



DEPARTMENT OF VETERANS AFFAIRS
UNDER SECRETARY FOR HEALTH
WASHINGTON DC 20420

MAY 19 2008

Cathy Spivey-Paul, FACHE
Director (00)
VA Northern Indiana Health Care System
2121 Lake Avenue
Fort Wayne, Indiana 46805

Gwen Adams,
Vice President, AFGE Local 1384
2121 Lake Avenue
Fort Wayne, Indiana 46805

Dear Ms. Spivey-Paul and Ms. Adams:

I am responding to your memoranda of October 3, 2007, and October 11, 2007, respectively, concerning the enclosed grievance filed by American Federation of Government Employees Local 1384.

Pursuant to delegated authority, I have determined on the basis of the enclosed decision paper that the issue presented by this grievance is not a matter or question concerning or arising out of professional conduct or competence and does not raise issues concerning or arising out of peer review within the meaning of 38 U.S.C. § 7422(b); however, the Union's requested remedies are non-grievable and non-negotiable because they concern or arise out of professional conduct or competence and peer review within the meaning of 38 U.S.C. § 7422(b).

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

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 –Northern Indiana Health Care System
VA -08 -**

FACTS:

This matter arises out of a grievance filed by the American Federation of Government Employees (AFGE) Local 1384 (Union) alleging that P and S improperly met with employee to communicate her year-end proficiency rating at the Northern Indiana Healthcare System (VAMC). (Attachment 1) Ms. P supervised Ms. from December 25, 2005, to October 28, 2006. (Attachment 2) However, Ms. S began supervising Ms. on October 29, 2006. (Attachment 2) On December 22, 2006, Ms. S and Ms. P met with Ms. to provide her with a joint proficiency rating. (Attachment 2) Ms. S is listed on the report as the individual with whom the joint review was conducted and Ms. P is listed as the Rating Official. Both Ms. S and Ms. P signed the report.

On or about January 18, 2007, AFGE Local 1384 filed a grievance on Ms. 's behalf, alleging that Ms. P and Ms. S improperly met with Ms. to discuss her proficiency rating. (Attachment 1) The Union asserted that Ms. S should have been excluded from Ms. 's proficiency rating process because she had not supervised her for more than 90 days as required by VAMC policy. (Attachment 1; Attachment 10) The Union alleged that Management violated Article 54, Section E, and that Ms. 's proficiency rating was in conflict with "the policy for Northern Indiana Health Care System," which was not specifically referenced. As a remedy, the Union requested that Ms. be given a fair and accurate proficiency rating.

On January 30, 2007, Ms. S sent an email to her staff that stated: "In order to evaluate you, I had to be in my position for 90 days. If your evaluation is past due, that is the reason why. Please submit any information you would like me to take into consideration by COB 2/2/07. My plan in to completed (sic) evaluations by 2/9/07." (Attachment 3)

On January 30, 2007, Management met with the Union in an effort to resolve the grievance (Attachment 4). On February 1, 2007, Ms. P responded to the Union's grievance. (Attachment 4) Ms. P noted that although proficiencies cannot be appealed, she had met with the Union to discuss the concerns raised in the grievance and made several suggestions concerning possible action by the Union and/or Ms. (Attachment 4).

Thereafter, AFGE filed a second step grievance with Associate Director for Patient Care Services, which raised the same concerns that were raised at step one. (Attachment 6) As a remedy, the Union requested that Ms. be given a fair and accurate proficiency rating.

On February 6, 2007, Ms. [redacted] responded to the Union, stating that proficiency ratings are not grievable and reiterating that Ms. [redacted] could provide comments on her proficiency, which would be filed in her Official Personnel Folder. (Attachment 6) On or around March 1, 2007, the Union met with the Medical Center Director to discuss its concerns about Ms. [redacted]'s proficiency report. (Attachment 7) The Medical Center Director did not respond in writing to the Union because she took the position that proficiency reports are not grievable. (Attachment 11) The Union invoked arbitration on June 1, 2007 (Attachment 8). On August 7, 2007, the Federal Mediation and Conciliation Service forwarded a list of arbitrators to the Union so the parties could strike arbitrators. (Attachment 9)

On September 12, 2007, Management notified the Union that the Agency would be requesting a 7422 determination from the Under Secretary for Health (USH). (Attachment 10) It noted that it would provide the Union with a copy of the request before it was mailed to the USH and that the Union would have an opportunity to submit its views to the USH as well.

On October 3, 2007, the Union submitted a memorandum, with supporting exhibits, to the USH concerning the "matter raised as a 7422 issue against [redacted]". (Attachment 10) The Union's memorandum stated that the issue "is not that of a proficiency grievance, but that as (sic) procedural error. . . ." It contended that Ms. S [redacted]'s remarks about Ms. [redacted] should have been excluded from the latter's proficiency report because Ms. S [redacted] had not been her position for 90 days. As a remedy, the Union requested that Ms. [redacted] "be made whole and the supervisor's [Ms. S [redacted]] remark be expunged from the proficiency." In addition, the Union asserted that the Medical Center Director failed to provide a response to the Union and Ms. [redacted] within the time frame set forth in Article 42. The Union also raised the issue that Management "never raised [the 7422 issue] until the invoking of arbitration."

On October 11, 2007, the Medical Center Director requested a 7422 determination by the USH that the issue grieved, as well as the Union's requested remedies, are outside the scope of collective bargaining and not subject to the negotiated grievance procedure. (Attachment 11) In its request, Management cited several other decisions issued by the USH concerning proficiency reports where the USH "determined that substantive ratings in proficiency reports involve issues of professional conduct or competence within the meaning of 38 U.S.C. § 7422." Management also noted that collegiality – the proficiency criterion on which Ms. S [redacted] evaluated Ms. [redacted] – is one of the nine criteria that define performance requirements for RNs under the Nurse Qualification Standards and addresses the extent to which an RN contributes to the professional development of colleagues, peers, and others.

PROCEDURAL HISTORY

The Secretary has delegated to the USH the authority to determine 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).

ISSUE

Whether the grievance over Ms. [redacted] proficiency rating involves an issue of professional conduct or competence (direct patient care) within the meaning of 38 U.S.C. § 7422(b).

DISCUSSION

The Department of Veterans Affairs Labor Relations Act of 1991, 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, peer review, and employee compensation as determined by the USH.

The USH decisions on proficiency reports have long held that proficiency reports are non-grievable when they involve the substantive rating of an employee or clearly constitute an assessment of a provider's patient care duties. (See VA Medical Center, Fayetteville 5-16-94; VA Medical Center Washington DC, 01-06-06). In its memorandum, dated October 3, 2007, the Union asserts that its grievance does not involve Ms. [redacted]'s substantive proficiency rating. However, the Union's requested remedies – that Ms. [redacted] be given a fair and accurate proficiency rating and that Ms. P [redacted] remarks be removed from Ms. [redacted]'s proficiency report – do involve Ms. [redacted]'s substantive proficiency rating and are therefore non-grievable as matters that concern professional conduct or competence or peer review within the meaning of 38 U.S.C. § 7422(b).

The Union argues that it is grieving the procedural error allegedly committed by Management when Ms. [redacted] acted as Ms. [redacted]'s Rating Official. Pursuant to 38 U.S.C. § 7421(a), the Secretary has prescribed regulations contained in VA Directive/Handbook 5013\4 Part II, to implement the Title 38 Proficiency Rating System. VA Handbook 5013\4 Part II, Paragraph 5(a), identifies a Rating Official as "An employee designated to prepare a proficiency rating on an employee under that person's supervision." (Attachment 12) VA Directive/Handbook 5013\4 Part I, Paragraph 9(f) addresses the 90-day requirement set forth for Rating Officials: "As long as sufficient information is available on which to appraise an employee's performance that covers a 90-day minimum period, there is no requirement that a Rater occupy his/her position for a specific length of time. However, if a performance rating is not available or is not sufficiently developed to permit an appraisal, the appraisal period will be extended to provide for performance under the Rater for the minimum appraisal period." (Attachment 12)

The Union alleges that, despite the fact that Ms. S and Ms. F both met with Ms. to provide her with a joint proficiency rating, Ms. S's input on Ms. rating was improper because she had not been her supervisor for a 90-day period. The USH has previously determined that a grievance over when, and if, a proficiency rating is performed, concerns a narrow procedural requirement and does not affect the substance of the decision underling the employee's proficiency. (VA Medical Center Long Beach, 8-31-94) As the Union's grievance concerns the timing of the rating performed by Ms. S, it is not a matter of professional conduct or competence or peer review within the meaning of 38 U.S.C. § 7422(b) because it concerns a procedural requirement for the issuance of a proficiency rating.

The Union further alleges that Management violated Article 42 when the Medical Center Director failed to issue a written decision to the Union and Ms. after their meeting on or around March 1, 2007. Although Management's assertion that a written decision was not issued "because proficiency reports are not grievable" is generally true, the issue grieved in this particular case relates to a procedural requirement for a proficiency report, which is grievable for the reasons described above. (Attachment 11)

Finally, the Union suggests, albeit indirectly, that Management's delay in invoking the protections of 38 U.S.C. § 7422 until arbitration was invoked was somehow improper. In fact, the 38 USC § 7422(b) 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.

RECOMMENDED DECISION

That the Union's grievance over when Ms. 's supervisor conducted her proficiency rating is not covered by 38 U.S.C. 7422 exclusions.

APPROVED _____

X

DISAPPROVED _____

That the Union's requested remedies, that Ms. be given a fair and accurate proficiency rating and that Ms. P remarks be removed from Ms. 's proficiency report, are excluded from collective bargaining as matters or questions that concern or arise out of professional conduct or competence and peer review within the meaning of 38 U.S.C. § 7422(b).

APPROVED _____

X

DISAPPROVED _____

That the Agency did not waive its right to raise 38 U.S.C. § 7422 by raising the issue after the Union invoked arbitration.

APPROVED X

DISAPPROVED _____

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

5/20/08
Date