

**Title 38 Decision Paper**  
**Department of Veterans Affairs (VA)**  
**St. Cloud VA Health Care System (Medical Center)**

**FACTS**

On November 5, 2019, the St. Cloud VA Health Care System (Medical Center) issued a notice of proposed removal under the authority of 38 U.S.C. § 7462 to a registered nurse (RN). (Attachment A.) The proposed removal included one charge, “Failure to Provide Quality Patient Care” with three individual specifications relating to direct patient care. *Id.*

The first specification related to a routine blood transfusion on a Veteran patient which occurred around August 30, 2019. (Attachment A.) The RN failed to follow protocol for verification and documentation of patients. *Id.* The error resulted in patient notes being entered into the chart for the incorrect patient. *Id.* The second specification related to the same blood transfusion, when the RN incorrectly charted a start time of a specific unit of blood that was two hours prior to the laboratory actually releasing the unit of blood. *Id.* The third specification involved the RN’s failure to properly triage a patient that presented in Urgent Care on October 25, 2019. *Id.* The RN rated the patient as a Level 4 triage and sent a patient to the PACT team for treatment without actually physically examining the individual. *Id.* As a result, the patient waited over two hours for treatment. *Id.*

On November 26, 2019, the Director of the Medical Center issued a Notice of Removal under the authority of 38 U.S.C. § 7462 to the RN, effective on December 2, 2019. (Attachment B.) The Director sustained Charge 1, along with all three specifications in their entirety. *Id.* The notice referenced the consideration of both the oral and written replies from the RN. *Id.* The notice also alerted the RN that the sustained charges involved questions of professional conduct or competence and informed the RN of the right to appeal the decision to the Disciplinary Appeals Board (DAB). *Id.*

On December 26, 2019, rather than appeal the decision to the DAB, the American Federation of Government Employees (AFGE), Local 390 (Union) invoked arbitration on this matter. (Attachment C.) The Union cited to Article 44 of the AFGE Master Agreement. *Id.*

On January 17, 2020, the Medical Center submitted a request for a 38 U.S.C. § 7422 determination. (Attachment D.) In the request, the Medical Center provided a timeline of events, including that the RN was hired on April 5, 2015. *Id.* The request indicates that the basis for the 7422 decision is that the removal involved a question of professional conduct and competence and thereby removing the matter from grievance and arbitration procedures. *Id.*

On February 7, 2020, the Union submitted a response to the Medical Center’s request. (Attachment H.) The Union asserted that the RN was wrongfully terminated for “simply

following protocol” and that the Medical Center Director had not considered all of the evidence presented. *Id.* The response addressed specific issues with each specification, with the Union providing evidence in various forms as support. *Id.* As remedy, the Union requested that the termination be held in abeyance while the RN participated in the Employee Assistance Program (EAP). *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. (Attachment E.)

## **ISSUE**

Whether the Medical Center’s removal of an RN for the failure to provide quality patient care is 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, is excluded from collective bargaining and grievance procedures.

## **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 employees appointed under title 38 of the United States Code (Title 38), 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. “Professional conduct or competence” is defined to mean “direct patient care” and “clinical competence.” 38 U.S.C. § 7422(c).

If the charge and related specifications are determined to be matters concerning direct patient care or clinical competence, the RN may not, based on 38 U.S.C. § 7422, pursue an appeal of her removal through the parties’ negotiated grievance procedure. Pursuant to 38 U.S.C. § 7462, an employee subject to a major adverse action that involves a question of professional conduct or competence may appeal the decision to a DAB. The prescribed administrative appeal process, which involves presenting the nurse’s case before a DAB, was provided to the RN in the Medical Center’s Notice of Removal from November 26, 2019. (Attachment B.)

The Union did not file a step three grievance, nor have they provided any specific rationale for invoking arbitration. In their response to the 7422 request, the Union provided evidentiary support that addresses the substance of the charges, rather than the whether the issue concerns or arises out of professional conduct or competence i.e.

direct patient care. (Attachment H.) Additionally, the defenses raised by the Union in the response provided further support for finding that the activity in question was in fact related to direct patient care. *Id.* To the extent the Union has invoked arbitration to challenge the employee's removal for allegations of the failure to provide quality patient care, the grievance and arbitration invocation are excluded from collective bargaining.

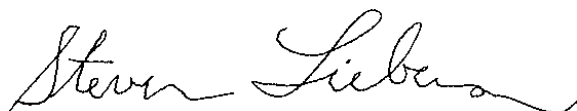
In VAMC Tomah, the Under Secretary for Health concluded that a grievance filed by the Union claiming that the Tomah Medical Center failed to follow the parties' national and local agreements when challenging the discharge of a nurse. (Attachment F, VAMC Tomah, (June 17, 2016)). The discharge was based on two charges: Endangering the Safety of Patients and Failure to Follow Orders. *Id.* The decision concluded that the charges involved matters concerning direct patient care and clinical competence. *Id.* Similar to the current situation, the decision also notes that the employee in question was given the right to appeal to DAB. *Id.*

Similarly, in VAMC Southern Arizona, the Secretary concluded, the nurse's conduct of administering a blood transfusion to a patient without first obtaining the patient's consent and sleeping on duty, concerned or arose out of professional conduct and care and held that the grievance was excluded from collective bargaining under 38 U.S.C. § 7422. (Attachment G, VAMC Southern Arizona (August 29, 2013)). The RN received a 10-day suspension and was informed of the right to file a grievance. *Id.* Similar to VAMC Tomah, the decision notes that both charges were related to direct patient care. *Id.*

In this case, the charges sustained by the Director of the Medical Center include failure to provide quality patient care with three individual specifications. The charge and three specifications were related to direct patient care and specifically concerned the nurse's direct care of those patients, as well as her clinical competence in caring for those patients. As a result, applying 38 U.S.C. § 7422's professional conduct or competence exclusion precludes the matter from being appealed through the collective bargaining grievance process.

## **DECISION**

The charges which formed the basis of the Medical Center's decision to remove the RN for failure to provide quality patient care are matters concerning direct patient care and clinical competence, and a challenge to the Medical Center's decision may not be advanced through the parties' negotiated grievance procedure.



Steven L. Lieberman  
Acting Under Secretary for Health

October 26, 2021  
Date

Veterans Health Administration