., direct patient care or clinical competence), peer review, or any matter or question concerning or arising from employee compensation, as determined by the Secretary. 38 U.S.C. § 7422(b). The following employees are described in 38 U.S.C. 7421(b)—physicians, dentists, podiatrist, optometrist, registered nurses, physician assistants, expanded-duty function dental auxiliaries, and chiropractors. *Id.*; see 38 U.S.C. 7401(1).

The charge sustained against the part-time RN by the Medical Center Director was unacceptable conduct, as supported by one separate specification. Attachment B. The specification was based on the unacceptable interaction with a terminally ill Veteran patient's close family friend and designated power of attorney regarding the terminally ill Veteran patient's health status. *Id.* The notice of removal informed the RN, "[S]ince the

reasons for the action as stated in the notice of proposed discharge do not involve a question of professional conduct or competence, you may appeal this action under the negotiated grievance procedure.” *Id.* Prior to an arbitration hearing, the Medical Center concluded upon advice of District Counsel that the matter was not arbitrable as the part-time RN’s “actions involve a matter of professional conduct or competence which require a request for a 38 U.S.C. § 7422 (b) determination by the Secretary.” Attachment B, see *also* Attachment A.

Part-time registered nurses, including those with an intermittent duty basis, appointed under 38 U.S.C. § 7405(a)(1)(A) who have satisfactorily completed the probationary period required by 38 U.S.C. § 7403(b), may appeal the major adverse action only under the VA grievance procedures outlined in VA Handbook 5021, Part IV, Chapter 3. Thus, only if it is determined the part-time RN’s actions do not involve a matter of professional conduct or competence and are not excluded from collective bargaining under 38 U.S.C. § 7422 (b), the Medical Center will afford the part-time RN “recourse to appeal under the agency grievance procedures in Handbook 5021 which apply to part-time RN’s.” Attachment F¹.

The Union’s response to the Medical Center’s request for a 38 U.S.C. § 7422 determination contends that the statements made by the RN to a third party “do not arise out of professional conduct and competence and are not exempt from the negotiated grievance procedure,” and the comment to a third party is not “direct patient care.” Attachment G. A power of attorney is a mechanism authorizing a person to act as the agent or attorney of the person granting it in various transactions including healthcare settings. In this case, although the discussion held by the part-time RN was not directly with the terminally ill Veteran patient, it was held with the terminally ill Veteran patient’s close family friend and designated power of attorney— who is an extension of this terminally ill Veteran patient who was unable to advocate or speak for himself in this setting.

The Secretary has previously determined that disciplinary actions related to patient care are subject matter excluded from collective bargaining and grievance procedures under 38 U.S.C. § 7422. In VAMC Poplar Bluff, the Union argued the charge sustained against the RN by the Medical Center Director for Inappropriate Conduct, which was “based on four separate incidents where the RN demonstrated inappropriate patient care in making inappropriate statements, utilizing profanity, throwing patient belongings, and jerking a patient’s legs off his bed” should not be excluded from collective bargaining because the Medical Center “placed outdated and expired policies into the evidence file” which were not “bargained with the local union.” Attachment I, VAMC Poplar Bluff (February 24, 2021). The Secretary concluded that [T]he grievance claiming the Medical Center “placed outdated and expired policies into the evidence file” which were not “bargained with the local union” as it relates to a removal of the registered nurse for inappropriate conduct towards veteran patients involves a matter or question

¹ The assertion of 38 U.S.C § 7422 is jurisdictional, and can be raised at any point in the proceedings. *AFGE, Local 2152 v. Principi*, 464 F.3d 1049 (9th Cir.2006).

concerning or arising out of professional conduct or competence within the meaning of 38 U.S.C. § 7422(b), and thus, are excluded from collective bargaining.” *Id.*

Further, in VAMC Southern Arizona, the Secretary previously determined that an RN’s conduct toward a family member of a patient under the RN’s care is “covered by the professional conduct and competence (i.e. direct patient care and clinical competence) exclusion of 38 U.S.C § 7422.” Attachment J, VAMC Southern Arizona (June 20, 2013).

Similar to the above decisions, the Medical Center’s decision to remove the part-time RN on the basis of inappropriate conduct towards a veteran patient’s close family friend and designated power of attorney is clearly related to professional conduct or competence. For that reason, the subject matter is excluded from collective bargaining and grievance procedures under 38 U.S.C. § 7422.

DECISION

The grievance claiming that the Medical Center removed the part-time RN “without just cause” as it relates to the part-time RNs unacceptable conduct in speaking with a terminally ill Veteran’s close family friend and designated power of attorney regarding the terminally ill Veteran patient’s health status involves a matter or question concerning or arising out of professional conduct or competence within the meaning of 38 U.S.C. § 7422(b), and thus, are excluded from collective bargaining.

Approved/Disapproved



Shereef Elnahal, M.D., MBA
Under Secretary for Health

September 27, 2022

Date