



DEPARTMENT OF VETERANS AFFAIRS  
Veterans Health Administration  
Washington DC 20420

SEP 30 2003

Director (00)  
VA Medical Center  
130 Kingsbridge Road  
Bronx, New York 10468

In Reply Refer To:

Dear

I am responding to the issue raised in your letter of August 27, 2003, concerning the grievance filed by the New York State Nursing Association (NYSNA) on behalf of [redacted]. The issue pertains to NYSNA's dissatisfaction over management's requirement that Ms. Cotter obtain a fitness for duty physical examination in an effort to ascertain her clinical competence.

Pursuant to delegated authority, I have decided on the basis of the enclosed paper that the issue presented is a matter of professional conduct or competence and thus exempted from collective bargaining by 38 U.S.C. 7422(b).

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

Sincerely yours,

A handwritten signature in black ink, which appears to read "Robert H. Roswell".

Robert H. Roswell, M.D.  
Under Secretary for Health

Enclosure

TITLE 38 DECISION PAPER  
VAMC BRONX

VA 03-08

FACTS:

In December 2002, \_\_\_\_\_, a Registered Nurse (RN) at the Department of Veterans Affairs Medical Center (VAMC) in the Bronx New York, was reassigned to the Telephone Triage Unit and began an orientation program. During her orientation, she made repeated errors. The errors included, but were not limited to, the following:

- failing to follow protocol for the triage calls in a logical manner;
- failing to document critical aspects of patient assessments such as correctly describing patient complaints and symptoms or correctly recording what medication the patient was on;
- failing to provide patients with the correct triage advice, such as whether or not immediate medical care was required or whether medication was contraindicated; and
- failing to list the correct protocol numbers on reports.

*Attachment A.*<sup>1</sup> \_\_\_\_\_ received orientation training and was corrected repeatedly for these errors. Despite constant training and correction, \_\_\_\_\_ did not improve. By March 2003, due to the observed deficiencies of her ability to handle calls and her lack of improvement, \_\_\_\_\_ supervisor placed her on one-on-one monitoring (precept monitoring). \_\_\_\_\_ did not improve, and her supervisors began to be concerned that \_\_\_\_\_ was not fit to perform the duties of a telephone triage nurse.

By letter dated April 2, 2003, the Director of Medical Surgical Patient Care Center, \_\_\_\_\_ ordered \_\_\_\_\_ to report for a Special Physical Examination under the provisions of VA Directive and Handbook 5019 to determine her physical or mental ability to properly perform the duties of her nurse position. *Attachment B.*<sup>2</sup>

On April 24, 2003, NYSNA, representing \_\_\_\_\_ filed a grievance, alleging "**abuse of Sections 10.3, Federal and Agency Laws and Regulations, and Section 15, Management Rights, of the local Bronx and NYSNA Agreement.**" *Attachment C;*<sup>3</sup> *see also Attachment D.*<sup>4</sup> NYSNA asserted that

<sup>1</sup> Letter from \_\_\_\_\_ dated April 21, 2003.

<sup>2</sup> Letter from \_\_\_\_\_ dated April 2, 2003.

<sup>3</sup> Letter from NYSNA dated April 24, 2003.

<sup>4</sup> Excerpts from the Agreement between NYSNA and Bronx VAMC, Sections 10.3 and 15 (emphasis in original).

management had no basis to request the fitness for duty examination. As a remedy for the alleged abuse, NYSNA requested that management "rescind the mandate for the examination" and permit [redacted] to "work to the fullest extent of her License in triage." *Attachment C.*

[redacted] underwent the April 24, 2003, mandated fitness for duty physical examination. The examining internist found no physical problems or limitations in his examination. *Attachment E.*<sup>5</sup> The examining internist also referred [redacted] for a neuropsychological examination to address any concerns about her job performance believed to be due to cognitive problems. *Id.*

On May 15, 2003, the Director denied [redacted] third step grievance. The Director found the medical center had acted responsibly and in conformance with VA Regulations. She further determined that the second referred neuropsychological examination was necessary, as was the continued monitoring of Ms. Cotter's work. *Attachment F.*<sup>6</sup>

A May 20, 2003, letter ordered [redacted] to report for a follow-up neuropsychological examination on June 11, 2003. *Attachment G.*<sup>7</sup> On June 11, the date of the examination, NYSNA submitted a document indicating that [redacted] would be unable to report for the examination, and that "[m]otions for arbitration were being developed." *Attachment H.*<sup>8</sup> NYSNA officially requested arbitration on June 13, 2003. *Attachment I.*<sup>9</sup>

After consultation with Regional Counsel, on August 25, 2003, VA requested that the arbitrator suspend the case, pending receipt of a 7422 decision by the Under Secretary for Health (USH). *Attachment J.*<sup>10</sup> The facility provided a copy of the request to NYSNA. *Id.* On August 27 the Director, VAMC Bronx requested a determination from the USH on whether the issue being grieved was a matter of clinical conduct/competence or patient care, and thus exempt from collective bargaining under 38 U.S.C. § 7422. *Attachment K.*<sup>11</sup>

#### PROCEDURAL HISTORY:

Time is of the essence because the facility has proposed [redacted] removal for October 10, 2003.<sup>12</sup>

<sup>5</sup> Consultation Sheet dated May 1, 2003.

<sup>6</sup> Letter from [redacted] dated May 15, 2003.

<sup>7</sup> Letter from [redacted] dated May 20, 2003.

<sup>8</sup> VA Memorandum dated June 11, 2003.

<sup>9</sup> Letter from NYSNA dated June 13, 2003.

<sup>10</sup> Letter from [redacted] dated August 25, 2003, with attachment.

<sup>11</sup> VA Memorandum dated August 27, 2003.

<sup>12</sup> On August 4, 2003, [redacted] was given a Notice of Proposed Discharge for failing to follow the directive to report for the June 11, 2003 examination as well as for failing to follow and cooperate with a second directive to undergo the examination that had been rescheduled on July

The Secretary of Veterans Affairs (Secretary) delegated to the USH the final authority to decide whether a matter or question concerns or arises out of professional conduct or competence (direct patient care, clinical competence). When labor and management disagree over such matters or question and the parties are unable to resolve the dispute, the USH is asked to render a decision.

On August 27, 2003, VAMC Bronx provided NYSNA with a copy of the request to the USH and advised that NYSNA could officially submit their position on the issue to the USH, through the Office of Labor Management Relations.

*Attachment L.* On September 9, 2003, VAMC Bronx notified NYSNA that any comments must be received no later than September 19, 2003. *Attachment M.* On September 22, 2003, management confirmed that no union submission has been received.

#### ISSUE:

Whether requiring a nurse to undergo a Special Physical Examination and a follow-up neuropsychological examination, to determine whether performance deficiencies are the result of medical problems, is a matter relating to professional conduct or competence, under to 38 U.S.C. § 7422, so that it is not subject to collective bargaining and negotiated grievance procedures.

#### DISCUSSION:

The Department of Veterans Affairs Labor Relations Improvement Act of 1991 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 arising out of professional conduct or competence, peer review and employee compensation as determined by the USH. 38 U.S.C. § 7422.

The issue of determining whether a RN is fit for duty, or meets the minimum physical or mental standards to perform the RN duties, is an issue that is left to the unfettered discretion of the Secretary and/or USH as provided by 38 U.S.C. §§ 7421(a) ("the Secretary shall prescribe by regulation the . . . conditions of employment . . . [for] (b)(5) Registered Nurses."), 7403(a)(1) (health care professional must meet VA qualifications), and 7422(b) (collective bargaining obligations may not cover the conditions of employment for positions appointed under 7421(b)).

The Secretary, in consultation with the USH, promulgated regulations pursuant to 38 U.S.C. §§ 7403(a)(1) and 7421(a) pertaining to fitness for duty and physical standards for RNs. These regulations are contained in VA Handbook 5005, Part

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28, 2003. On August 29, 2003 a decision notice was issued to \_\_\_\_\_, sustaining the charges and discharging her from employment with the Bronx VAMC, effective October 10, 2003.



II and Appendix 11-G-6. Additionally, regulations in VA Handbook 5019, Part II, Paragraph 5 provide facility directors with the authority to order Special Physical Examinations of any employee "to solve questions of physical or mental ability to perform the duties" of their position. This includes the authority to order examination of RNs.

In a recent 7422 determination, also involving the determination of a RN's fitness for duty, the USH decided these determinations involve professional conduct and competence within the meaning of 38 U.S.C. § 7422(b). This prior determination was rendered on July 3, 2003, in a case involving the San Juan Puerto Rico VAMC.

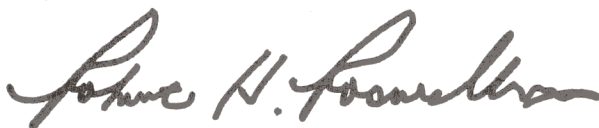
Professional competency includes a determination of whether the employee meets the physical or mental requirements of the job. The VA is responsible for the delivery and direction of Title 38 employee professional duties and services. This responsibility encompasses reviewing the fitness for duty and physical and/or mental qualifications of all registered nurses, especially where it directly impacts patient care, as is the case with

RECOMMENDED DECISION:

That the NYSNA grievance regarding the order to \_\_\_\_\_, RN, to report for a fitness for duty Special Physical Examination and follow-up neuropsychological examination to determine her fitness for duty is exempt from collective bargaining or to challenge through the negotiated grievance procedure pursuant to 38 U.S.C. 7422(b) as a matter concerning or arising out of professional competency and conduct.

APPROVED  \_\_\_\_\_

DISAPPROVED  \_\_\_\_\_



Robert H. Roswell, M.D.  
Under Secretary for Health

SEP 30 2003

Date