

**Title 38 Decision Paper
Department of Veterans Affairs (VA)
Poplar Bluff, Missouri**

FACTS

On April 16, 2019, the John J. Pershing VA Medical Center (Medical Center) issued a notice of proposed removal to one of its registered nurses (RN). (Attachment 1). The proposed removal included a single charge, “Inappropriate Conduct,” supported by four separate specifications relating to inappropriate patient care and failure to “demonstrate proper empathy or awareness of the situation.” *Id.*

On May 2, 2019, the Medical Center Director issued a notice of removal to the nurse, effective May 16, 2019. (Attachment 1). The Director sustained the single charge of “Inappropriate Conduct.” *Id.* The removal decision described the specific facts underlying the four specifications. *Id.* The RN had demonstrated inappropriate patient care and lack of “proper empathy” when he engaged in profanity and made inappropriate comments to a Veteran resident; threw a patient’s belongings (including an artificial limb) around the patient’s room while providing care; jerked a patient’s legs off the bed while the patient was sleeping causing hip pain; and communicated the passing of a patient to the patient’s family in an inappropriate manner. *Id.* The notice informed the RN that the sustained charge involved questions of professional conduct or competence. *Id.* As a result, the RN had the right to appeal the decision to a Disciplinary Appeals Board (DAB) under 38 U.S.C. § 7462. *Id.* The decision specifically noted that copies of VA Handbook 5021, Part V, Chapter 1, and Human Resources Management Letter (HRML) 05-17-08 were enclosed to provide the employee with the necessary information regarding DAB appeals and the appropriate timeframe for appeal. *Id.*

The American Federation of Government Employees (AFGE) Local 2338 (Union) filed a Step 3 grievance on behalf of the RN on May 8, 2019¹ instead of appealing to the DAB. (Attachment 2; see Attachment 6). The Union’s grievance charged the Medical Center with multiple violations of the VA-AFGE Master Collective Bargaining Agreement (Master Agreement). *Id.* Specifically, the Union charged the Medical Center with placing “outdated and expired policies into the evidence file” which were not “bargained with the local union.” *Id.* The grievance further alleged that the Medical Center failed to show the relevant policies to the employee prior to including them into an evidence file. *Id.* As remedies, the Union requested that the Medical Center rescind the decision to remove and provide written notice per the Agreement on every policy utilized in the proposal and decision. *Id.*

On May 9, 2019, the Medical Center replied to the Union grievance via email explaining that 38 U.S.C § 7422 excluded the subject matter from collective bargaining.

¹ The Step 3 Grievance document is dated March 15, 2019, although it was submitted electronically to the Medical Center on May 8, 2019. (Attachment 2; Attachment 12.)

(Attachment 3). The removal was based on issued directly related to professional conduct and competence. *Id.*

On May 15, 2019, the Medical Center provided a formal written response to the Union's grievance denying the grievance in its entirety. (Attachment 4).

On May 20, 2019, the Union responded by email and invoked arbitration. (Attachment 5).

On May 24, 2019, the Medical Center submitted a request for a 38 U.S.C. § 7422 determination. (Attachment 6). The Medical Center asserted that the RN had engaged in profanity, made inappropriate comments to patients, and did not maintain professional conduct when throwing a patient's belongings while providing care to patients. *Id.* The request noted that VA has regulations and processes in place, as outlined in VA Handbook 5021, to take actions against employees not performing their jobs in an appropriate manner. *Id.*

On July 1, 2019, the Union filed a response to the Medical Center's request for § 7422. (Attachment 10 and Attachment 11). The Union asserted that the agency could not provide proof of improper care, delay in care, denial of care, or refusal to provide care by the RN. *Id.* The Union asserted they "invoked arbitration due to contract violations as the agency collected, maintained, circulated and created their own interpretation of rules, laws, and regulations." *Id.* The Union also noted that the agency had failed to specify the portion of VA Handbook 5021 that applied. *Id.*

AUTHORITY

The Secretary of Veterans Affairs has the final authority to decide whether a matter or question concerns or arises out of professional conduct or competence (i.e., direct patient care or clinical competence), peer review, or employee compensation within the meaning of 38 U.S.C. § 7422(b). On October 18, 2017, the Secretary delegated his authority to the Under Secretary for Health (USH). (Attachment 7).

ISSUES

Whether a grievance claiming that 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 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 limited collective bargaining rights to Title 38 employees, and specifically excluded from the collective bargaining process matters or questions concerning or arising out of professional conduct or competence (i.e., direct patient care or clinical competence), peer review, or employee compensation, as determined by the Secretary.

The charge sustained against the RN by the Medical Center Director was Inappropriate Conduct, as supported by four separate specifications. (Attachment 1). The specifications were 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. *Id.* The decision notes that three of the four incidents occurred in the course of the RN providing direct patient care. *Id.* While the final incident did not directly involve a patient, the inappropriate communication was made in the course of reporting the passing of a patient under the RN's care. *Id.* Given the underlying facts of the RN's removal are directly tied to direct patient care, the subject matter of the removal decision is directly related to professional conduct or competence and is therefore not subject to collective bargaining.

If the charges involve matters concerning direct patient care or clinical competence, the RN may not, based upon 38 U.S.C. §7422, pursue an appeal of their discharge through the parties' negotiated grievance procedure.² Employees appointed under 38 U.S.C. § 7401(1) are afforded an avenue for appealing major adverse actions which arise out of or which include questions of professional conduct or competence via the Disciplinary Appeals Boards (DAB). 38 U.S.C. § 7462(a)(1). The policies and procedures governing appeals to the DAB are found in VA Handbook 5021, Part V and HRML 05-17-08, "Disciplinary and Major Adverse Action Procedure (Title 38 Employees)". The handbook notes that major adverse actions would include suspensions, transfers, and discharges and further defines a question of professional conduct or competence as one that "involves direct patient care and/or clinical competence." VA Handbook 5021, Part V, Chapter 1, paragraph 1. The removal decision states that given the reason for the action involves a question of professional conduct or competence, the RN had a right to appeal to the DAB. (Attachment 1). The decision further informs the employee that copies of VA Handbook 5021 and HRML 05-17-08 would be provided to the RN. *Id.* The copies were provided to give the RN the "necessary information regarding an appeal to the Disciplinary Appeals Board" as well as the associated time limits for filing the DAB appeal. *Id.*

² Article 43 of the AFGE Master Agreement excludes "any matter or question concerning or arising out of professional conduct or competence such as direct patient care or clinical competence" from the negotiated grievance procedure.

The Step 3 grievance from the Union contends that the Medical Center “placed outdated and expired policies into the evidence file” which were not “bargained with the local union.” (Attachment 2). The Union’s requested remedy is to “rescind the proposed and sustained decisions” and “make the union and employee whole.” *Id.* Regardless of whether the allegation of “outdated and expired polices” is accurate, the issue is unrelated to the determination of whether the RN’s actions were a matter of professional conduct or competence. As such, the requested remedy cannot be granted by the negotiated grievance procedure since the remedy is directly tied to the underlying matter of professional conduct or competence (direct patient care) of an RN. Therefore, a 38 U.S.C. §7422 decision is not the appropriate forum to address such concerns.

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 Tomah, the Union argued that that the Medical Center failed to follow the parties’ national and local agreements when challenging the discharge of a nurse for endangering the safety of patients and failing to follow orders. (Attachment 8, VAMC Tomah (June 17, 2016)). The decision notes that on multiple occasions, the nurse failed to provide proper care by failing to access patient records prior to administering medications to patients. *Id.* The Secretary concluded that the charges sustained in the discharge were matters concerning the nurse’s direct care of patients. *Id.* As a result, the matter was excluded from being appealed through the collective bargaining process as a matter involving professional conduct or competence under 38 U.S.C. § 7422. *Id.*

In VAMC Tennessee, the Union argued that the Medical Center violated the RN’s due process rights during an investigation process to ascertain discipline of the RN for issues of patient abuse. (Attachment 9, VAMC Tennessee (January 24, 2008)). The RN was issued a suspension for abusive language and disrespectful conduct towards a patient. *Id.* The Secretary concluded that the allegation regarding the investigation of the incident was not related to whether the RN’s actions were a matter of professional conduct or competence. *Id.* Therefore, a 38 U.S.C. § 7422 decision was “not the appropriate means to address such concerns.” *Id.* The Secretary concluded that the suspension of an RN involved issues concerning or arising out of professional conduct or competence (direct patient care) within the meaning of 38 U.S.C. §7422(b). *Id.*

Similar to the above decisions, the Medical Center’s decision to remove the RN on the basis of inappropriate conduct towards patients 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. The RN was informed of the DAB appeal process, which was the appropriate forum to appeal the removal decision.

DECISION

The grievance claiming that 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 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.



Richard A. Stone, M.D.
Acting Under Secretary for Health

February 24, 2021

Date