U.S. Department of Veterans Affairs

Veterans Health Administration
Washington DC 20420

JUN 2 4 2016

In Reply Refer To:

(051)

Eva M. Reed, RN
2555 N. Trafalgar Dr.
Fayetteville, AR 72704

SUBJECT: Disciplinary Appeals Board

Dear Ms. Reed:

Your appeal to a Disciplinary Appeals Board (DAB) regarding your Reduction in Grade from the VA Health Care System of the Ozarks, Fayetteville, AR, was received on January 27, 2016. On February 4, 2016, a DAB was appointed to consider your appeal and your request for a hearing before the Board. This is to notify you that a decision has been made regarding your appeal.

At the time of your Reduction in Grade, you were a full-time permanent employee who had completed your probationary period. The action being appealed was a major adverse action. The charge upon which the action was based, in whole or in part, involved an issue of professional conduct and competence, and the appeal was timely filed. Therefore, I find the Board's jurisdictional determination was proper.

The Reduction in Grade was based on a charge of Unsatisfactory Performance. The Board concluded that the charge was not proven by a preponderance of the evidence, and did not sustain the charge. In consideration of the fact that the charge brought by the Agency was not sustained, the Board recommended that the penalty of Reduction in Grade be overturned. It is my decision to execute the decision of the Board, and a copy of the Board Action is enclosed.

By copy hereof, within 30 days of this decision, the Director of the VA Health Care System of the Ozarks, Fayetteville, AR, is directed to cancel your Reduction in Grade and return you to your position. In addition, you will be paid the appropriate amount of back pay no later than 60 calendar days after the date of receipt of this decision. You are directed to cooperate in providing information to management that is necessary to determine the appropriate amount of back pay.

You may be entitled to an award of attorney's fees. The Under Secretary for Health will make a final determination regarding entitlement and an appropriate award. A request for an award of attorney's fees must be submitted in accordance with the attached instructions to the Principal Deputy Under Secretary for Health within 30 calendar days of receipt of this decision.

Eva Reed, RN – Disciplinary Appeals Board

The Director of the VA Health Care System of the Ozarks, Fayetteville, AR, will provide written notice to the Office of Human Resources Management, Employee Relations and Performance Management Service (051), of the date when specific actions are taken to implement this decision. This is the final administrative action in this case.

If you have questions regarding this decision, please contact Terri McVay, OHRM Employee Relations Specialist (051), at (205) 655-4128.

Sincerely,

Richard A. Stone, M.D.
Principal Deputy Under Secretary for Health

Enclosures

cc: Daniel W. Scott, AFGE Local 2201, Appellant's Representative
Medical Center Director, VA Health Care System of the Ozarks, Fayetteville, AR

REQUEST FOR ATTORNEY FEES

The Back Pay Act authorizes the payment of attorney fees in connection with the correction of a personnel action which is determined to be unjustified or unwarranted. 5 U.S.C. § 5596(b)(1)(A)(ii). This authority also applies to Disciplinary Appeals Board proceedings and allows for the payment of attorney fees if the employee is a prevailing party, the award of fees is in the interest of justice, and the amount of the fees are reasonable. Because the decision executed by the Principal Deputy Under Secretary for Health mitigated or overturned the Agency's action, you may be entitled to payment of such fees.

Should you decide to request an award of attorney fees, your request must be submitted to the Principal Deputy Under Secretary for Health, at the address indicated below, within 30 days of your receipt of this decision and contain the following information and documentation:

a. A copy of original time and billing records for all fees claimed, including identification of the person who provided legal services, the nature of the services performed, and the number of hours worked;

b. A copy of the fee agreement;

c. A statement as to your attorney's customary hourly charge, as well as the usual and customary hourly charge for each person who worked on this case. It should, to the extent applicable, explain any distinction between in court and out of court fees, whether the fee was fixed or contingent, the nature and length of the professional relationship, and any other factors which might affect the amount of attorney fees in this case. The affidavit must describe the training and experience of each person who worked on this case, and the date of bar membership as applicable;

d. Affidavits from other attorneys attesting to the prevailing market rate in your area for similar services, and any evidence regarding hourly rates that you have been awarded in prior cases; and

e. Any documentation (bills, receipts, invoices, *etc.*) to support any charges for costs billed to the client.

If you and your representative wish to negotiate a settlement of the attorney fees award with the facility director or staff office head, rather than having the award decided by the Principal Under Secretary for Health, such an agreement must be reached prior to the issuance of a final decision on this matter by Principal Deputy Under Secretary for Health. This decision will not be delayed because of settlement negotiations unless the complainant's attorney files a written request for an extension of time with the Principal Deputy Under Secretary for Health.

A request for an award of attorney fees must be submitted to the following office and address:

Principal Deputy Under Secretary for Health (10)
Department of Veterans Affairs
810 Vermont Avenue, NW
Washington, DC 20420

Department of Veterans Affairs

BOARD ACTION

INSTRUCTIONS - Prepare one copy for Field Station and one copy for Central Office for all employees for whom Board Action is forwarded to Central Office for review or filing in Board Action Folder.

1. EMPLOYEE/APPLICANT'S NAME	1A. EMPLOYEE'S POSITION
Eva Reed, RN	Registered Nurse

1B. EMPLOYEE'S GRADE AND STEP	1C. NAME OF STATION
Nurse II, Step 3	VA Health Care System of the Ozarks, Fayetteville

INITIATING BOARD

2. NAME OF BOARD (Check one)	3. STATION OF BOARD	4. DATE
○ PROF. STD. BOARD ◉ DISCIPLINARY ○ PHYSICAL STANDARDS		4/20/16

5. FINDINGS

I. INTRODUCTION

On February 4, 2016 the Undersecretary for Health for the Department of Veterans Affairs appointed a Disciplinary Appeals Board to determine jurisdiction and conduct a hearing on the adverse action (loss of pay)of Eva Reed, RN. The Appellant was notified of a proposed removal on November 2, 2015, from her nursing position in the Financial Office (Utilization Management). The Employee was charged with unsatisfactory performance following a Counseling Program Conference (60 days) and was issued an Unsatisfactory Rating on her proficiency in all VA Nurse Qualification Standards. Additionally, concerns were raised about the Appellant's clinical judgment as an RN at the Department of Veterans Affairs. On December 21, 2015 she was notified of the decision to reduce her pay to a GS-5, Step 1 Office Automation Assistant in Radiology. This action became effective on December 27, 2015. On January 27, 2016 the Appellant requested a hearing before a Disciplinary Appeals Board.

II. JURISDICTION

The employee was confirmed to be a Registered Nurse (Nurse II, Step 3) in a permanent status. She was hired in 2010, and had completed her probationary period. (Exhibit B-9.) The Board considered whether the action was a Major Adverse Action involving Professional Conduct and Competence, if it was timely filed and if there were any significant harmful procedural errors (HPE). The Board determined that this action met the definition of a Major Adverse Action, the process was timely followed, and there were no significant harmful procedural errors.

PLEASE SEE ADDITIONAL PAGES

III. FACTS AND ANALYSIS

A. Facts Not in Dispute:

1. A 90-day evaluation of the Appellant, by supervisor Nail was for satisfactory performance. (Exhibit A-2.)
2. A proficiency rating for Eva Reed, RN, of Unsuccessful was signed by supervisor Elizabeth Nail, RN on August 20, 2015. (Exhibit M-1, p. 16.)
3. A Title 38 nursing Counseling Program was initiated on August 24, 2015 by Business Office (and CFO) Service Chief Birch Wright, with Ms. Nail to supervise. (Exhibit M-1, p. 17.)
4. Appellant Eva Reed, RN, (Nurse II, Step 3) sustained a loss of basic pay, to GS-5, Step 1 effective 12/27/15. (Exhibit B-9.)

B. Findings:

NOTE: The charge did not include any specifications, therefore the board considered it as a whole, as written, with three parts.

Charge, as written in the agency's action:
You were notified as early as December 10, 2014 that your performance was unsatisfactory. Beginning on August 24, 2015, you were placed on a formal Counseling Program in order to address the deficiencies in your performance and to give you an opportunity to correct the identified deficiencies. The sixty (60) calendar days for the Counseling Program have elapsed, and despite scheduled periodic meetings to provide you feedback and offer suggestions for improvement, you have failed to raise your performance even to a minimally successful level, and have been evaluated as Unsatisfactory in all VA Nurse Qualification Standards. In addition, issues noted during the Counseling Program have raised serious concerns about your clinical judgement as an RN at the Department of Veterans Affairs.

1 **Unsatisfactory Rating: Finding – Not sustained**

The Appellant was employed in the Utilization Management (UM) section of the Business Office during the period covered in this board action. The proficiency rating process as required by VA Handbook 5013, part II, section 8d, requires the rating to be on the annual anniversary of either hiring or other action (such as a promotion within Nurse I or change in grade) that changes this annual date. Other proficiencies in the Appellant's files (also based upon the appellants SF-50, box 31, M-1, p.1 indicate that August was the correct proficiency month (B-11, B-12). No special rating exists for the period of June 2014 to August 2014 by the Business Office, closing out the 2014 rating year. According to the above Handbook 5013, this change in assignment alone would not change the anniversary date from August to June. Therefore, the proficiency report rating the Appellant as unsatisfactory during the period of June 2, 2014 to August 20, 2015 (Exhibit M-1, p. 16) is not for an appropriate rating period.

On multiple fronts, the process prescribed for evaluating an RN under the proficiency system was not followed. There is no evidence to indicate that when the Appellant was reassigned into the Fee section of the Business Office in June of 2014, or again into the

UR section after 90 days, she was given a properly constructed set of elements or a functional statement. This is required prior to receiving her rating of record, in accordance with VA Handbook 5013, part II, Appendix A, section 2(4), instructions for issuing a nursing proficiency. The only Functional Statement in the evidence is signed by the supervisor Nail only, on 8/20/15, the same date the unsatisfactory rating was issued. (B-14, p. 9). This is not in accordance with VHA Handbook 5013, Part II, section e(1).

Nail's testimony (p. 373, lines 11-15) stated that the Appellant was reassigned from the Fee section after her first 90-day, fully successful evaluation, into the UM Section of the Business Office about October of 2014. The reasons for reassignment were vague other than "not getting the work done", per Nail's testimony, p. 57, lines 3-14. The Appellant was issued an unsatisfactory rating on August 20, 2015 and *subsequently* began the Counseling Program on August 24, 2015, for 60 days. Additionally, the rating was for a total of 15 months, not 12 months, as required by Handbook 5013, Part II. This proficiency was not signed by an approving official, as required, in Part II, Appendix A of this same handbook. The Nurse Executive, Ms. Lesniewski, testified that she did not concur with the submitted proficiency, once she learned of it, due to both the rating and the absence of a counseling program. (Lesniewski testimony p. 34, lines 1-10.) She states she instructed the supervisor (Nail) to go back, start a counseling program and to correct the process. She states she was not involved after that point in the Counseling, nor with the adverse action. (Lesniewski testimony, pp. 33-34, p. 45 line 18-20.) Lesniewski testified in response to direct board member questioning that the normal [sic] process was for her to have been involved in this process fully, through the adverse action. To her recall, there had not been any others (employees) outside of Nursing Service to whom this applied. (Lesniewski testimony, p. 48.)

According to Nail's testimony (Nail testimony p. 66, lines 17-23), after her meeting with Lesniewski, she had the Business Office service chief (Birch) delay the Appellant's performance rating. (M-1, p. 2). In accordance with VHA Handbook 5013, Part II, section 8e(3), only the Director may approve such a delay for field employees. Moreover, there is no final proficiency rating in the evidence file, other than that originally signed by supervisor Nail on 8/20/15, prior to the Counseling Program. (B-14, p. 9.)

On page 3 of M-1, the statement defining the Appellant's clinical competence specifically states: CLINICAL COMPETENCE: NVCC UR Nurse using nursing knowledge and systems theory to assess, organize and facilitate appropriate clinical services in a concurrent manner, is noted prior to the *following performance deficiencies:* 1) Not able to enter a minimum of 20 days of clinicals per day; 2) Did not complete written and/or verbal assignments of daily work; 3) Your performance has not demonstrated the ability to adjust to change or work pressure in a professional manner and, 4) Unable to accurately and consistently input, retrieve or otherwise process patient/employee information.

The following points were considered by the board with regard to each deficiency and suggested solution noted in the Counseling program, to substantiate its recommendation to the Under Secretary for Health. The suggested and then 'specifically suggested' solutions are noted as follows in M-1, pp. 3 and 4:

Suggested Solutions (M-1, p.3- 4):

a. *Enter and complete at least 20 days of clinicals per day.* The testimony indicated on more than one occasion that she was being compared to other nurses, not to a standard.

(Ward p. 130, line 20, Birch p. p. 200, lines 1-8) There is no evidence that this requirement is in place other than in this counseling program as a suggested *production* solution. It also does not exist in the functional statement for this position. (B-14, pp 4-9.) Dunn testimony p. 184, lines 7-14, stated that clinicals were often hard to get unless you had a 'resource' person as she did. Finally, there is no definition of the term "clinical". It was vaguely interpreted in testimony by the Appellant on page 306 of Reed's testimony, lines 20-25. Given this ambiguity, lack of understanding by the Appellant and obvious comparison to other staff instead of a standard, the board did not sustain a lack of performance in this area.

b. *Complete written and verbal assignments of assigned work.* This solution was not defined, nor did there appear to be any evidence outside of the discussion on clinicals, shared drive and community logs, throughout. The board could not discern how this could be separately understood by the appellant. Given this vague statement, the board did not sustain a lack of performance in this area.

c. *Demonstrated the ability to adjust, to change or work pressure in a professional manner.* There was no evidence that this element was defined sufficiently to the Appellant to provide a concrete opportunity to improve. In the proficiency rating of record, there is no narrative assessment of this nursing standard in the proficiency (collegiality, collaboration). In order to sufficiently improve, the Counseling Program would have had to identify specific issues in the deficiencies and what was required to raise her rating. Given this vague statement, the board did not sustain a lack of performance in this area.

d. *Accurately and consistently input, retrieve or otherwise process patient/employee information.* This was highly ambiguous, particularly in that the Appellant did not process employee records that the board could determine. The term "otherwise process" is so vague that to measure this, evaluate this or to sustain a specific rating level could not possibly have been accomplished in any meaningful or significant manner. Given this vague statement, the board did not sustain a lack of performance in this area. There were multiple citations (examples are, M-1, p. 21, M-1, p. 25; M-1, p. 29) of correct entries but no definition of 'processed'.

"Specific" suggested solutions (M-1 p. 4):

a. *Call for clinicals on IP' s; preferably by fax.* Given the ambiguity described above in the suggested solutions, item a, the board found no meaningful way to measure this component as a solution. There was no quantitative nor qualitative definition, and there was no timeframe defined that would put priority level to each community-based inpatient. This was not defined in the supervisory notes, any testimony or the functional statement. There were several examples, one being M-1, p. 29, that had lengthy lists of abbreviations such as "HNN Run, 21 correct". There were also references to (same reference) as "HNN run, 5 correct", or "Review of 10/19/15 run: all 10 correct". The Appellant could not have known based upon the Counseling document what was needed to raise her level to a minimally satisfactory or satisfactory level.

b. *Call for transfers, d/c' s, and/or POS with appropriate documentation in CPRS.* The Counseling Program, the supervisory notes of Nail (M-1, pp. 17-30) or the testimony all failed to define this in any measureable, meaningful way. This was also noted as successful in at least one place in the supervisory notes (M-1, p. 21). There are a variety of tables and documents in the evidence file that are ill-defined, as well as having been

initiated *prior* to the Counseling Program. (M-1, pp. 6-14.) Therefore, the board did not sustain a lack of performance to an unsatisfactory level in this element.
c. Complete NVCC Community log appropriately. This was a clerical log, "appropriately" was not defined nor linked to direct patient care. The verbiage "log not updated" was noted sporadically in the Nail supervisory notes (M-1, pp 21, 27) however the board was unable to determine whether or not she had the information needed to complete the log appropriately or even how "appropriately" was defined. There are no logs in the evidence package, no specifics in the Counseling Program and no samples. Not only did the board not sustain the unsatisfactory performance in this element, the board also did not deem this connected to Clinical Competence.
d. Update clinicals received in shared drive. No evidence to show anything other than she updated them correctly in the shared drive. (M-1, p. 21 and p. 27). Aside from there being no evidence, the board was unable to determine what clinical competence was addressed in "receiving" these items into a shared drive for staff. There was no defined parameter and no explanation that was quantifiable as a means to achieve a minimally or fully satisfactory rating. Therefore, the board could not sustain this element as unsatisfactory.
e. Process additional admissions and/or discharges - daily IP admits. The board reviewed this element but determined that neither they nor the Appellant could have possibly been able to define or quantify this to any degree of certainty. It was simply too vague to uphold this as unsatisfactory. There was no evidence to define 'process', and in order to have sustained this, the board would have been inappropriately required to speculate.
f. Enter clinicals completely, concisely, in order and proof read . Item a, in specific solutions, above, mentioned examples of where these were done. However, there is no mention of what it means to be 'in order' or otherwise concise. Nothing showed she did not do this, as there was no quantifiable measure. Nothing in the Counseling Program addressed completed clinicals, or an expected denominator and numerator. Moreover, this was not addressed in the stated deficiencies, above. The board therefore could not sustain an unsatisfactory rating in this element.
g. Clear alerts daily. Nail's supervisory notes indicated that there were occasions in which the alerts were not "cleared". (M-1 p. 26.) However, according to the supervisor Nail testimony p. 89, line 19, "less than 250 is expected". There was also testimony by Dunn (Dunn testimony, p. 187, lines 8-21) that they all had a lot of volume, but that she also on occasion had "extra" alerts not answered. This therefore makes the daily amount or definition of this element very ambiguous. Additionally, prioritization not measured as one would expect: clinical urgency, by date, acuity level, etc. Alerts were viewed as a simple production line item in the Counseling. Therefore, the board determined that this cannot be measured against a clinical competency standard. The board cannot sustain an unsatisfactory rating in this element.

Following the counseling program, the proposal to remove the appellant (and subsequent decision to effect a loss of pay) was made utilizing the same proficiency noted to be incorrect, dated August 20, 2015. The Appellant testified that she had little understanding of the defined parameters of the Counseling Program (Reed testimony, p. 315, lines 2-16.) The quality and accuracy of the rating process, and compliance with VHA regulation were considered inadequate at best, and did not substantiate the charge of being rated 'unsatisfactory under all nurse qualification standards'.

2. **Unsatisfactory in all VA Nurse Qualification Standards: Finding-Not sustained.**
   This proficiency addresses 5 dimensions of nursing practice (Practice, Ethics, Resource Utilization, Professional Development, and Performance). VHA Handbook 5013, Part II, Appendix A(2)(1) states that, " the Nurse Qualification Standard and appropriate functional statement (M-2 part V) delineate the criteria upon which the nurse will be evaluated by the rating and approving officials." The two categories to be rated on the proficiency form are, 1) Nursing Practice (under which the criteria in discussion reside) and, 2) Interpersonal Skills. These criteria were delineated in the Functional Statement which the agency contends was used in this most recent position of record (Utilization Management), and are labeled Practice, Professional Development, Collaboration and Scientific Inquiry. (Exhibit B-14, pp. 4-9.) The Appellant's proficiency did not fully address the 4 dimensions of nursing within the two required rating areas under the proficiency rating system, or as listed on the Appellant's functional statement.

   The narrative is insufficient to address the appellant's full performance. It cannot be determined from the proficiency report whether she met ALL VA Nurse Qualification Standards *as related to* the proficiency and the position's functional statement. Moreover, VHA Handbook 5013, Part II, section c(1) requires the employee be informed in advance which elements will be considered in the rating process. Ms. Nail attested that she did not give the Appellant the proficiency rating. (Nail Testimony, p. 66 line 25, and p. 67, line 1.) Ms. Nail testified that she has no experience in writing a proficiency (Nail testimony, p. 395, lines 8-14.) Finally, the Functional Statement purportedly used for this rating period was signed only by her supervisor Elizabeth Nail, and it was only signed on the *same date* (August 20, 2015) as the appellant was issued the unsatisfactory rating. (Exhibit B-14, p. 9.)

   Of note, the aggravating and mitigating factors considered *incorrectly* that the Appellant's last rating of record (2014) prior to this was minimally satisfactory. (Exhibit M-1, p. 32, box 4.) It was in fact, a Highly Satisfactory rating for *both* of the immediately preceding two years where the Appellant was assigned to Palliative Care (direct patient care). (B-11, p. 2, B-12, p. 2.) Finally, the Appellant's supervisor Ms. Nail stated in testimony (p. 396, lines 1-15) that she did not rate the final proficiency sufficiently, or to all the required components, nor has she ever had training on writing a proficiency for a nurse. The quality and accuracy of the rating process, and compliance with VHA regulation were considered inadequate and did not substantiate the charge of being rated 'unsatisfactory under all nurse qualification standards'.

3. **Counseling Program Clinical Judgement Concerns: Finding – Not sustained**
   The second section of the same charge paragraph broadly stated that issues noted during the Counseling Program raised "serious concerns about (the Appellant's) clinical judgment as an RN at the Department of Veterans Affairs". The board reviewed the clinical records (referenced in the Counseling Program Conference (M-1, p. 16, August 25, 2015, page 27, October 13, 2015 and October 14, 2015) directly in CPRS. Since there were no specifications with incidents cited in the Counseling program, the board relied on the documents and testimony of the witnesses. The documents provided by the agency

included the counseling program conference notes (M-1, pp 17-30) and testimony from Ms. Nail (Nail testimony p. 64, lines 10-21), Mr. Wright, (Wright testimony p. 197, lines 20-25) and Interim Director Worley (Worley testimony p. 235, lines 9-25) citing [three] instances where the clinical judgment of the Appellant was in question.

The agency and the Appellant both agreed there is a standard operating procedure for non-VA care (Nail testimony, page 380, lines 7-14) which states patients are case managed while they are receiving care from a non-VA inpatient facility and that this case management ends when he/she is transferred back to the VA facility or is no longer receiving treatment from the non-VA facility. In two of these instances The Appellant documented that she was aware the patient was discharged and had notified the referring physician via CPRS requiring a co-signature on the note. According to the documentation and the testimony given by The Appellant (Reed testimony, p. 287, lines 5-25), the policy was followed and the referring physicians were aware of the status of their patient. Ms. Nail testified (Nail testimony p. 69, lines 1-14) that the aneurysm patient had been discharged from the non-VA facility per the Appellant.

The third instance cited involved a subdural hematoma with active bleeding and a 12 mm midline shift. (M-1,p. 27.) That patient was referred emergently to a community hospital on October 5, 2015 at time 1943. The Appellant authorized the care on October 6, 2015 at 0832 according to the board's review of CPRS. That patient was discharged from the community hospital on October 6, 2015 with follow-up surgery planned. It is unclear when the Appellant was notified of the discharge. The Appellant, one mentor as well as Ms. Nail, testified that getting communications from non-VA facilities could be difficult. (Galyean testimony, p. 183, lines 6-14; Reed p. 363, 1-14; Nail testimony p. 410, lines 12-23.) The medical record indicates the Appellant documented the discharge and notified the referring Primary Care physician on October 9, 2015 0814. The primary care physician acknowledged receipt of the notification on October 9, 2015 at 0844. According to the internal policy, the Appellant followed procedures as outlined.

Determining whether or not there is an issue with her clinical judgment is difficult from this one instance when the agency and the appellant were unable to tell the board WHEN The Appellant possessed the information on the discharge. The Appellant began her first orientation sometime in late May, 2014 and then began a second orientation after moving to the UM section. (Nail testimony p. 139 and p. 141, lines 3-11.) As noted earlier, she was rated as fully satisfactory during her 90-day evaluation dated August 26, 2014. (A-2.) The counseling program conference was initiated August 24, 2015. If the agency felt there were serious issues relating to her clinical judgment it is reasonable to assume they would have presented much earlier in her orientation period(s). The board evaluated the content of the Counseling Program Conference, and noted specifically that the majority of the documentation references her ability to maintain numerical production standards and to some extent, her conduct. The agency did not provide sufficient documentation to expose a lack of clinical judgment nor did they cite any instances in the charge. There is no evidence to show that any Veterans were harmed or that Utilization Management policy was not followed.

The board also considered the prior work history of the Appellant in determining what her clinical judgment skills were while working for the agency. It is true that each new assignment carries with it typically a new set of standards and potentially different ratings at the end of the year. However, work history immediately prior to this position is relevant

because the question of clinical judgment is under scrutiny. Regardless of the standards, elements or functional statement, the Appellant was still expected to have the clinical judgment of a Nurse II in any assignment, up to this point. The previous two proficiencies (2013 and 2014, exhibits B-11 and B-12, respectively) each rated the Appellant as highly satisfactory, addressed all nine criteria, and were completed by Masters prepared nurses qualified to assess her clinical judgment. They both reference her highly satisfactory ability to perform on the palliative care, med-surg and telemetry units providing care and as charge nurse. (These roles require clinical judgement.) The proficiency dated 6/2/2014 *specifically states* she applies the nursing process and critical thinking to her patients daily and there is no documentation after this date to provide evidence that she is no longer mentally capable of sound clinical judgment. Therefore, the board finds that the agency's documentation does not support this clinical portion of the charge.

IV. PENALTY DETERMINATION

Penalty Determination: The board finds that the penalty of loss in pay, effected by a reassignment From a Nurse II to a GS-5 position, cannot be sustained. Based upon the analysis provided in Part III above, the other factors considered (noted below), the testimony of the witnesses and the starkly poor documentation on all accounts, the board does not recommend that the charge be upheld. Therefore, there is no penalty determination.

V. OTHER FACTORS CONSIDERED

A. There were several instances throughout the documentation that pertinent processes (absent significant HPE) were not followed. Additionally, there were inconsistencies in the agency documentation. For example, during testimony by Ms. Nail, (p. 103, lines 11-25, and p. 104, lines 1-13) there was discussion of another proficiency. The board initially admitted this into exhibit, however learned later that this was not the original document. Moreover, this proficiency document had never been shared with the Appellant, there was no consultation regarding this 'other' proficiency with the Nurse Executive Ms. Lesniewski and there was no evidence that this document was part of the evidence file for the adverse action. Human Resources did not have a copy. Therefore, the board withdrew the admission as an exhibit.

B. Ms. Nail indicated that the Appellant could not work independently in Utilization Review and therefore could not work overtime. (Nail testimony p. 384, lines 2-20.). Exhibit A-4 is the PAID system report indicating that the Appellant indeed did work overtime in those pay periods described. This calls into question the reliability of the agency's evaluation of clinical judgment and performance. The board called into question whether or not the managers were making informed decisions not solely based upon relative productivity but on actual clinical issues.

C. There is discussion in the testimony of 'exhibit A5'. This was initially introduced conditionally pending verification that it was a policy. Since this validity was not obtained by the Appellant, the board opted to make the pertinent, instructive portion of the document (to be followed by the UM nurses), part of the testimony. This can be found in Ms. Nail's testimony, page 380, lines 7-14. At this point, the board made the decision to

review the actual CPRS records in order to make a more informed determination and recommendation regarding clinical competence.

D. Despite the fact that Ms. Nail testified that Palliative Care does not require critical thinking skills and med surg requires it to a "lesser degree", (Nail testimony p. 106, lines 6-12.), the board disagrees. Palliative Care (the Appellant's former position prior to the Business Office, see exhibit B-12) is a known specialty of medicine that requires clinical judgment, critical thinking and a particular skillset. Medical – Surgical care most certainly does, to a large degree. These statements by Ms. Nail regarding her personal assessment of the need for clinical judgment and critical thinking skills in Palliative Care and med-surg lend us to question Ms. Nail's credibility in determining the current and future ability of a nurse to continue to practice. More importantly, the Appellant credibly testified (Reed testimony pp. 317, lines 23-25 and p. 318, lines 12-19) that she lacked understanding of the full Counseling Program details.

VI. OTHER RULINGS BY THE BOARD

Based upon statements and documents by the agency, initially the proposed removal raised concerns regarding clinical judgment. (Exhibit A1, p. 38.) A question did arise as to whether the proposing official met the requirement of being the Appellant's service chief (and therefore, was or was not, the appropriate proposing official) based upon the original information provided. Subsequent documentation by facility management in response to a Show Cause Order made the HPE an erroneous finding, and the process continued.

VII. RECOMMENDED DECISION

A. There was one charge, with 3 parts. This charge included a statement of concern for clinical judgment.

The board does not sustain the charge of :

You were notified as early as December 10, 2014 that your performance was unsatisfactory. Beginning on August 24, 2015, you were placed on a formal Counseling Program in order to address the deficiencies in your performance and to give you an opportunity to correct the identified deficiencies. The sixty (60) calendar days for the Counseling Program have elapsed, and despite scheduled periodic meetings to provide you feedback and offer suggestions for improvement, you have failed to raise your performance even to a minimally successful level, and have been evaluated as Unsatisfactory in all VA Nurse Qualification Standards. In addition, issues noted during the Counseling Program have raised serious concerns about your clinical judgement as an RN at the Department of Veterans Affairs. **The board does not sustain the agency's allegations regarding clinical judgment.** The documentation related to this charge and related to the proficiency process for the Appellant was woefully inadequate, haphazard and completely lacked credibility. The frequent reference to productivity, numbers of cases and numbers of alerts, gives the impression that the agency desired a more productive, amenable employee and did not have sufficient evidence (even after testimony) to make that happen. This perhaps leads to the inconsistent application of the proficiency process, as required by VHA Handbook 5013.

B. By reason of the board's recommendation not to sustain the charge, there is no penalty analysis.

BOARD ACTION

6. AFTER CAREFUL CONSIDERATION OF ALL FACTORS, THE BOARD RECOMMENDS THAT THE EMPLOYEE BE *(Check one and explain in detail in item 9.)*

- ( ) APPOINTED
- ( ) PROMOTED
- ( ) GIVEN SPEICIAL ADVANCEMENT
- ( ) NOT APPOINTED
- ( ) DECLARED INELIGIBLE
- (•) OTHER *(Specify)*: Disciplinary Appeals Board
- ( ) NOT PROMOTED

7. RECOMMENDED GRADE AND STEP

8. PHYSICAL EXAMINATION

- ( ) APPROVED
- ( ) NOT APPROVED

9. OTHER RECOMMENDATIONS AND ADDITIONAL REMARKS TO SUPPORT RECOMMENDATIONS IN ITEM 6.

PLEASE SEE ADDITIONAL PAGES

10. SIGNATURE(S) OF INITIATING BOARD MEMBERS *(All signatures must be dated)*

A. CHAIRMAN	B. MEMBER
Tammy A. Huneycutt 187840	Patrice L Kennedy 351915

C. MEMBER	D. MEMBER	E. SECRETARY
		PAUL E CARTER 468735

11. Certification of initiating board technical advisor that board action is complete and has been reviewed for adherence to all legal and technical requirements before being forwarded to approving authority.	SIGNATURE	DATE
	BARBARA R. ROGERS 151722 — Digitally signed by BARBARA R. ROGERS 151722 DN: dc=gov, dc=va, o=internal, ou=people, 0.9.2342.19200300.100.1.1=barbara.rogers@va.gov, cn=BARBARA R. ROGERS 151722 Date: 2016.05.25 10:58:39 -05'00'	May 25, 2016

REVIEWING BOARD

12. REVIEWING BOARD RECOMMENDATIONS AND REMARKS

13. SIGNATURE(S) OF REVIEWING BOARD MEMBERS *(All signatures must be dated)*

A. CHAIRMAN	B. MEMBER

C. MEMBER	D. MEMBER	E. SECRETARY

ACTION BY APPROVING AUTHORITY

14. ACTION	15. DATE	16. SIGNATURE AND TITLE OF APPROVING AUTHORITY
(X) APPROVED ( ) DISAPPROVED	6-27-16	(?DUSH)

VA FORM OCT 2008 **10-2543**