

**Title 38 Decision Paper
Department of Veterans Affairs (VA)
Southern Arizona VA Health Care System (SAVAHCS)**

FACTS

On November 12, 2011, _____, a registered nurse at the Southern Arizona VA Healthcare System (SAVAHCS) in Tucson, Arizona, administered a blood transfusion to a patient without first obtaining the patient's consent. Despite this, _____ signed three different pages of the patient's blood transfusion record form verifying that there was in fact a valid informed consent. (Exhibit A). Medical center policies require providers to obtain patient consent prior to administering transfusions. (Exhibit B). On the same day, _____ was observed sleeping during her duty time in violation of medical center policy requiring employees to report for duty "ready, willing, and able to perform work assignments." (Exhibit C).

On November 18, 2011, SAVAHCS management conducted a fact-finding investigation during which _____ admitted that she sometimes "dozes off at the nurses' station" and that she failed to obtain consent from the patient before administering the blood transfusion in question. (Exhibit D). In another fact-finding investigation conducted on December 21, 2011, _____ acknowledged that she signed-off on the blood transfusion consent forms even though she had not received consent. (Exhibit E). Based on the results of these investigations, management issued _____ a proposed 10-day suspension on January 23, 2012. (Exhibit F).

_____ responded to the proposed suspension orally and in writing. She acknowledged that she had given the patient blood without verifying that he had signed a blood consent, but that she did this because she was focused on ensuring that the patient received the correct blood type and did not suffer an adverse transfusion reaction. She further noted that she assumed that consent had been obtained upon the patient's admission to the hospital. In her reply, _____ again admitted that she occasionally finds herself "dozing off at the desk" at the nurses' station. (Exhibit G). On February 15, 2012, management issued _____ a decision to suspend her for 10 days. (Exhibit H). Management issued _____ an amended decision letter on March 30, 2012. This letter did not alter the decision on the suspension but updated _____ appeal rights to include her right to file a grievance. (Exhibit I). The decision sustained both charges but imposed only a "paper suspension," meaning that it would be maintained in her personnel file and could be considered in the future for progressive discipline, but the employee would not suffer any loss of pay.

AFGE Local 495 filed a level 1 and 2 grievance on _____ behalf on May 3, 2012. (Exhibit J). On May 8, 2012, management responded to the grievance indicating that the matters being grieved were excluded from the

negotiated grievance procedure because they related to issues arising out of professional conduct and competence (patient care). (Exhibit K). On May 14, 2012, the union filed a level 3 grievance. (Exhibit L). Management responded on May 17, 2012, again indicating that the matter was excluded from the negotiated grievance procedure because it involved professional conduct and competence. (Exhibit M). On June 16, 2012, the union notified management that it was invoking arbitration. (Exhibit N).

By memorandum dated July 2, 2012, the SAVAHCS Director requested a secretarial determination that the grievance was excluded from collective bargaining by 38 United States Code (U.S.C.) §7422(b), asserting again that at least one of the sustained charges involved a matter of professional conduct and competence. (Exhibit O). The union also requested a determination, contending that the issues did not fall under §7422(b) and [redacted] should be permitted to exercise her rights through the grievance process. (Exhibit P).

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).

ISSUE

Whether the union's grievance challenging the suspension issued to registered nurse [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 collective bargaining and any grievance procedures provided under a collective bargaining agreement, 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 term "professional conduct or competence" means direct patient care or clinical competence. 38 U.S.C. §7422(c).

In its grievance, the union challenges management's decision to issue Ms. Thomsen a suspension. The union contends that the suspension was excessive and did not take into consideration mitigating circumstances such as [redacted] health issues or her prior work performance. The union contends that since the matters referenced in the suspension involve performance, they are not related to [redacted] professional conduct or competence and hence should not be excluded from the grievance process by §7422(b).

The Medical Center Memorandum on blood transfusions provides in pertinent part: "Prior to obtaining blood components from the Blood Bank, the individual responsible for administering the blood components must confirm: . . . The patient has given consent by signing an iMed Consent for Transfusion of Blood or Blood Products..." (Exhibit B). Failure to verify the existence of a blood transfusion consent prior to the administration of blood is a violation of treatment protocol and applicable medical center procedures and directly impacts patient care. VA Tennessee Valley Healthcare System/AFGE (January 23, 2008,) (holding that 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)." That the patient fortuitously suffered no ill consequence from [redacted] actions does not mean that the matter did not relate to direct patient care. Accordingly, this matter is excluded from collective bargaining pursuant to 38 U.S.C. § 7422(b).

Likewise, [redacted] practice of sleeping on duty also involves direct patient care. Omaha/AFGE (July 7, 1992,) (holding that employees are expected to be alert and awake when on duty status in order to meet patient care requirements and that the grievance filed on a nurse's written counseling for sleeping on duty "concerns or arises out of professional conduct under Title 38)." Employees are expected to report for duty ready and able to work in order to meet patient care requirements. (Exhibit C). Sleeping while on duty compromises the care of patients. Therefore, the section of the grievance challenging the charge of sleeping on duty is also excluded from collective bargaining pursuant to 38 U.S.C. § 7422(b).

RECOMMENDED DECISION

The grievance challenging the validity of the suspension of [redacted] concerns professional conduct or competence within the meaning of 38 U.S.C. § 7422(b), and is thereby excluded from collective bargaining.

APPROVED / DISAPPROVED



Eric K. Shinseki
Secretary

8/29/2013

Date