



DEPARTMENT OF VETERANS AFFAIRS
UNDER SECRETARY FOR HEALTH
WASHINGTON DC 20420

JAN 24 2006

Acting Director
VA Gulf Coast Health Care System
400 Veterans Avenue
Biloxi, MS 39506

Dear

I am responding to the issue raised in your October 25, 2005 memorandum concerning an unfair labor practice charge (ULP) filed by the American Federation of Government Employees (AFGE) local union. The ULP concerns the reassignment of RN, to non-patient care duties in April 2005.

Pursuant to delegated authority, I have determined on the basis of the enclosed decision paper that the issue presented is a matter concerning or arising out of professional conduct or competence and is thus exempted from collective bargaining by 38 USC § 7422(b).

Please provide this decision to your Regional Counsel and Union President as soon as possible.

Sincerely yours,

A handwritten signature in black ink, appearing to read "Jonathan B. Perlin", is written over the typed name.

Jonathan B. Perlin, MD, PhD, MSHA, FACP
Under Secretary for Health

Enclosure

Title 38 Decision Paper
VA Gulf Coast HCS
VA – 06-03

FACTS:

This matter arises out of a decision by management at the VA Gulf Coast Health Care System (VAGCHCS) to reassign [redacted] RN, from a position involving direct or indirect patient care duties to a position involving administrative duties.

Prior to December 12, 2004, [redacted] worked as a Registered Nurse in VAGCHCS' Intensive Care Unit (ICU). On December 11, 2004, allegations arose with respect to the care that [redacted] had provided during her evening shift. To investigate these allegations, management convened an Administrative Board of Investigation (ABI). At the same time, management suspended [redacted] from direct patient care duties (Attachment 1) and detailed her to an indirect patient care assignment as a Telemetry Monitor (Attachment 2) pending the results of the ABI's investigation.

The initial allegations with respect to [redacted]'s performance of her patient care duties involved failure to document the care provided to at least four (4) ICU patients. In late March 2005, the ABI uncovered additional information that suggested that [redacted] may have also abused one of her patients. (See Attachments 6 and 7.) As a result of this information and in the interest of patient safety, management determined that [redacted] should not perform patient care duties, either directly or indirectly. On March 29, 2005, VAGCHS management notified [redacted] that she would be reassigned to non-patient care duties within Nursing Service effective April 11, 2005 (Attachment 3).¹

On April 5, 2005, AFGE Local 1045 filed an Unfair Labor Practice Charge (ULP) with the Federal Labor Relations Authority (FLRA), alleging that VAGCHS violated 5 USC §§ 7116 (a) 1, 2, 5, & 8 by reassigning [redacted] to a non-patient care area and changing her work schedule (Attachment 4). On July 29, 2005, the FLRA notified VAGCHCS management that AFGE had withdrawn its allegations in regards to subsections 2 and 8 of 5 USC § 7116(a) (Attachment 5).²

¹ Facility management gave [redacted] advance notice of this reassignment because it also effected a change in her duty hours from 12 hour night shifts to 8 hour day shifts.

² The allegation that VAGCHS management violated 5 U.S.C. § 7116(a)(1) by reassigning [redacted] seems to stem from the fact that [redacted] person had previously filed several grievances under the negotiated grievance procedure. (See Attachment 12.)

On June 2, 2005, management proposed removal based on her failure to follow proper policies and procedures in documenting patient care; failure or delay in carrying out physicians' orders; negligence in the performance of her duties, resulting in risk to veteran patients; and patient abuse (Attachment 6). She was discharged based on those charges effective August 12, 2005 (Attachment 7).

By email dated August 4, 2005, FLRA notified VAGCHS management that the Regional Director had made a determination to issue a Complaint on the ULP charge (Attachment 8). More specifically, FLRA stated that the complaint "will allege that the Agency violated Section 7116(a) (1) and (5) of the [Federal Service Labor-Management Relations] Statute by unilaterally reassigning [redacted] on or about April 11, 2005, without notice or bargaining over the reassignment to the extent required by the statute."³

On October 25, 2005, the Acting Director of the VAGCHCS submitted a request to the Under Secretary for Health (USH) for a determination that the issues raised by the ULP are exempted from collective bargaining as matters or questions concerning or arising out of professional conduct or competence (direct patient care) pursuant to 38 U.S.C. §7422(b). (Attachment 10.) Management notified the AFGE local union of its 38 U.S.C. §7422 decision request and of its opportunity to provide input into the matter to the USH (Attachment 11). As of January 11, 2006, no such input had been received.

PROCEDURAL HISTORY

The Secretary has delegated to the USH the final authority in the VA to decide whether a matter or question concerns or arises out of professional conduct or competence (direct patient care), peer review or employee compensation within the meaning of 38 U.S.C. 7422(b).

ISSUE

Whether the local AFGE union's ULP concerning the April 11, 2005 reassignment of [redacted] to non patient care duties involves issues concerning or arising out of professional conduct or 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, granted collective bargaining rights to Title 38 employees in accordance with Title 5 provisions, but specifically excluded from the collective bargaining

³ The FLRA issued a Complaint in this matter on January 9, 2005, and set the matter for hearing March 21, 2006. (Attachment 9.)

process matters or questions concerning or arising out of professional conduct or competence (i.e., direct patient care and clinical competence), peer review or employee compensation as determined by the USH.

Pursuant to 38 U.S.C. §7421(a), the Secretary has prescribed regulations contained in VA Directive/Handbook 5005, Part IV, Chapter 3, Sections A & B to govern assignments, reassignments and details of Title 38 medical professionals, including registered nurses. Section A, paragraph 4(b) of Handbook 5005, Part IV, Chapter 3, provides that when Title 38 assignments and reassignments are made, primary consideration will be given to the efficient and effective accomplishment of the VA mission. Patient care is thus the primary consideration in assigning or reassigning Title 38 personnel at health care facilities such as the VAGCHCS.

In the instant case, management reassigned Ms. _____ to non patient care duties to protect and safeguard the safety and well being of patients after an investigation indicated that she had abused a patient within her care. This decision was patently driven by patient care considerations.

In several prior cases involving the reassignment of Title 38 medical center professionals, the USH has determined that were such reassignments are necessary to provide uncompromised patient care, they involve professional conduct and competence within the meaning of 38 U.S.C. §7422. Two such determinations include Poplar Bluff VAMC (February 12, 2003) and VAMC Canandaigua (December 15, 2005.).

RECOMMENDED DECISION

That the issues raised by the reassignment of _____ RN, to non-patient care duties concern or arise out of professional conduct or competence within the meaning of 38 U.S.C. 7422(b).

APPROVED _____ ✓

DISAPPROVED _____

Date: 1-23-06



Jonathan B. Perlin, M.D., PhD, MSHA
Under Secretary for Health