



DEPARTMENT OF VETERANS AFFAIRS
Veterans Health Administration
Washington DC 20420

JAN 23 2008

In Reply Refer To:

Juan A. Morales, RN
Interim System Director
VA Tennessee Valley Healthcare System
1310-24th Avenue South
Nashville, TN 37212

Marsha Joy Steward
AFGE Local 2400
1310 24th Avenue South
Nashville, TN 37212-2637

Dear Mr. Morales and Ms. Joy:

I am responding to the issue raised in your memoranda of April 24, 2007, and May 18, 2007, concerning a grievance filed by AFGE Local 2400 regarding the five day suspension issued to Mr.

Pursuant to delegated authority, I have decided 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 thus exempted from collective bargaining by 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

cc: Deputy Under Secretary for Health for Operations and Management (10N)

Title 38 Decision Paper
VA Tennessee Valley Healthcare System
VA 07-05

FACTS:

 RN, was assigned to the Surgical Intensive Care Unit (SICU) in the Tennessee Valley VA Medical Center (VAMC) in December 2006. Mr. M was a patient in the SICU from December 2006 to January 2007. While Mr. M was in the SICU, Mr. was his nurse.

On January 8, 2007, RN, completed a Report of Adverse Event/Special Incident about an event between Mr. and patient M. (Attachment 1) Ms reported that she spoke with Mr. M who told her that has helped me out a lot, but I could see where he might piss some people off. (Attachment 1) I was talking to my son earlier and he snatched the phone right out of my hand and proceeded to talk to him. My son was upset about it but I had to tell him it was okay." (Attachment 1) Ms. indicated that the patient did not seem upset with Mr. and believed that Mr. had helped him a great deal. (Attachment 1) Mr. M was concerned that his son, Rocco, was upset by the alleged incident. (Attachment 1)

On January 9, 2007, Mr. spoke with Mr. M for approximately 30 minutes concerning possible verbal abuse committed by Mr. (Attachment 2) Based on the Report of Contact (ROC) executed by Mr. Mr. M said "I'm upset over the manner which he spoke to me", referring to one incident in which he was speaking to his son and having difficulty holding the phone. (Attachment 2) Mr. M stated that Mr. "snatched the phone out of his hands then he said don't you know how to hold it and what's the matter with you." (Attachment 2) Mr. went on to say "you're being lazy and you're not going to get away with that" and "what do I have to do, are you going to listen." (Attachment 2) Mr. M indicated that his son overheard the conversation and became upset. (Attachment 2) Later in the conversation, Mr. M said that at the Nashville VA "professionalism is excellent and the nurses' only interest is getting you back on your feet." (Attachment 2) He also said that "everyone has been superb with me" and that he was very "impressed" with his stay there. (Attachment 2)

A second ROC was completed on January 9, 2007, by Ms. Nurse Practitioner, CT and RN, Nurse Manager – SICU, who met with Mr. M, Mr. M's son, Rocco, and his daughter-in-law, Vicki, concerning the allegations of verbal abuse by Mr. (Attachment 3) Rocco relayed that while he was on the phone with his father, he overheard Mr say "what the fuck is wrong with you? Pick up the God Damn phone and talk with your son!" (Attachment 3) Mr. M said that he needed help, to which Mr. responded "I'm not gonna God Damn help you. Pick up the phone. You were just joking and telling stories." (Attachment 3)

On another occasion, Mr. M reportedly told his son that he was ready and would be coming home the next day. (Attachment 3) Rocco wanted to speak with his father's nurse to confirm. (Attachment 3) According to Rocco, Mr. got on the phone and, in an argumentative tone, said, "What's the problem? Didn't he just tell you? Why are you questioning me? I told you and he told you." (Attachment 3) Mr. then allegedly said, "I'm really gonna miss your old man. Your old man and I decided when he gets better we're either going to get a drink or get in a fist fight. So if he comes home with a gash over his left eye you know it's from me. That's where I like to hit people. I've been in a lot of bar fights. I'm a good bar fighter". (Attachment 3) Rocco asked if his father was coming home and Mr. did not respond and the phone was disconnected. (Attachment 3) When Rocco called back and asked the secretary to speak to his father, he was routed to Mr. (Attachment 3) Rocco told Mr. he would like to speak to his father, to which Mr. reportedly responded, "No, you need to speak to me." (Attachment 3) On another occasion, Mr. answered the phone ABC Metals which caused Mr. M's sister to believe she had misdialed. (Attachment 3) Mr. he was just joking before Mr. M's sister hung up. (Attachment 3)

The family indicated that Mr. was unprofessional, condescending, confrontational, and intimidating. (Attachment 3) They also indicated that since they did not live nearby, they could not be with Mr. M as much as they wanted to and believed that the treatment by Mr. added to their stress and Mr. M's stress at a time when recovery was the utmost priority. (Attachment 3)

On January 10, 2007, Ms. contacted Mr. and instructed him to come to the VAMC and file a Report of Contact (ROC) about his interaction with Mr. M. (Attachment 4) Mr. came in on his day off to prepare the ROC. (Attachment 4) In the ROC, Mr. indicated that he provided excellent care to Mr. M. but was very direct with him concerning mobility issues. (Attachment 5) Mr. indicated that his directness could be considered to be harsh. (Attachment 5) He claimed that his goal was to assist Mr. M. in reaching his goals of independence and mobility. (Attachment 5) He indicated that his relationship with Mr. M. was close and that they were constantly telling war stories and making fun of each other. (Attachment 5) Mr. admitted that he was short and to the point in a kidding manner. (Attachment 5) He also admitted that he had made reference to a scuffle with Mr. M. and asked if Rocco would mind if his father came home with a nick above his eye. (Attachment 5) Mr. stated that he had not "used the G D and or F word when dealing with this patient." (Attachment 5) By his own admission, the way in which Mr. spoke to Mr. M was intended to assist him in his recovery. (Attachment 5) Mr. M's interdisciplinary education record shows that he was to be instructed in mobility training. (Attachment 6)

On February 7, 2007, Mr. was issued a proposed 30-day suspension based on his interactions with Mr. M. and his family. (Attachment 7) The three charges were: (1) Abuse (verbal) of a patient and/or beneficiaries; (2)

Disrespectful conduct, use of insulting abusive or obscene language to a patient; and, (3) Conduct prejudicial to the Department of Veterans Affairs. Mr. [redacted] was notified that he had a right to reply either verbally and/or in writing until close of business on February 21, 2007.

On February 8, 2007, Mr. [redacted] submitted a written response in which he denied swearing at Mr. M. (Attachment 4) Mr. [redacted] referred to January 10, 2007, when he was asked to report to the VAMC to complete a ROC on the alleged incident. (Attachment 4) He reported that during his time at the VAMC, he was not advised of his right to a union representative. (Attachment 4) Mr. [redacted] also presented an oral response to the Director, which he ultimately made on March 14, 2007.

On March 26, 2007, a Decision Letter was issued to Mr. [redacted] (Attachment 8) In the Decision Letter, the VAMC Director sustained all three charges but found that although Mr. [redacted] used insulting language with a patient, he did not use obscene language. (Attachment 8) Even though the Director determined that the penalty of 30 days was reasonable and appropriate, he conditionally mitigated the penalty to a five day suspension and held the remaining 25 days in abeyance for a period of one (1) year, pending completion of a Behavioral Modification program, review of policies on Patient/Resident Rights and Responsibilities and Prevention of Abuse of Patients, and completion of three therapy sessions. (Attachment 8)

The Decision Letter noted that the actions of Mr. [redacted] involved professional conduct or competence. (Attachment 8) The Decision Letter further informed Mr. [redacted] of his right to file a written appeal to the Disciplinary Appeals Board (DAB or Board) and request a formal hearing before the Board. (Attachment 8)

On March 29, 2007, the American Federation of Government Employees, Local 2400 (Union) filed a Step 3 grievance on behalf of Mr. [redacted] (Attachment 9) The Union stated in the grievance that "[i]n order for patients to be able to care for themselves they have to be motivated to become independent. Sometimes motivation means repeating instructions to a patient more than once." (Attachment 9) The Union stated that Mr. [redacted] was using a technique to motivate patients to become more independent. (Attachment 9) The Union alleged that Mr. [redacted] due process rights were violated during the entire investigation process as he was called to the VAMC on his day off to address this issue without any representation. (Attachment 9) In addition, the Union alleged that he was not advised of his rights at the time he was questioned or when he was asked to respond to the incident. (Attachment 9) Further, the Union alleged that Mr. [redacted] was neither offered nor received compensation for the two hours of off duty time he used to come in and address the alleged abuse charge, in violation of Article 46 Sec. 3 of the Master Agreement. (Attachment 9)

The Union claimed that Mr. [redacted] was detailed to the pharmacy for two and a half months without the written notice required by the Master Agreement. (Attachment 9) In addition, the Union alleged that "Mr. [redacted] had been detailed

to the Pharmacy for over a month before the Union was notified of this action which is a violation of the Master Agreement. Mr. [redacted] did not receive a written notice of Proposed Suspension until February 8, 2007, which was almost a month after he was detailed to the Pharmacy. Mr. [redacted] has loss (sic) a total of six hundred sixty dollars from January 9, 2007 until March 14, 2007. Article 46, Sec. 4 of the Master Agreement was violated." (Attachment 9) As a remedy, the Union requested that the 30-day suspension "be reduced to a Reprimand or Admonishment that will be removed from [Mr. [redacted]] file in 6-12 months"; that the three (3) EAP sessions Mr. [redacted] has "already successfully completed stand and the additional Behavior Program be rescinded"; that Mr. [redacted] be allowed to return to SICU on the 7 a.m. to 7 p.m. shift; that Mr. [redacted] be made whole, reimbursing him "for all lost shift, differential, and holiday pay from the date he was detailed to the Pharmacy to reinstatement to SICU"; and that Mr. [redacted] be paid for the 2 hours he used to attend a meeting to draft a ROC during his time off, including any special pay and any pay differential he used during his off time to complete the report his supervisor "instructed him to do and any other time he is entitled to." (Attachment 9)

On April 12, 2007, Management denied the grievance, stating that the issue was specifically excluded from the negotiated grievance procedure because it was a matter or question concerning or arising out of professional conduct or competence, in accordance with 38 U.S.C § 7422. (Attachment 10)

On April 24, 2007, the Union requested that the Under Secretary for Health (USH) determine that the issues giving rise to Mr. [redacted] discipline did not arise from professional conduct or competence and requesting the same remedies requested in the Step 3 grievance. (Attachment 11) This letter appears to be both a request for a hearing before the Board and a request for a 7422 decision by the USH. The purported request for a hearing before the Board was sent on April 25, 2007, and was not received until April 26, 2007. (Attachment 12) In the letter, the Union did not assert any reason why the decision that Mr. [redacted] had verbally abused a patient was not a matter of professional conduct or competence.

On May 18, 2007, the Director of the VA Tennessee Valley Healthcare System submitted a request for a determination from the USH on whether the suspension of Mr. [redacted] is outside the scope of collective bargaining, and, therefore, not grievable, pursuant to the exclusions in 38 U.S.C. § 7422(b). (Attachment 13) In its request, the facility noted that "in prior cases involving verbal patient abuse and disrespectful conduct toward a patient, the Under Secretary for Health has determined that such actions involve professional conduct or competence...." (Attachment 13)

PROCEDURAL HISTORY

The Secretary has delegated to the USH the final authority in 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).

ISSUES:

1. Whether the suspension of Mr. _____ RN, involves issues concerning or arising out of professional conduct or competence (direct patient care) within the meaning of 38 U.S.C. § 7422(b).
2. Whether the detail and resulting pay loss of Mr. _____ RN, involves issues concerning or arising out of professional conduct or competence (direct patient care) and the establishment, determination, or adjustment of employee compensation within the meaning of 38 U.S.C. § 7422(b).

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/or clinical competence), peer review or employee compensation as determined by the USH.

The Union's request for a 38 U.S.C. § 7422 decision addresses whether Mr. _____ engaged in patient abuse and asserts that Mr. _____ did not treat Mr. M in an abusive manner. (Attachment 11) The Union and Mr. _____ maintain that Mr. _____ was trying to motivate Mr. M and help him meet his treatment goals of mobility and independence, noting that Mr. M even recognized that Mr. _____ had helped him. (Attachment 11) However, the merits of the patient abuse charge are not relevant to whether a charge of patient abuse involves professional conduct or competence.

This decision addresses the question of whether patient abuse is a matter of professional conduct or competence. Other than stating that neither Management nor Mr. M had an issue with Mr. _____ professional competence, the Union offered no reasons to support its assertion that patient abuse is not a matter of professional conduct or competence. (Attachment 9) In its response to the Union's request for a 38 U.S.C. § 7422 decision, Management asserts that the USH previously determined that verbal patient abuse involves issues of professional conduct or competence within the meaning of 38 U.S.C. § 7422(b). In Portland/AFGE, April 13, 1993, the USH determined that a nurse's verbally abusive treatment of a patient raised a matter or question concerning or arising out of professional conduct or competence. The USH stated the following: "The dealings between patient care employees, especially nurses, require behavior that is not abusive in any manner. This high standard of conduct is required by both management and professional organizations and is recognized in the community. Patient abuse both verbal and physical by its very nature concerns both professional conduct and competence." As a full-time Registered Nurse at

the VAMC. Mr. [redacted] was directly responsible for caring for patients and interacted with patients, their families, and their visitors on a regular basis. Mr. [redacted] allegedly abusive treatment of Mr. M occurred while he was providing direct patient care to him as his nurse. The alleged patient abuse under these circumstances necessarily involves professional conduct or competence.

The question of whether Mr. [redacted] engaged in patient abuse is outside the purview of this 38 U.S.C. § 7422 decision and would normally be addressed by a DAB. However, matters subject to a DAB cannot be raised in the negotiated grievance process. See AFGE v. FLRA, 850 F.2d 782 (D.C. Cir. 1988). While Mr. [redacted] was given the opportunity to file a DAB appeal of his 30-day suspension because it involved professional conduct or competence, the Union's request for a formal hearing on his behalf appears to be untimely. (Attachment 8; 11) Under VA Directive 5021 Appendix A (3)(b), the Deputy Under Secretary for Health for Operations and Management makes final determinations regarding the timeliness of such an appeal.¹

The Union claims that Mr. [redacted] was denied a formal investigation or hearing by an Administrative Investigation Board (AIB). (Attachment 9) Management conducted a formal investigation, took statements, and gave Mr. [redacted] an opportunity to respond to the charges.² Moreover, an AIB is not required in every situation and failure to provide an AIB is not a violation of due process. Moreover, these alleged deficiencies do not alter the fact that the matter concerns professional conduct or competence.

The Union alleges that Mr. [redacted] Weingarten³ rights were violated as he was not informed of his right to have a union steward present before his signed statement was obtained. This allegation is unrelated to the determination of whether Mr. [redacted] actions were a matter of professional conduct or competence.

¹ Therefore, a copy of this decision and its attachments will be forwarded to the Deputy Under Secretary for Health for Operations and Management so a final determination can be made on the timeliness of the Union's request for a hearing before the Board.

² Article 13, Section 10 Investigation of Disciplinary Actions. A. Management will investigate an incident or situation as soon as possible to determine whether or not discipline is warranted. Ordinarily this inquiry will be made by the appropriate line supervisor. The employee who is the subject of the investigation will be informed of their right to representation before any questioning takes place or signed statements are obtained. Other employees questioned in connection with the incident who reasonably believe they may be subject to disciplinary action have the right to Union representation upon request.

³ Weingarten refers to the right of bargaining unit employees to have a union representative present during investigative interviews that the employee reasonably believes could lead to disciplinary action if such representation is requested by the employee. The specific right of federal employees to union assistance during investigative interviews is rooted and spelled out in 5 U.S.C. § 7114(a)(2)(B). The AFGE Master Agreement goes beyond the statute in that it requires management to inform the employee of their right to union representation prior to questioning.

Therefore, a 38 U.S.C. § 7422 decision is not the appropriate means to address such concerns.⁴

The Union argues that Management did not invoke the protections of 38 U.S.C. §7422(b) until the April 12, 2007, letter from _____, which denied the Step 3 grievance. In fact, the Decision Letter that Mr. _____ received on March 26, 2007, stated that the sustained reason for Mr. _____ suspension involved professional conduct or competence and informed him that he had the right to appeal the decision to a DAB. Moreover, 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.

The Union asserts that Management improperly detailed Mr. _____ to the pharmacy and, as a result, he lost shift, differential, and holiday pay. Given the allegations of patient abuse against Mr. M, it was Management's prerogative to detail Mr. M to a position where patients would not be placed at risk until an investigation was completed. Moreover, the effect that such a patient care related decision had on Mr. _____ pay is directly related to the adjustment of employee compensation. Therefore, Management's decision to detail Mr. _____ and any resulting effect that it had on his compensation directly involves issues of professional conduct and competence and compensation within the meaning of 38 U.S.C. § 7422(b).⁵

RECOMMENDED DECISION:

That the Union grievance relating to the decision of the Director of the Tennessee Valley VAMC, Nashville, TN to discipline _____ RN involves issues concerning or arising out of professional conduct or competence within the meaning of 38 U.S.C. § 7422(b).

APPROVED _____ X _____

DISAPPROVED _____

That the Union grievance relating to the detail and resulting lost pay of Mr. _____ RN, involves issues concerning or arising out of professional conduct or

⁴ Questions regarding the substance of the charge would properly be addressed in a DAB. Mr. _____ was informed of his right to file such an appeal and the associated time limits in the March 16, 2007, Decision Letter.

⁵ The evidence and argument submitted by Management and the Union does not dispute the fact that Mr. _____ was instructed by a Nurse Manager to prepare a ROC at the VAMC on his day off. If the VAMC has not compensated Mr. _____ for the two (2) hours that it took him to prepare the ROC, the VAMC is directed to pay Mr. _____ for the two (2) hours of overtime in accordance with VA Handbook Sections 5011, Part II, Ch. 2 (3) and 5007/12, Part V, Ch 2 (2) (b).

competence and the establishment, determination, or adjustment of employee compensation within the meaning of 38 U.S.C., section 7422(b).

APPROVED X

DISAPPROVED _____

Michael J. Kussman

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

1/24/08

Date
