

Title 38 Decision Paper
VAMC Hampton, Virginia

FACTS:

In a letter dated January 6, 2010, _____, M.D., Chairperson, Professional Standards Board ("PSB") at the VA Medical Center, Hampton, VA ("HVAMC"), notified _____, 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. _____ and four bargaining unit employees. (Attachment B) Management did not offer the witnesses union representation, but one of the employees, _____, 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. _____ 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, _____, 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

in paragraph 2a-2e above are responsible for deciding whether to conduct a summary review of an employee's services. Supervisors may initiate requests for summary reviews at any time during the probationary period.

. . .

d. Employee Rights. Employees subject to summary Board review have the right to:

(1) Advance written notice of the Board review.

(2) Review documents relied upon by officials in initiating or recommending a summary Board review, subject to applicable disclosure requirements.

(3) Impartial review by the Board.

(4) Reply orally and/or in writing to the Board concerning the reasons for the review.

(5) Be represented by an individual of the employee's choice, provided the choices would not create a conflict of interest. A summary review is not an adversarial procedure. The representative's role is limited to assisting the employee in exercising the right to reply orally and/or in writing to the reasons for the review. Any responses to requests for information by the Board during the review process are considered part of the employee's reply. Accordingly, the employee's representative may assist in such matters. *NOTE: Because summary reviews deal with issues related to professional competence and 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.*

. . .

f. Conduct of Board Review

(1) The primary purpose of the Board in conducting a summary review is to obtain the available facts and determine whether the employee is fully qualified and satisfactory. Interviews with the employee, supervisors, and others should be conducted in an informal manner.

(2) Oaths or affirmations are not required in connection with the Board review.

. . .

(7) To obtain essential facts, the Chairperson may call persons before the Board to answer questions that may assist the Board in its review. This includes persons who are believed to possess pertinent information about the employee or the circumstances which led to the review.

. . .

(9) Only 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. Employees or others who may be called upon to furnish information will not be subject to cross-examination, and the Chairperson of the Board will ensure that this does not occur.

MASTER AGREEMENT PROVISIONS

The Union alleged that the Agency violated Sections 2D and 2B of Article 21 of the Master Agreement. These provisions are listed below.

ARTICLE 21—INVESTIGATIONS

. . .

Section 2—Investigations

. . .

B. The 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.

. . .

D. Employees 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 testimony.

. . .

Although the Union's grievances and invocation of arbitration did not allege that the Agency violated Article 55 of the Master Agreement, the language of that article is pertinent to the resolution of this issue:

ARTICLE 55: TITLE 38 REPRESENTATION AT BOARDS OR HEARINGS

A. The Union will be allowed to represent any unit employee at any hearing before a Title 38 Disciplinary board or whenever a probationary employee appears before a Professional Standards Board (PSB) in a termination proceeding. A representative in a PSB hearing may do those things an employee is entitled to do under regulation.

B. If the employee does not choose to have union representation, the Union may be permitted to have an observer present at hearings described in Paragraph A. The Union observer may attend the PSB hearing only during the employee's presentation. Consistent with applicable laws and regulations, Union representatives and observers must protect the confidentiality of any information to which they have access in connection with a Board Hearing.

ISSUE:

Whether the Union's grievances over HVAMC management's alleged refusal to acknowledge the right of the Union to represent witnesses, other than the subject employee, appearing before a Professional Standards Board summary review proceeding raises issues of peer review 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, 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 Secretary.

Pursuant to 38 U.S.C. § 7421(a), the Secretary is authorized to prescribe by regulation the hours and conditions of employment and leaves of absence of title 38 medical professionals, including registered nurses. The Secretary has exercised this authority to address peer review of title 38 probationary employees by promulgating the regulations in VA Handbook 5021, Part III, Chapter 1. At paragraph 3(d)(5), the Handbook explicitly states that "*summary reviews deal with issues related to professional competence or conduct and peer review[.]*"

The Federal Labor Relations Authority has acknowledged the Agency's authority to promulgate regulations governing peer review procedures for title 38 employees without regard to the bargaining and representational rights and obligations set forth in the Federal Service Labor-Management Relations Statute. See *Dep't of Veterans Affairs Med. Ctr., Leavenworth, Kan. & NFFE, Local 1765*,

49 FLRA 1624, 1627-28 (1994) (holding that “the Department was free to promulgate regulations precluding union representation at peer review hearings”); *Dep’t of Veterans Affairs Med. Ctr., Jackson, Miss. & NFFE, Local 589*, 49 FLRA 171, 175 (1994) (affirming the Agency’s authority to “prescribe regulations governing, among other things, probationary peer review proceedings for nonhybrid employees without regard to the bargaining and representational rights and obligations set forth in the Statute”), *consolidated and aff’d, NFFE Local 598 v. FLRA*, 73 F.3d 390, 393-94 (D.C. Cir. 1996) (“[W]e agree with the FLRA’s view that the Secretary exercises complete discretion over peer review procedures[.]”). The Agency, through the Master Agreement and VA Handbook 5021, has chosen to allow Union representation for title 38 probationary employees who are the subject of a summary review. See Article 55; VA Handbook 5021, Part III, Chapter 1, Paragraphs 3(d)(5) and 3(f)(9). However, consistent with the Agency’s authority to limit representation in peer review proceedings, the Agency has limited union representatives’ access to summary review proceedings to that portion of the proceeding at which the employee subject to the review is present. There is no Agency provision that allows Union representation for bargaining unit employees who are witnesses before a summary review proceeding.

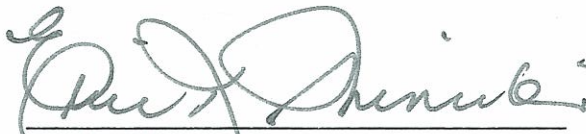
In a prior 38 U.S.C. § 7422 determination involving similar facts, *VAMROC Anchorage, AK* (Dec. 17, 2004), the USH determined that a grievance over the limitation of the Union’s access to a Professional Standards Board summary review proceeding raises issues of peer review within the meaning of 38 U.S.C. § 7422.

RECOMMENDED DECISION

That the grievances over HVAMC management’s alleged refusal to acknowledge the right of the Union to represent witnesses, other than the subject employee, appearing before a Professional Standards Board summary review proceeding raises issues of peer review within the meaning of 38 U.S.C. § 7422(b).

APPROVED _____

DISAPPROVED _____



Eric K. Shinseki
Secretary

15 July 2011
Date