



DEPARTMENT OF VETERANS AFFAIRS
UNDER SECRETARY FOR HEALTH
WASHINGTON DC 20420

JUN 03 2008

Dennis H. Smith
Director, VA Maryland Health Care System
10 North Greene Street
Baltimore, MD 21201

Edward Elder
Counsel, NAGE
601 North Fairfax Street, Suite 125
Alexandria, VA 22314

Dear Mr. Smith and Mr. Elder:

I am responding to the issue raised in your memorandum of January 25, 2008, and *Statement Supporting Arbitrability* of December 21, 2007, respectively, concerning the grievance and request for arbitration filed by NAGE Local R3-19 regarding the one-day suspension of _____ RN.

Pursuant to delegated authority, I have decided on the basis of the enclosed decision paper that there is insufficient information to make a determination that the issue presented by this grievance is a matter concerning or arising out of the professional conduct or competence within the meaning of 38 U.S.C. § 7422(b). As a result, the issue presented by this grievance is within the scope of collective bargaining.

Sincerely yours,

A handwritten signature in cursive script that reads "Michael J. Kussman".

Michael J. Kussman, MD, MS, MACP
Under Secretary for Health

Enclosure

Title 38 Decision Paper
VAMC Baltimore, Maryland
VA 08-0

FACTS

, a registered nurse (RN) on Psychiatric Unit 6A at the Baltimore VA Medical Center (VAMC), was suspended for one day for "careless workmanship", due to an incident that occurred during the evening and early morning of September 7 and 8, 2006. NAGE Local R3-19 filed a grievance on behalf of Mr. alleging a number of violations of the VA/NAGE Master Agreement. The grievance was denied and the union moved to invoke arbitration. Thereafter, management at the Baltimore VAMC requested that the issue be declared non-grievable pursuant to 38 U.S.C. § 7422.

Mr. 's suspension and the union's subsequent grievance stem from an incident that allegedly took place on September 8, 2006. Based on an investigation conducted by an Administrative Board of Investigation (ABI)¹, a veteran arrived at the Washington, DC VAMC on the afternoon of September 7, 2006, experiencing "suicidal ideation to overdose on multiple medications." (Attachment A) No beds were available at the DC VAMC and the patient was transferred to the Baltimore VAMC. However, it is not clear who accepted the patient transfer at the Baltimore VAMC. Ms. , PA, POD testified that she did not have access to the patient's electronic medical record and declined acceptance of the patient until records could be reviewed and a signed Maryland Voluntary Admission form could be obtained. The patient arrived by ambulance at approximately 12:15 a.m. on September 8, 2006. Mr. was the charge nurse at Psychiatric Unit 6A at the Baltimore VAMC at the time the patient was transferred. It is alleged that Administrative Officer of the Day (AOD), spoke with Mr. on the day of the incident and Mr. instructed Ms. to send the patient back to the DC VAMC because the procedures for transferring a patient were not followed.

The ABI made the following relevant conclusions:

Uncoordinated and inadequate communication between administrative staff and clinical staff within each facility and between facilities resulted in the incident listed above. The absence of official documentation of the communication between facilities is a systems failure that permitted this error to occur. There is no evidence of patient abuse or dereliction of duties. It is the opinion of this board that further action by the

¹ ABI 2006-08 was conducted on October 23, 2006.

Administrative Officers of the Day or the 6A Charge Nurses could have prevented this error in judgment. This error resulted in neglect of the patient but no harm.

...

The Attending Physician has the responsibility to determine that the patient is appropriate for transfer based on the patient's medical condition and eligibility status. This information, in addition to a signed Voluntary Admission Form was requested by the Baltimore VAMC Psychiatry Officer of the Day (POD) from the Washington VAMC referring physician in order to make a decision regarding acceptance or denial. This information was not provided prior to the patient's arrival.

...

Had the AOD consulted a physician or provider with authority to accept a patient transfer this patient would likely not have been sent back to the Washington VAMC. The patient reportedly arrived with documents. These were apparently not presented to or reviewed by the Baltimore POD [Psychiatry Officer of the Day] or the Baltimore ECS [Emergency Care Service] attending physician.

Evidence suggests that the 6A charge nurses did have some knowledge of a second pending patient transfer from Washington VAMC. It was wrong of them to suggest that the patient be sent back to Washington VAMC. The 6A charge nurses did not refer or suggest that the AOD contact the Baltimore VAMC POD with the information that the patient had arrived. (Attachment A, pages 3-4)

The ABI made the following recommendations:

- a. VAMHCS Policy Memorandum 512-11/ECOS-18: Policy for Interfacility Transfers should be reviewed by all Clinical and Medical Staff involved in the patient transfer process.
- b. VAMHCS Policy Memorandum 512-11/ECOS-18: Policy for Interfacility Transfers should be revised...
- c. AOD's and 6A change nurses assigned to the evening shift of September 7, 2006 and the night shift of September 8, 2006 should receive disciplinary action. Although the evening shift staff was officially off duty it is clear that they had knowledge of the situation, were present upon the arrival of the patient and did not intervene on behalf of the patient to prevent the transport of the patient back to Washington VAMC. (Attachment A, pages 4-5)

On January 3, 2007, Mr. _____ received a proposed one-day suspension for the charge of "careless workmanship". (Attachment B) As part of the suspension

letter, the Associate Chief Nurse, Mental Health, explained that Mr. [redacted] s response contributed to a patient not being admitted to Unit 6A and being returned to the Washington, DC VAMC. Mr. [redacted] was specifically charged with carelessly performing his duties on September 8, 2006, resulting in delay in patient care.

On February 8, 2007, Mr. [redacted] received the final decision to suspend him for one day, February 23, 2007. (Attachment C) As part of the decision letter, the Director of the VAMC informed Mr. [redacted] that “[s]ince the reason stated in the notice of proposed suspension does not involve a question of professional conduct or competence, you may appeal this action under the VA grievance procedure or the negotiated grievance procedure, but not both.” (Attachment C, ¶ 3)

On March 1, 2007, NAGE R3-19 filed a Step III grievance on behalf of Mr. [redacted]. (Attachment D) NAGE alleged that management violated Article 40, Investigations, Section 1, A (1) and Section 2, B, C, and D, and Article 41, Discipline and Adverse Actions, Section 1, A, B (2), Section 4 and Section 5, A and B of the VAMNAGE Master Agreement; and Article XIII, Section 2, B and C, and Article XXIII, Section 1 of the Local Agreement. The union further stated that the disciplinary action taken was excessive and requested such action be reconsidered and rescinded.

On March 28, 2007, the Deputy Network Director submitted a response to the union denying the grievance. (Attachment E) As part of the response, management justified its position by stating that Mr. [redacted] had confirmed during their meeting that “...beds were available; he made no attempt to contact the POD as the shift change occurred, made no effort to contact the Nursing Supervisor or a higher-level authority, and was aware of the VAMHCS policy on transfer processing.” (Attachment E, ¶ 2b.)

On April 10, 2007, the union invoked arbitration. (Attachment F) The arbitration was scheduled for December 17, 2007.²

On December 6, 2007, management informed the union that it would request a determination from the Under Secretary for Health (USH) on whether the above-referenced issue was excluded from collective bargaining under 38 U.S.C. § 7422.³ The arbitration was held in abeyance pending a decision from the USH.⁴

On December 21, 2007, Edward Elder, Counsel for NAGE, submitted a Statement Supporting Arbitrability, on behalf of Mr. [redacted]. (Attachment G) The union argued that management waived arbitrability issues because it failed to

² This information comes from the union's *Statement Supporting Arbitrability* and management's request for a decision from the USH. (Attachments G and H)

³ *id.*

⁴ *id.*

raise 38 U.S.C. § 7422 in its grievance response. (Attachment G, § III.A, ¶ 1) The union further argued that “[b]y failing to raise a 38 U.S.C. § 7422 determination as required by [Articles 44⁵ and 45⁶ of] the Master Agreement, the Agency has pursued a tactic that defeats the purpose of the grievance procedure. The Agency should not be rewarded by having the argument be heard now.” (Attachment G, § III.A, ¶ 3)

In addition, the union argued that the above-referenced incident does not raise an issue of patient care or clinical competence. Specifically, the union argued the issue is one of administrative procedure and communication between hospitals. The union explained that Mr. “never interacted with the patient..., provided no medical care to the patient, nor (sic) was it possible for him to either provide care, or make any recommendations for patient care.” (Attachment G, § III.B., ¶ 1).

In its final argument, the union explained that clinical competence has never been an issue since the ABI determined that “...Mr. performed his duties in accordance with VA policy memoranda.” (Attachment G, § III.B., ¶ 2)

On January 25, 2008, the Director of the VA Maryland Health Care System, submitted a request for a determination from the USH that the issues raised were excluded from bargaining under 38 U.S.C. § 7422. (Attachment H) Management refuted the union’s argument about waiver of arbitrability by arguing that “the Agency can raise 38 USC 7422 at any time, even after an arbitrator enters and award on the same issue. See AFGE, AFL-CIO, Local 446 v. Nicholson, 473 F. 3d 341 (2007).” (Attachment H, ¶ 6) In addition, management made the following argument:

While Mr. ’s actions did not cause any direct injury to the patient, the patient’s treatment was delayed as a result of those actions and could have resulted in harm to the patient. His carelessness in failing to investigate the situation before ordering that the patient be returned to the Washington D.C. VAMC, which could have resulted in harm to the patient, amounts to patient abuse. (Attachment H, ¶7)

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

⁵ Article 44, section 6, Step 3 states the following:

“Grievance/Arbitrability issues will be resolved as the threshold issues of arbitration, but must have been raised no later than the time the Step 3 decision is given.”

⁶ Article 45, section 9 states the following:

“Grievability/Arbitrability issues will be resolved as threshold issues of arbitration, but must have been raised no later than the time the Step 3 decision is given.”

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

1. Whether the grievance over the one-day suspension of _____, RN is a matter or question that concerns or arises out of employee professional conduct or competence within the meaning of 38 U.S.C. § 7422(b).
2. Whether the Agency waived its right to raise 38 U.S.C. § 7422 by not raising the issue before the 3rd Step Grievance decision.

DISCUSSION

The Department of Veterans Affairs Labor Relations Act of 1991, codified at 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 (i.e., direct patient care and clinical competence), peer review or employee compensation as determined by the USH.

38 U.S.C. § 7422(c) the term "professional conduct or competence" as "direct patient care" or "clinical competence". VA Directive 5021, Appendix A, Section C, Paragraph 1 states that "[a] question of professional conduct or competence involves direct patient care and/or clinical competence. The term clinical competence include issues of professional judgment."

In the instant case, the union argues that the incident that occurred on the early morning of September 8, 2006, pertains to administrative procedures and communications between hospitals and has nothing to do with patient care or clinical competence. The evidence presented to the AIB suggests that physician assistants and attending physicians are responsible for assessing whether a patient is appropriate for transfer, based on the patient's medical condition and eligibility status. It does not appear that Mr. _____'s professional duties and responsibilities encompass the acceptance or rejection of the patient in this case. Moreover, Mr. _____ did not interact with the patient or provide the patient with medical care. Therefore, there is insufficient evidence to support a finding that Mr. _____'s suspension concerned or arose out his professional conduct or competence under 38 U.S.C. § 7422.

In addition, the Union argues that in accordance with Articles 44 and 45 of the VA/NAGE Master Agreement, management has waived its right to invoke the protections of 38 U.S.C. § 7422 by not raising such an argument before the Step III grievance decision was given. The Union's argument is in error since the 38

USC § 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.

The union further alleges that management violated Articles, 40 and 41 of the NAGE/VA Master Agreement and Articles XIII and XXIII of the Local Agreement. (Attachment D) The only argument made by the union to support its position was a statement that the evidence and comments from the ABI do not fully support the charge. Absent evidence that supports the union's argument, we will not entertain such allegations.

TITLE 38 RIGHTS TO APPEAL ADVERSE ACTIONS

Title 38 statutory authorities and related VA regulations lay out several distinct avenues through which Title 38 employees may appeal adverse actions. Under 38 USC §§ 7461(b)(1) and 7462, and VA Directive 5021, Appendix A, Section C, a major adverse action which arise out of, or which include, a question of professional conduct or competence is appealable only to a Disciplinary Appeals Board. Under 38 USC § 7461(b)(2)(A), the agency grievance procedure set forth in VA Directive 5021, Appendix A, Section B is the sole avenue of appeal for an action other than a major adverse action involving professional conduct or competence or where the employee is not a member of a collective bargaining unit. Under 38 USC § 7461(b)(2)(B), an employee who is a member of a collective bargaining unit may appeal an action that does not involve professional conduct or competence through either the agency grievance procedure or a negotiated grievance procedure.

In the instant case, the union filed a Step III grievance and argued that the disciplinary action taken against Mr. [redacted] was excessive. (Attachment D). The union requested as a remedy that the action be reconsidered and the suspension be rescinded. In the Step III grievance response, management informed the union that the issue did not involve a question of professional conduct or competence and the action could therefore be appealed under the VA grievance procedure or the negotiated grievance procedure, but not both. (Attachment C) On December 6, 2007, management changed its position and informed the union it believed that the issue involved professional conduct or competence. As noted above, there is insufficient information to support a finding that Mr. [redacted]'s one-day suspension involved his professional conduct or competence under 38 U.S.C. § 7422(b). Therefore, Mr. [redacted] does not have the right to appeal his one-day suspension to a Disciplinary Appeals Board but may continue to appeal the suspension through the negotiated grievance procedure.

RECOMMENDED DECISION

That there is insufficient information to make a determination that NAGE's grievance over the one-day suspension of _____, RN is a matter or question that concerns or arises out of professional conduct or competence within the meaning of 38 U.S.C. § 7422(b).

APPROVED ✓

DISAPPROVED _____

That the Agency did not waive its right to raise 38 U.S.C. § 7422 by not raising the issue before the 3rd Step Grievance decision.

APPROVED ✓

DISAPPROVED _____

Michael J. Kussman

Michael J. Kussman, MD, MS, MACP
Under Secretary for Health