

**Title 38 Decision Paper – VA Black Hills Health Care System
VA 04-05**

FACTS:

In April 2003, management at the VA Black Hills Health Care System (VA BHHCS) directed the reassignment of _____ RN from the position of Staff Nurse on 148-P, Mental Health Service (MHS) to the position of Staff Nurse on NHCU-G, Geriatric, Extended Care and Rehabilitation Service. Management determined to reassign Ms. _____ out of the MHS after Dr. _____ Medical Director for the MHS, and Dr. _____ a staff psychiatrist, expressed serious concerns about Ms. _____ attitude toward and skills relevant to the new cognitive behavioral therapy (CBT) program on the open side of 148-P.

More specifically, Doctors _____ and _____ and the MHS Nurse Manager, _____ RN, observed that Ms. _____ displayed resistance to the change from an old-fashioned psychiatric care delivery system, which limited nurses' interaction with patients to isolated observation (often from the distance of the nurses' station and/or while patients were restrained or heavily medicated) and dispensing medication, to a more modern "Living Skills in Action" (LSIA) system in which nurses play an active role in providing cognitive behavioral therapy to a less secluded and less restrained patient population. This resistance – which took the form of negative statements at LSIA planning meetings, keeping her distance rather than interacting with patients, and disrespectful behavior toward her supervisors -- called into question Ms. _____ own clinical competence to provide care under the new system, and also fostered resistance to the change in the other nurses on 148-P, who viewed Ms. _____ as an informal leader.

In giving Ms. _____ written notice of her reassignment, VA BHHCS' then-Director, _____ stated:

Observations from [Drs. _____ and _____] indicate that you appear to lack the therapy skills required for this new care delivery model. That, in and of itself, is not an obstacle that could not be overcome with the training that will be made available to all 148-P staff. It is your rigid attitude, resistance to change, and open negativity toward the new program that have led me to decide that your reassignment is necessary. Because of your years of service as a psychiatric nurse at this medical center, you are viewed as an "informal leader" by many of the nurses on the Unit. Your lack of a positive attitude and your continued vocal resistance to this change are negatively influencing the staff and impeding progress toward a change that Mental Health management and I strongly support.

Therefore, in the best interest of patient care, I must initiate action to transfer you from 148-P.

Attachment A.

On April 11, 2003, AFGE Local 2342 filed a third step grievance against the Medical Center Director, Mr. _____, relating to Ms. _____'s reassignment.

Attachment B. In the grievance – which was filed on the union's behalf, not on behalf of Ms. _____ -- the union alleged that management had failed to give the union "reasonable advance notice prior to [the] change in working conditions [i.e. the reassignment], with sufficient information for the purpose of exercising its full rights to bargain." The union further alleged that management's conduct violated several enumerated provisions of the AFGE Master Agreement.¹ As a remedy, the union demanded that management "cease using 38 USC 7422 as an excuse to retaliate against RNs for speaking up about patient and staff safety. Management will notify AFGE in writing with sufficient time to bargain appropriate arrangements for any bargaining unit employees affected by changes in working conditions. Management Directed Reassignments will not be used as punishment, harassment or reprisal."

Mr. _____ responded to the union's grievance in writing on May 19, 2003.

Attachment D. In its response, Mr. _____ noted that "your grievance states that AFGE was not given reasonable advance notice prior to this change in working conditions to exercise its full rights to bargain. Your concern would be well placed were this not a clinical decision affecting a Title 38 employee. However, in this case, we are dealing with a Registered Nurse, who is a Title 38 employee, and a decision to reassign that was based strictly on direct patient care issues."

On July 17, 2003, VA BHHCS management submitted a memorandum to the Under Secretary for Health (USH) requesting that Ms. Larson's directed reassignment be determined non-grievable pursuant to 38 USC § 7422(b). This memorandum provided information regarding the clinical basis for the reassignment, but did not address the grievance's allegation that management was required to, but did not, notify the union before reassigning Ms. _____.

Attachment E.

On July 29, 2003, the union sent a memorandum to the USH disputing that the grievance fell within the "professional conduct or competence" exception of 38 USC § 7422(b). *Attachment F.* More specifically, the union's memorandum

¹ The Union alleged violations of Article 46, § 4; Article 12, § 10; and Article 20, § 3 of the AFGE Master Agreement. Article 46, § 4 provides that "[t]he Department shall provide reasonable advance notice to the appropriate Union official(s) prior to changing conditions of employment of bargaining unit employees ... with sufficient information to the Union for the purpose of exercising its full rights to bargain." Article 12, § 10 provides, in pertinent part, that "[r]eassignments shall not be used as punishment, harassment, or reprisal." Article 20, § 3 concerns tours of duty and scheduling. Copies of the relevant Master Agreement provisions are attached hereto as *Attachment C*

argued that [redacted] was made the scapegoat for why Mental Health Service was unable to proceed with its Cognitive Behavioral Therapy (CBT) Program,” and asserted that the difficulties management encountered in implementing the CBT program “stem not from the [nursing] staff and their professional conduct and competence, but from the lack of competence and professional conduct on the part of Mental Health Management.”

Subsequent to the submission of the July 17 and July 29 memoranda, a staff member from VA Central Office’s Office of Labor Management Relations (LMR) contacted management to inquire as to the status of the grievance arbitration. Upon learning that the union had not invoked arbitration, LMR advised that the 38 USC 7422 decision request was not yet ripe. LMR further advised that the grievance, as drafted, did not challenge the substance of Ms. [redacted] reassignment, but instead simply complained of management’s alleged failure to notify the union prior to directing that reassignment; for that reason, a 38 USC 7422 determination regarding the grievability of the grievance would not address the substance of the reassignment.

On August 28, 2003, the union amended its grievance to grieve the directed reassignment on Ms. [redacted] behalf. *Attachment G*. More specifically, the union alleged that Ms. [redacted] Management Directed Reassignment was done in retaliation for Ms. [redacted] speaking out about patient and staff safety issues related to a proposed new program.” As a remedy, in addition to the remedy requested in the initial grievance, the union requested that “Mental Health Management and the HRM Officer ... apologize to Ms. [redacted] in a meeting of her peers, for questioning her professional conduct and competency” and further that “[redacted] be given the choice of remaining on the unit where she currently works or returning to 148P.”

On or about November 4, 2003, management and the union jointly invoked arbitration. *Attachment H*. The parties received a list of arbitrators on or about November 20, 2003, *Attachment I*, but informally agreed to hold off on selecting an arbitrator pending the USH’s determination on the matter’s grievability under 38 USC 7422(b).

On January 21, 2004, management renewed its request to the USH for a 38 USC 7422 decision, again stating that the concerns raised by Dr. [redacted] and Dr. [redacted] led BHHCS management to direct Ms. [redacted] reassignment on the basis of her professional conduct or competence. *Attachment J*. The union responded to management’s renewed request on January 29, 2004, again averring that the reassignment was not made on the basis of Ms. [redacted] professional conduct or competence but rather as “retaliation for raising concerns about the safety of patients and employees.” *Attachment K*.

On March 4, 2004, the Deputy Under Secretary for Health for Operations and Management sent a letter to BHHCS management requesting further information relating to the 38 USC 7422 decision request. *Attachment L*. On April 13, 2004, management responded to the March 4, 2004 letter, providing, among other

things additional statements from Dr. _____, Ms. _____, and the local union president. *Attachment M.*

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, clinical competence), peer review, or employee compensation within the meaning of 38 U.S.C. § 7422(b).

ISSUE:

Whether the reassignment of _____ RN, 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 process matters or questions concerning or arising out of professional conduct or competence, peer review, and 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 and B) to implement assignments, reassignments and details. Section A, paragraph 4 (b) of Handbook 5005, Part IV, Chapter 3 provides that in exercising the authorities covered in the handbook, primary consideration will be given to the efficient and effective accomplishment of the VA mission. The assignment and placement of Title 38 health care personnel is fundamental to the patient care mission of VA health care facilities such as VA BHHCS.

In the instant case, management determined to reassign Ms. _____ based on concerns raised by the Medical Director for the Mental Health Service and a staff psychiatrist regarding Ms. _____ inexperience with and resistance to the new CBT model of care delivery. In management's view, Ms. Larson's lack of relevant clinical experience might have been overcome with training, but her open negativity toward the new program influenced others on the nursing staff and impeded progress toward implementation of a care delivery change that the clinicians had determined necessary for the efficient and effective accomplishment of VA BHHCS's patient care mission.

In several prior cases involving reassignments of Title 38 medical professionals, the USH has determined that where such reassignments are based on issues of clinical competence or are necessary to provide uncompromised patient care,

they involve professional conduct or competence within the meaning of 38 U.S.C. § 7422. These prior determinations include: Memphis, TN VAMC (October 28, 2003); Poplar Bluff, MO VAMC (February 12, 2003); Biloxi, MS VAMC (January 23, 2001); White River Junction, VT VAMC (July 7, 1994); and Hampton, VA VAMC (July 20, 1992).

A determination that 38 USC 7422 bars a grievance over VA BHHCS management's decision to reassign Ms. [redacted] based on her professional conduct or competence does not, of course, address the other issues raised by the union's grievance and management's response thereto. Where management proposes a change in working conditions for one or more bargaining unit employees, it may have an obligation under the Federal Labor-Management Relations Statute (the Statute) to notify the union and to bargain over any proposals the union may offer that are not precluded by the Statute or by 38 USC 7422. While the substantive issue of Ms. [redacted] reassignment was non-negotiable under 38 USC 7422(b), the reassignment did constitute a change in working conditions; for that reason, management should have provided the union notice and an opportunity to present negotiable procedural proposals.² Those aspects of the grievance that address only management's failure to comply with its notice and bargaining obligations – and request remedies other than reversal of the reassignment – do not involve professional conduct or competence and are not barred by 38 USC 7422.³

The union has also asserted that VA BHHCS management's claimed professional conduct or competence-based reasons for reassigning Ms. Larson were merely "an excuse to retaliate against RNs for speaking up about patient and staff safety." In its July 29, 2003 and January 29, 2004 memoranda to the USH, the union contends that where retaliation is alleged, the 38 USC 7422 exclusions should not apply. The union's argument in this regard is misplaced. Management has provided evidence, in the form of the written statements of Drs. [redacted] and [redacted], as well as Ms. [redacted] supervisor, [redacted], to demonstrate that Ms. [redacted] inexperience with and attitude toward the CBT care delivery system negatively impacted patient care. That negative impact on patient care constituted a valid professional conduct or competence-based reason for management's decision to reassign Ms. [redacted] and 38 USC 7422 bars third-party review of such decision through the negotiated grievance procedure. The fact that the union may not grieve this issue does not, however, leave Ms. [redacted] without recourse. Where an employee believes management has used professional conduct or competence as a pretext to mask an unlawful personnel action, the employee may – and should – challenge the action through other available procedures, but not through a union grievance.

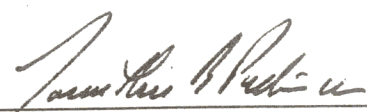
² Had the union responded to notice of Ms. [redacted] reassignment by proposing, for example, that she receive training relevant to her new assignment, or that an annual leave request approved by her MHS supervisor carry over to her new assignment, such proposals would not have been barred by 38 USC 7422.

RECOMMENDED DECISION:

That the union grievance relating to the decision of VA BHHCS to reassign
RN involves issues concerning or arising out of professional conduct or
competence within the meaning of 38 U.S.C. § 7422(b).

APPROVED ✓

DISAPPROVED _____


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

5-11-04
Date