



DEPARTMENT OF VETERANS AFFAIRS  
UNDER SECRETARY FOR HEALTH  
WASHINGTON DC 20420

SEP 02 2008

Steven P. Kleinglass  
Director  
VA Medical Center  
One Veterans Drive  
Minneapolis, MN 55417

Kevin M. Grile  
Assistant General Counsel  
AFGE, AFL-CIO  
300 South Ashland Ave., Ste. 302  
Chicago, Illinois 60607

Dear Mr. Kleinglass and Mr. Grile:

I am responding to the issue raised in your memoranda of February 20, 2008, and March 12, 2008, concerning the Unfair Labor Practice charges filed by AFGE Local 3669 alleging reprisal for testimony provided by \_\_\_\_\_ RN and \_\_\_\_\_ RN on behalf of the union on December 12, 2007.

Pursuant to delegated authority, I have decided on the basis of the enclosed decision paper that the issue presented by the Unfair Labor Practices is a matter or question arising out of professional conduct or competence within the meaning of 38 U.S.C. § 7422(b).

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 Minneapolis, MN**  
**VA 08-0\_**

On December 12, 2008, an arbitration hearing was held concerning the termination of \_\_\_\_\_, a Respiratory Therapist at the Minneapolis VA Medical Center (MN VAMC). During the arbitration, two nurses, \_\_\_\_\_ (Staff Nurse and Steward of AFGE Local 3669) and \_\_\_\_\_ (Staff Nurse in Medical Intensive Care Unit and Steward of AFGE Local 3669), allegedly made statements about the clinical competence of a fellow nurse, \_\_\_\_\_, who also testified during the arbitration. It is alleged that Ms. \_\_\_\_\_ stated that Ms. \_\_\_\_\_ was lazy and not a good nurse, or words to that effect. (Attachment A, ¶ 2) Ms. \_\_\_\_\_ allegedly stated that she believed Ms. \_\_\_\_\_ practiced sub-standard care. (Attachment A, ¶ 3)

The staff attorney representing the MN VAMC during the arbitration, \_\_\_\_\_ contacted the Nurse Executive, \_\_\_\_\_, to make her aware of the statements allegedly made by Ms. \_\_\_\_\_ and Ms. \_\_\_\_\_, and to suggest that an investigation be conducted because a nurse practicing below the standards puts patients at risk.<sup>1</sup> MN VAMC management alleges that Ms. \_\_\_\_\_ later expressed concern about the failure of Ms. \_\_\_\_\_ and Ms. \_\_\_\_\_ to notify management about Ms. \_\_\_\_\_ allegedly substandard nursing practices.<sup>2</sup> More specifically, MN VAMC management alleges that Ms. \_\_\_\_\_ believed that Ms. \_\_\_\_\_ and Ms. \_\_\_\_\_ may have violated VHA Handbook 1100.18, *Reporting and Responding to State Licensing Boards*, by failing to promptly notify VAMC management that another nurse was providing below substandard care. Ms. \_\_\_\_\_ allegedly began an investigation by interviewing Ms. \_\_\_\_\_ and her supervisor.<sup>3</sup>

On December 18, 2007, Ms. \_\_\_\_\_ sent separate letters to Ms. \_\_\_\_\_ and Ms. \_\_\_\_\_ informing them of their reporting obligations and asking to discuss the allegations made during the arbitration. (Attachments B and C) Specifically, Ms. \_\_\_\_\_ letters referred to the reporting requirements of the Minnesota Board of Nursing<sup>4</sup> and VHA Handbook 1100.18, *Reporting and Responding to State Licensing Boards*. The letters further stated that “[i]f you have knowledge that a RN is incompetent, unprofessional, unethical or unable to practice safely, you have an obligation to report that information to me or a manager so that procedures outlined in VHA Handbook 1100.18...may be initiated.” (Attachments

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<sup>1</sup> This information is provided in paragraphs 2 and 3 of Attachment I.

<sup>2</sup> Id.

<sup>3</sup> Attachment I at ¶ 3.

<sup>4</sup> Minn. Stat. § 148.263(3) (2007) provides: “A person licensed by a health-related licensing board as defined in section 214.01, subdivision 2, shall report to the board personal knowledge of any conduct the person reasonably believes constitutes grounds for disciplinary action under sections 148.171 to 148.285 by any nurse including conduct indicating that the nurse may be incompetent, may have engaged in unprofessional or unethical conduct, or may be mentally or physically unable to engage safely in the practice of professional, advanced practice registered, or practical nursing.”



B and C, ¶ 2b.) The letter further advised that “failure to report practice as noted above is grounds for disciplinary action.”(Attachments B and C, ¶ 3)

On January 10, 2008, AFGE Local 3669 (Union and/or AFGE) filed an Unfair Labor Practice (ULP) charge (CH-CA-08-0214) against the agency with the Federal Labor Relations Authority (FLRA). (Attachment D) The union alleged that management’s demands to meet with Ms. to discuss the testimony provided under oath during arbitration and the possibility of disciplinary action are “reprisal for Ms. ’s testimony on behalf of the Union and is an attempt to intimidate all employees.”

On January 11, 2008, the union filed a second ULP charge (CH-CA-08-0213) on behalf of Ms. , with the same allegations made in the ULP filed on behalf of Ms. . (Attachment E)

On January 30, 2008, MN VAMC management submitted to FLRA its response to the ULP charges filed by AFGE. (Attachment F) MN VAMC management argued that it had a duty to investigate the allegations of poor clinical practice against a nurse for patient safety reasons. Management specifically alleged that the letters sent to Ms. and Ms. had a two-fold purpose: “1) to notify the employees that the agency had been advised of and (sic) an inquiry made of their statements given during their testimony and the requirements of the agency and the employee in this situation; [and] 2) to inform the employees that time would be scheduled to meet with them on their specific allegations, so that the agency may take action should it be warranted.” Id. at ¶ 4.

On February 19, 2008, Ms. sent additional letters to Ms. and Ms. , as a follow-up to discussions held on February 1 and February 6, 2008, respectively, with each nurse. (Attachments G and H) In these letters, Ms. stated that she had “completed a review of reported allegations that a RN’s practice is below standard...[and] there were no substantive findings.” Id. at ¶ 2.

On February 20, 2008, the Director of the MN VAMC submitted a request for a determination that the issues raised in the union’s ULPs were covered by 38 U.S.C. § 7422 and were therefore excluded from collective bargaining. (Attachment I) In that request, MN VAMC management explained that the purpose of the language in the December 18, 2007, letter sent by Ms referring to the possibility of disciplinary action, was so Ms. and Ms. would know of their right to bring union representation to the meetings, per Article 13, section 10 of the VA/AFGE Master Agreement. Id. at ¶ 4. Management further explained that no disciplinary action was ever proposed against either Ms. or Ms. . Id at ¶ 5. In addition, management provided the following argument to justify the need for the investigation referred to in Ms. letters to Ms. and Ms.

Under 38 USC § 5711 (a)(5), Department personnel shall have the power to make investigations and examine witnesses upon any matter within the



jurisdiction of the Department. The clinical practice of a nurse was brought into question by the testimony of two nurses during the subject arbitration. Management responded to the allegations by undertaking an investigation (See VHA Handbook 1100.18).

We believe an investigation into the clinical practice of a nurse, stemming from allegations of fellow nurses of substandard practice, is clearly a matter involving professional conduct or competence as defined by 38 USC § 7422.

Id. at ¶¶ 6 and 7. Further, the MN VAMC request included a declaration by \_\_\_\_\_, in which he stated that he “heard Ms. \_\_\_\_\_ state that a fellow nurse was lazy and otherwise not a good nurse or words to that effect” and Ms. \_\_\_\_\_ state that the same nurse “practices below the standard of care.” (Attachment A, ¶ 2 and 3)

On March 12, 2008, the union submitted a letter to the USH arguing against a determination that the issues raised in the ULPs are outside the scope of collective bargaining under 38 U.S.C. § 7422. (Attachment J) The union alleged, in part, that the letters Ms. \_\_\_\_\_ sent to Ms. \_\_\_\_\_ and Ms. \_\_\_\_\_ were issued in reprisal for the latter nurses’ testimony in support of the union, and that the issuance of such letters constituted “interference with, and restraint and coercion of, the rights of the unit employees to form, join or assist AFGE Local 3669.” (Attachment J, page 1)

In addition, the union included a declaration by \_\_\_\_\_, an attorney who represented AFGE Local 3669 during the arbitration where the alleged clinical competence allegations were made against Ms. \_\_\_\_\_ (Attachment K) In his declaration, Mr. \_\_\_\_\_ stated that neither Ms. \_\_\_\_\_ nor Ms. \_\_\_\_\_ testified at the arbitration that the competency of Ms. \_\_\_\_\_ was substandard; or that she failed to provide the requisite care for any patient; or that she was a ‘bad nurse’. Id. at ¶ 3. He further declared that he believes Ms. \_\_\_\_\_ and Ms. \_\_\_\_\_ testimony “has been inaccurately twisted in the VAMC Minneapolis’ presentation to the Under Secretary for Health.” Id.

#### 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 (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 ULPs filed by the union alleging reprisal for testimony provided by two nurses on behalf of the union are matters or questions concerning or arising



out of professional conduct or competence within the meaning of 38 U.S.C. § 7422(b).

DECISION:

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.

Per VHA Handbook 1100.18, on which the VAMC primarily relies to support its assertion that Ms. [redacted] and Ms. [redacted] had an obligation to report a fellow nurse's incompetent, unprofessional, or unethical practice, the Department of Veterans Affairs, Veterans Health Administration (VHA), has an obligation to report any VHA professional "whose behavior or clinical practice so substantially failed to meet generally-accepted standards of clinical practice as to raise reasonable concern for the safety of patients."<sup>5</sup> The facility Director is responsible for facility initiated reporting.<sup>6</sup> The policy does not require individual employees to report such information to their State Licensing Boards or to report any questionable behavior or questionable clinical practice, by another nurse, directly to their supervisors or anyone else in their facility. In addition, the VAMC has not identified any other policy that imposes such an obligation. However, the Minnesota Board of Nursing reporting obligations do require individual nurses to report personal knowledge of any conduct by another nurse that might be evidence of incompetence, unprofessional and/or unethical conduct, or evidence that another nurse is unable to practice safely.<sup>7</sup>

VHA Handbook 1100.18 states that management has a right and an obligation to investigate allegations of the clinical incompetence of a nurse. Mr. [redacted] communication to Ms. [redacted] – that he heard Ms. [redacted] state that Ms. [redacted] was "lazy" and "not a good nurse or words to that effect" and Ms. [redacted] state that Ms. [redacted] "practices below the standard of care" – and a resulting investigation concerning Ms. [redacted] clinical practice clearly relate to Ms. [redacted] professional competence within the meaning of 38 U.S.C. § 7422 (b).

The subject ULPs concern management's requests to meet with Ms. [redacted] and Ms. [redacted] concerning their alleged statements about Ms. [redacted] professional competence and management's notice that "failure to report practice as noted above [the incompetence, unprofessional or unethical conduct, or mental or physical incapacity of a nurse] is grounds for discipline." The union alleges that management threatened Ms. [redacted] and Ms. [redacted] with discipline in retaliation for

<sup>5</sup> VHA Handbook 1100.18, Paragraph 5a

<sup>6</sup> VHA Handbook 1100.18, Paragraph 8

<sup>7</sup> See Footnote 4

their testimony on behalf of the union.<sup>8</sup> Attachments B and C state that Ms. [redacted] would like "to discuss the specific allegations" Ms. [redacted] and Ms. [redacted] made during the arbitration and Attachments G and H state that Ms. [redacted] had "completed a review of reported allegations that a RN's practice is below standard...[and] there were no substantive findings."<sup>9</sup> Thus, the evidence provided by the parties does not indicate that Ms. [redacted] and Ms. [redacted] interviews did not arise out of management's investigation concerning Ms. [redacted] professional competence.

If the union's ULPs were considered to be independent from the investigation from which they flowed, the FLRA would be able to substantively review the VAMC's actions with regard to Ms. [redacted] and Ms. [redacted]. However, 38 U.S.C. § 7422 (d) specifically provides that "an issue of whether a matter or question concerns or arises out of...professional conduct or competence...shall be decided by the Secretary and is not itself subject to collective bargaining and may not be reviewed by another agency." Therefore, the investigation related to the professional competence of Ms. [redacted] is not subject to FLRA review. Similarly, an inquiry as to whether clinical staff had knowledge of shortcomings regarding either the quality of direct patient care being provided or the clinical competence of another provider, is a matter concerning or arising out of professional conduct or competence. See generally, AFGE, AFL-CIO, Local 3306 v. FLRA, 2 F.3d 6 (1993). For the above-stated reasons, the subject ULPs concern or arise out of professional conduct or competence within the meaning of 38 U.S.C. § 7422 (b)

RECOMMENDED DECISION

That the Unfair Labor Practice charges filed by AFGE Local 3669 alleging reprisal for testimony provided by [redacted] RN and [redacted] RN on behalf of the union on December 12, 2007, arise out of professional conduct or competence within the meaning of 38 U.S.C. § 7422(b).

APPROVED   X  

DISAPPROVED \_\_\_\_\_

*Michael J. Kussman*

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

*9/2/08*

Date

<sup>8</sup> 5 U.S.C. § 7116(b)(3) prohibits reprisal for union activities.

<sup>9</sup> It does not appear that Ms. [redacted] or Ms. [redacted] were subjected to any adverse or disciplinary action as a result of Ms. [redacted] investigation.