

**Title 38 Decision Paper
Department of Veterans Affairs (VA)
Sheridan VA Medical Center (VAMC)
VA 12-XX**

FACTS

On November 9, 2011, Dr. _____, a title 38 physician, was serving as the Medical Officer of the Day (MOD)¹ at the Sheridan VAMC in Sheridan, Wyoming. While he was on duty, a patient presented through ambulatory care for evaluation of a leg injury. The patient's driver requested a wheelchair to bring the patient from the vehicle into the unit. Dr. _____ told the driver that the VAMC did not have x-ray capabilities and, therefore, he should take the patient to Sheridan Memorial Hospital for proper evaluation. Dr. _____ did not see or examine the patient. (Exhibit A).

The VAMC determined that Dr. _____'s actions did not meet the standard of care and issued a reprimand to Dr. _____ on February 6, 2012. (Exhibit B). In response, the American Federation of Government Employees (AFGE) Local 1219 filed a grievance on Dr. _____'s behalf, arguing that he did not deviate from the appropriate standard of care. (Exhibit C). The grievance cited the VAMC's medical bylaws which limit "emergency services" to first aid and life saving measures. The grievance asserted that Dr. Maertens did an appropriate "triage of the situation" prior to advising the driver to take the patient to an emergency room equipped to handle the described trauma. The union alleged that the proposal to reprimand was impermissibly vague and should have been rescinded, and that the incident reflected a systems issue that the VAMC should address rather than disciplining individuals.

On March 15, 2012, the VAMC notified AFGE that because the reprimand involved Dr. _____'s professional competence and direct patient care, it was requesting a Secretarial determination under 38 United States Code (U.S.C.) § 7422(b) on whether the issue was excluded from the negotiated grievance procedures. (Exhibit D). On March 19, 2012, the VAMC Director submitted the request to the Under Secretary for Health. (Exhibit E). The March notification to AFGE informed the union that it could argue in favor of the right to grieve this discipline. However, there is no evidence in the file that AFGE submitted a response in support of its contentions.

AUTHORITY

Authority is vested in the Secretary to determine whether a matter or question involves issues which concern or arise out of professional conduct or competence (direct patient care or clinical competence), peer review, or the establishment, determination, or adjustment of employee compensation within the meaning of 38 U.S.C. § 7422(b).

¹ The management request for Secretarial determination states that Dr. _____ served as "Medical Officer On Duty" on November 9, 2011. The VAMC bylaws identify the MOD as "Medical Officer of the Day." For purposes of this determination, we will assume that the terms are used interchangeably.

ISSUE

Whether the union's grievance challenging the reprimand issued to Dr. [redacted] and the requested remedies involve issues which concern or arise out of professional conduct or competence within the meaning of 38 U.S.C. § 7422(b).

DISCUSSION

The Department of Veterans Affairs Labor Relations Improvement Act of 1991 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, or employee compensation, as determined by the Secretary. 38 U.S.C. § 7422.

The VAMC issued Dr. [redacted] a reprimand because of his failure to provide appropriate patient care. Management contends that Dr. [redacted] decision not to see the patient and ascertain his condition and vitals constituted a deviation from the appropriate standard of care within the meaning of the Medical Staff Rules and Medical Center Bylaws. These rules state, "Emergency services will be limited to first aid and life-saving measures to the treatment of on-the-job injuries on station and to the diagnosis, evaluation, and stabilization of emergency situations, as far as possible." (Exhibit F). Further, as the MOD, Dr. [redacted] was "charged with the proper care of all patients in the medical center during other than regular duty hours" and was required to "examine each patient prior to admission." (Exhibit G). Since Dr. [redacted] did not diagnose, evaluate, examine, or stabilize the patient, the reprimand was warranted.

AFGE contends that, since the Sheridan VAMC does not have the necessary tools to perform x-rays, Dr. [redacted] acted properly in referring the patient and his driver to another emergency room equipped to diagnose and treat the injury. Further, AFGE asserts that if Dr. [redacted] had examined the patient, the treatment would have been delayed by several hours since the VAMC did not have the capacity to provide emergency care for the injury.

The determination of whether this matter is excluded from collective bargaining under 38 U.S.C. § 7422(b) is based on the issues raised in the grievance, and whether those issues concern or arise out of professional conduct and competence, i.e., direct patient care. *VA Tennessee Valley Healthcare System/AFGE* (Jan. 23, 2008) (holding that a medical center director's decision to discipline a nurse for his interactions with a patient "involves issues concerning or arising out of professional conduct and competence").

The substantive issue raised in the union's grievance is whether Dr. [redacted] actions in referring a patient without seeing or examining him deviated from acceptable standards of care. The union's assertions to the contrary as to what constitutes reasonable care in assessing emergency situations does not alter the patient care nature of the incident. The VAMC issued the reprimand as a result of Dr. [redacted] patient care decisions. Although AFGE and management disagree on whether

Dr. [redacted] actions met the standard of care, the events arose out of patient care and clinical competence. Therefore, the challenge to the sufficiency of the reprimand concerns or arises out of professional conduct or competence within the meaning of 38 U.S.C. § 7422(b).

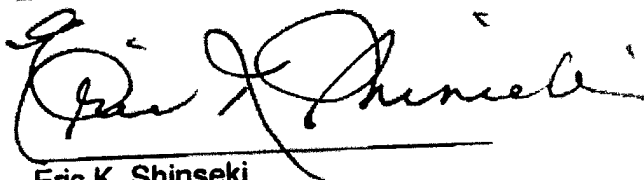
The union also raises additional challenges to the reprimand, including the time that elapsed between the incident and the issuance of the reprimand. The union further asserts that the form and content of the reprimand are vague and disagrees with management's reasons for taking the action as summarized in the *Douglas* factors. However, these challenges to the reprimand do not change the basis for the reprimand – patient care – or the fact that it arises out of professional conduct or competence within the meaning of § 7422(b). The claim of untimeliness in the instant case evidences only a disagreement as to how quickly the discipline should have been issued. The claim of vagueness, while couched in procedural terms as a “due process” issue, also amounts to a challenge to management's decision to issue the reprimand for failure to meet a reasonable standard of patient care and, therefore, involves matters exempted under 38 U.S.C. § 7422(b).

Accordingly, the issues raised in the grievance challenging Dr. [redacted] reprimand concern or arise out of professional conduct and competence and are excluded from collective bargaining pursuant to 38 U.S.C. § 7422(b).

RECOMMENDED DECISION

The grievance challenging the validity of the reprimand of Dr. [redacted], along with the requested remedies, raise issues which concern or arise out of professional conduct or competence within the meaning of 38 U.S.C. § 7422(b) and are thereby excluded from collective bargaining.

APPROVED/DISAPPROVED



Eric K. Shinseki
Secretary

8/16/2013
Date