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

FACTS

On January 19, 2011, Clinical Nurse Manager (CNM) of Ward 3-East at SAVAHCS in Tucson, Arizona, submitted a "Notice of Proposed Admonishment" to for incidents with a patient on December 22 and 30, 2010. (Attachment A) The charges are as follows:

a. Disregard of Patient's Needs: On December 22, 2010, beginning at 5:14 p.m. through 6:24 p.m., a Veteran patient under care sat in his own involuntary bowel movement (BM) for approximately 1 hour and 10 minutes. entered the patient's room at 5:30 p.m. when the patient informed that he had a BM and was sitting in it. told the patient she would be "right back." At 6:00 p.m., the patient's son arrived and found his father still sitting in his BM and his call light was still unanswered. At 6:04 p.m., re-entered the patient's room, but still did not attend to the patient. At 6:09 p.m., the charge nurse heard the son's complaint, found at her computer, and informed of the patient's need. At 6:17 p.m., re-entered the patient's room a third time but still did not attend to the patient. At 6:19 p.m., re-entered the patient's room for a fourth time, but again did not attend to the patient. At 6:24 p.m., entered the patient's room for a fifth time, but the charge nurse was cleaning the patient for . The call light was turned off at 6:26 p.m. – 1 hour and 12 minutes after being initiated. (Attachment B)

b. Rude and Disrespectful Demeanor Toward a Patient and Family Member: On December 22, 2010, was approached by the patient's son who attempted to speak to about the delays in caring for his father. responded, "I don't have time for this," and then walked away from the patient's son. The patient and the family formally complained to the CNM. actions violated SAVAHCS Memorandum 00-08-38, *Patients Rights and Responsibilities* (Attachment C), which requires employees to treat patients and their family members with dignity, compassion, and respect and to resolve issues in a positive manner.

c. Lack of Candor During Fact-Finding Meeting: On December 30, 2010, during a fact-finding meeting, was asked, "When the family notified you that the patient had stooled in bed, what did you do?" stated she was informed by another nurse while in another patient's room and that when she arrived, the charge nurse was cleaning up the patient and stated she did not need help. This answer, however, conflicted with patient testimony that he personally informed as early as 5:14 p.m. answer also conflicted with charge nurse testimony that she personally informed about the patient while was at her

computer in the hallway. Additionally, a review of the COMLinx-NCM report of ward activities revealed that between 5:14 p.m., when the call light was initiated, and 6:26 p.m., when the call light was turned off, had entered the patient's room on four occasions prior to the charge nurse cleaning the patient. (Attachment B)

d. Failure to Follow Required Hand-Off Communication Procedures: During shift-change on December 22, 2010, at approximately 8:30 p.m., failed to provide required hand-off communication with the on-coming night nurses. Instead of engaging in an interactive communication process that allows the opportunity for questions and answers between the giver and receiver of patient information, handed the on-coming nurses a hand-written note and then said that she was not dealing with this anymore. departed without giving the night nurses an opportunity to ask questions about patient care. Such actions violated SAVAHCS Memorandum 07-10-48, Hand-Off Communication, paragraph 2. (Attachment D)

On February 28, 2011, provided a written reply to the notice of proposed admonishment. (Attachment E) In her response, argued that she used her "best nursing judgment and clinical skills to prioritize for all patients under [her] care while assisting other RNs and patients."

On March 2, 2011, submitted a "Notice of Decision–Admonishment" to (Attachment F)

On April 4, 2011, the American Federation of Government Employees (AFGE) Local 495 filed a level one grievance under the negotiated grievance procedure. (Attachment G) The union alleged that 's rights as an employee were violated citing the Master Agreement between VA and AFGE (2011), Article 17, Section 1, paragraphs a, d, e, and h. The union also alleged that SAVAHCS was in violation of Article 14, Sections 1, 5, and 6. Furthermore, the union alleged the charges against did not include an assessment of the requirement that a professional RN assess and plan for acuity, staffing, and prioritization of care. Additionally, the union stated that other professional staff did not intervene and resolve the patient's needs. Finally, the union alleged that the charge of rude behavior is based solely on a perception and not the facts surrounding the episode.

On April 15, 2011, management, the union, and met to discuss the level one grievance and an extension for management's response was granted by AFGE until May 9, 2011. According to management's May 6, 2011, written response to the grievance (Attachment H), during the April 15, 2011, grievance meeting the union raised concerns over the architectural layout of the ward, the lack of nursing aides working on December 22, 2010, and the fact that the union believed the patient was confused and probably suffering from Intensive Care Unit (ICU) psychosis which resulted in the disagreement with en and the patient's family. The union also argued in the meeting that was attending to a higher-priority patient and not near the patient described in the admonishment. Furthermore, the union argued the COMlinx system is

unreliable and should not be used to track a person's whereabouts, the patient's son attempted to openly complain in a public setting, other nurses could have attended to the patient, and that a written report at shift change is an acceptable practice. For relief, the union asked that the admonishment be rescinded with prejudice. (Attachment H)

In management's May 6, 2011, response to the level one grievance, management stated that regardless of the patient's room location, was aware of the patient's need. Management further stated that there were two nursing assistants assigned to that ward at the time of the incident. Nonetheless, management argued, the presence or absence of nursing assistants does not excuse 's lack of action regarding a patient. The patient's medical record indicates no notion of confusion or ICU psychosis but that the patient was noted by as being pleasant, cooperative, appropriate, alert, and oriented. A review of s higher-priority patient's medical record revealed no other patient condition that day during s shift that would prevent from caring for the patient who was left to sit in his own bowel movement. The COMlinx system was used to confirm reports that had been in the patient's room several times while the patient was still sitting in his own bowel movement.[1] Management further asserted the patient's son did not attempt a public discussion with , but it became one when inserted herself into a conversation the patient's son was having with another nurse. As to other staff caring for the patient, management stated it is not normal for other nurses to care for patients not assigned to them when the patient's nurse, , is available (it should be noted the charge nurse aided this patient). Finally, management stated a written report for patient hand-off is not a normal practice but is only acceptable during those occasions when a nurse must depart early or when a nurse will arrive late. On December 22, 2010, did not have to leave early nor was a nurse arriving late such that needed to provide a written report.

On May 20, 2011, after receiving an extension from management, the union filed a level two grievance. (Attachment I)

On June 16, 2011, management denied relief for the level two grievance. (Attachment J) Management determined and the union offered no compelling argument, nor any evidence that would support the claim that was treated unfairly when she received the admonishment. Management found no evidence to support claim that leadership was lacking on the shift in question, that the lack of nursing assistants resulted in patient not being cared for, and that other nurses' experience levels contributed to patient being neglected. Management also noted that offered no evidence, other than her own assertion, to show she was too busy with another patient to attend to the patient who was sitting in his own bowel movement.

[1] Based on language in Attachment N, management claimed the COMlinx system is not a system used by management to track nurse activity, but was used in this case when informed the supervisor that she should check the system to see her whereabouts on the evening of December 22, 2010.

On July 6, 2011, after being granted an extension by management, the union filed a level three grievance. (Attachment K)

On August 3, 2011, management, the union and met to discuss the level three grievance. During that meeting, the union argued that the admonishment given to did not take into account an assessment of the requirement that a nurse assess and plan for acuity, staffing, and prioritization of care and asserted that other staff on the floor could have addressed the concerns of the patient because Ms. Boen was busy taking care of a higher acuity patient.

On August 9, 2011, management denied relief for the level three grievance. (Attachment L) Management based its denial on the fact that no new evidence was offered in defense of actions which resulted in her admonishment. Additionally, in management's response, the union was advised that this matter is considered to be a matter of professional conduct or competence (i.e., direct patient care and clinical competence).

On September 1, 2011, AFGE filed a Notice to Invoke Arbitration. (Attachment M) A hearing has not been scheduled.

On September 26, 2011, the Director of the SAVAHCS submitted a request for a decision by the Secretary of Veterans Affairs that the admonishment of is covered by the professional conduct and competence (i.e., direct patient care and clinical competence) exclusion of 38 U.S.C. § 7422 and is therefore outside the scope of collective bargaining and not subject to arbitration. (Attachment N)

On December 14, 2011, the union submitted its position paper to the request for a 38 U.S.C. § 7422 decision. (Attachment O) The union claimed the agency forfeited its right to request a 38 United States Code (U.S.C.) §7422 decision because they were obligated to make a declaration no later than the level three grievance response. The union further claimed that "did not disregard patient needs, was not rude or disrespectful, did not exhibit a lack of candor, nor did she fail to do an acceptable hand off." Furthermore, the union claimed that exercised her nursing judgment to provide the best possible care under the circumstances and the issues related to admonishment are not conduct or competency related.

AUTHORITY

The Secretary has the final authority in VA 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).

ISSUE

Whether the Union's request for arbitration on the admonishment of , RN, involves matters or questions that concern professional conduct or competence (i.e., direct patient care and clinical competence) 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 (b), granted collective bargaining rights to Title 38 employees in accordance with Title 5 provisions but 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, and employee compensation as determined by the Secretary.

In the instant case, the Director of the SAVAHCS states that the admonishment of is covered under the professional conduct and competence (i.e., direct patient care or clinical competence) exclusion of 38 U.S.C. § 7422 and is therefore non-grievable and non-arbitrable. Based on the evidence provided by the parties, we agree with management's assertion and conclude that the admonishment of is non-grievable and non-arbitrable pursuant to 38 U.S.C. § 7422.

Management asserts disregarded a patient's need by not responding to a patient's request to change his involuntary bowel movement for approximately 1 hour and 10 minutes. Management further found exhibited "rude and disrespectful demeanor toward a patient and family member" when the patient's son approached to discuss his father's care. Management found such behavior to be in direct violation the facility's *Patients Rights and Responsibilities* Memorandum. (Attachment C)

Memorandum 00-08-38, *Patients Rights and Responsibilities*, paragraph 2, states in part that, "Patients treated at the SAVAHCS have fundamental rights that protect their personal dignity and safeguard their cultural, psychosocial, and spiritual values, as well as patient responsibilities that allows the SAVAHCS to offer timely and safe care...All individuals will be sensitive and responsive to the needs of patients, family members, or significant others and will resolve issues in a positive and timely manner." The *Patients Rights and Responsibilities* document given to patients states in section I, "[y]ou will be treated with dignity, compassion, and respect as an individual."

In the instant case, did not provide information to show she had properly taken care of the patient and appropriately responded to the patient's family member's concerns. We therefore agree that the issue related to the charges of "disregard to patient's needs" and "rude and disrespectful demeanor toward a patient and family

member" are covered by the professional conduct and competence (i.e., direct patient care and clinical competence) exclusion of 38 U.S.C. § 7422 and is therefore non-grievable and non-arbitrable.

Furthermore, management found failed to follow required hand-off communication procedures based on SAVAHCS Memorandum 07-10-48, *Hand-Off Communication*, paragraphs 2 and 3.

Memorandum 07-10-48, paragraph 2, *Policy*, states in part:
"Patient-care providers use a standardized approach: Situation, Background, Assessment, and Recommendation (SBAR) technique to communicate patient-specific information when transferring care of a patient between or among providers."

Paragraph 3, *Definition*, states in part:
"Hand-off communication: An interactive communication process that allows the opportunity for questions and answers between the giver and receiver of patient information."

In the instant case, acknowledged that she did not communicate orally when handing-off her patients, but did so in writing. did not provide information or documentation to prove the written hand-off was acceptable in this instance. We therefore agree that the charge of "Failure to Follow Required Hand-Off Communication Procedures" is covered by the professional conduct and competence (i.e., direct patient care and clinical competence) exclusion of 38 U.S.C. § 7422 and is therefore non-grievable and non-arbitrable.

In the union's December 2011 opposition to the request for a 38 U.S.C. §7422 decision, the union asserts the agency forfeited its right to request a 38 U.S.C. §7422 decision because the union believes management was obligated to make a declaration no later than the level three grievance response. That statement is incorrect. The parties are encouraged to discuss matters that could potentially be covered by the 38 U.S.C. § 7422 exclusions and management should inform the union as soon as management believes an issue is excluded under 38 U.S.C. § 7422; however, 38 U.S.C. § 7422 (b)'s jurisdictional bar may be raised at any point in the processing of a grievance. *VAMC Asheville, NC and AFGE Local* 446, 57 FLRA No. 137. 57 FLRA 681 (2002), aff'd 475 F. 3d 341.

RECOMMENDED DECISION

The Union's request for arbitration regarding the admonishment of RN involves a matter or question that concerns professional conduct or competence (i.e., direct patient care and clinical competence) within the meaning of 38 U.S.C. § 7422(b) and is therefore non-grievable and non-arbitrable.

APPROVED/DISAPPROVED

Eric K. Shinseki
Secretary

6/20/2013
Date