



DEPARTMENT OF VETERANS AFFAIRS
Veterans Health Administration
Washington DC 20420

FEB 23 2008

In Reply Refer To:

Glen W. Grippen
Director
Clement J. Zablocki VA Medical Center
5000 West National Ave.
Milwaukee, WI 53295

Constance Ferentz, President
American Federation of Government Employees
Local 5032
5000 West National Ave.
Milwaukee, WI 53295

Dear Mr. Grippen and Ms. Ferentz:

I am responding to the issues raised in your memoranda of May 31, 2007, and October 15, 2007, concerning the grievances and request for arbitration filed by AFGE Local 5032 regarding the reassignment of [redacted] RN, BSN, Psych BA, from the midnight shift in the Spinal Cord Injury Division to the day shift in the Telephone Triage unit of the Primary Care Division at the Milwaukee VA Medical Center.

Pursuant to delegated authority, I have decided on the basis of the enclosed decision paper that the issues presented by these grievances are matters concerning or arising out of professional conduct or competence (i.e. direct patient care and clinical competence) and peer review or employee compensation within the meaning of 38 U.S.C. § 7422(b) and are therefore outside the scope of collective bargaining.

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
VA Medical Center- Milwaukee, WI
VA 07-XX**

This matter involves a series of grievances filed through the negotiated grievance procedure relating to the reassignment of a registered nurse from the midnight shift in the Spinal Cord Injury Division (SCI) to the telephone/triage area of the Primary Care Division of the Clement J. VA Medical Center in Milwaukee, WI (the Milwaukee VAMC).

FACTS:

, RN, BSN, Psych BA, suffered three on-the-job injuries while working as a staff nurse on the night shift in the Milwaukee VAMC's SCI in 2005 and 2006. As a result of these injuries, the Milwaukee VAMC's Employee Health Provider¹ recommended work limitations that restricted his ability to perform the duties required of a staff nurse in the SCI. (Attachments 1-5) When Mr. tripped and fell again in May 2006, the Employee Health Provider placed him off-duty pending an examination by his personal physician. (Attachment 6) Mr. physician, MD, extended the restrictions imposed by the Employee Health Provider and kept Mr. off-duty into August 2006. (Attachment 6)

On August 7, 2006 MD, Manager of the SCI, requested a Physical Standards Board Review to assess Mr. physical suitability for continued employment as a staff nurse in SCI. (Attachment 6) Mr. was sent a notice of the Physical Standards Board Review by certified mail on August 7, 2006. (Attachment 7) This notice informed Mr. that he had until August 18, 2007 to submit physical examination results or other medical evidence to the Physical Standards Board. He was also informed that he would remain in an approved leave status pending a determination by the Physical Standards Board.

On September 1, 2006, a second Milwaukee VAMC Employee Health Provider² completed an Employee Emergency Treatment Form (Attachment 8) indicating that Mr. was able to work but was restricted to sedentary³ work until a

¹ It should be noted that Mr. was examined by at least three different VA Employee Health Providers, one in September 2005 and February-March 2006; a second in September 2006; and a third in January 2007. The first two recommended different levels of work restriction while the third recommended no restrictions other than that Mr. work PM shifts. (Compare Attachments 2, 3, 4, 8 and 17)

² See footnote 1.

³ The Employee Emergency Treatment Form defines sedentary work as "Lifting 10 pounds maximum and occasionally lifting and/or carrying such articles as dockets, ledgers, and small tools. Although a sedentary job is defined as one that involves sitting, a certain amount of walking and standing is often necessary in carrying out job duties. Jobs are sedentary if walking and standing are required only occasionally and other sedentary criteria are met."

Functional Capacity Evaluation (FCE) was completed. Mr. [redacted] was to work a four hour shift on September 5, 2006 and increase to 6 hours after two weeks, as tolerated.

On September 1, 2006, [redacted] MD, the chairman of the Physical Standards Board, sent a written request to Dr. [redacted] MD, requesting that Dr. [redacted] evaluate, among other things, Mr. [redacted] current clinical status; the probability of Mr. [redacted] inflicting injury or harm if not restricted or accommodated; and whether Mr. [redacted] duties should be restricted on a continuing basis. (Attachment 9)

On September 17, 2006, Dr. [redacted] a doctor specializing in musculoskeletal and EMG for the Medical College of Wisconsin, performed an independent medical evaluation on Mr. [redacted] (Attachment 10) In his report to the Physical Standards Board, Dr. [redacted] opined that based on his examination of Mr. [redacted], review of radiological data, results of the functional capacity evaluation, Mr. [redacted] long clinical history and review of the physical requirements for the job of RN in the SCI unit, Mr. [redacted] could not safely (personally or on behalf of his patients) return to his position in the SCI without modifications of his job requirements to restrict the physical demand level of the work to medium level.⁴ Dr. [redacted] further stated that due to the irreversible nature of Mr. [redacted] underlying condition, the restrictions were likely to be permanent.

Mr. [redacted] also supplied the Physical Standards Board with an Independent Medical Evaluation completed on September 11, 2006. (Attachment 11) The IME was conducted by [redacted] MD and was based on Dr. [redacted] review of Mr. [redacted] medical records and a physical examination. Dr. [redacted] opined in the IME that Mr. [redacted] was not totally disabled from work as a result of his May 21, 2006 slip and fall. Dr. [redacted] further opined that Mr. [redacted] did not need any restrictions relative to the May 21, 2006 accident, and that he was capable of returning to work without restrictions.

The Physical Standards Board met on November 27, 2006 to review Mr. [redacted] fitness to continue his duties as a staff nurse in the SCI unit. The Board considered Dr. [redacted] report, Dr. [redacted] iME report, and additional materials that Mr. [redacted] submitted to the Physical Standards Board under cover of letters dated August 16, 2006; September 11, 2006; September 24, 2006; November 8, 2006; and November 22, 2006. (Attachment 12) In a Board Action dated February 14, 2007 (Attachment 13), the Board found that Mr. [redacted] was not physically disqualified from performing as a staff nurse, but

⁴ Medium work is defined on the Employee Emergency Treatment Form as "Lifting 50 pounds maximum with frequent lifting or carrying of objects weighing up to 20 pounds." Dr. [redacted] also indicated that Mr. [redacted] would be required to take frequent 5 minute breaks, every 30 minutes to hourly, from constant walking or standing.

accepted Dr. _____ recommendations that permanent physical restrictions be implemented for Mr. _____ upon his return to duty⁵.

After the Physical Standards Board met but before it issued its formal Board Action, _____ RN, MSN, Associate Director for Patient/Nursing Services sent a memo to _____ SCI Division Manager, asking if Mr. _____ could be permanently accommodated in a staff nurse position in the SCI given his restrictions. (Attachment 14) Dr. _____ responded on December 6, 2006, stating that due to the nature of patient care in SCI, it would be impossible to determine how much assistance each patient may require, such that SCI could not control the frequency of lifting, pushing and pulling to comply with Mr. _____ restrictions. (Attachment 15) Dr. _____ further indicated that he would be unable to dedicate a full-time RN position solely to the activities in the SCI that were within the listed restrictions. Dr. _____ requested that the Medical Center find a position that could better accommodate Mr. _____ restrictions.

On December 29, 2006, _____, RN, Program Manager of the Primary Care Division, sent Mr. _____ a letter informing him that he would be reassigned from his night shift in the SCI Division to a weekday tour⁶ in the Telephone Triage (TT) unit of the Primary Care Division effective January 7, 2007. (Attachment 16) The TT unit is the only unit at the VAMC that could accommodate Mr. _____ physical restrictions, because the unit is a sedentary nursing assignment and there are no other nursing assignments within the VAMC that do not have physical requirements on the off tours. (Attachment 16)

After Mr. _____ received this letter but before the Physical Standards Board submitted its formal Board Action, Mr. _____ submitted to the Board an Employee Emergency Treatment Form dated January 5, 2007, on which a third Employee Health Provider⁷ indicated that Mr. _____ was able to return to work doing Heavy Work⁸ but should work PM shifts of no more than 12 consecutive hours "due to possible impaired decision-making in AM due to medications." (Attachment 17) At that time, however, the Physical Standards Board had already adjourned the Board and did not consider the January 5, 2007 Employee Emergency Treatment Form submitted by Mr. _____⁹ On January 8, 2007, Mr. _____ reported to work in the TT unit.

⁵ The restrictions stated that Mr. _____ could exert up to 50 pounds of force occasionally, 20 pounds of force occasionally and 10 pounds of force constantly; five minute breaks every 30-60 minutes from constant walking or standing and advised against bending lifting, twisting, pulling, reaching, and kneeling activity.

⁶ The Milwaukee VAMC's TT unit operates only on the first (i.e. daytime) shift. (Attachment 32)

⁷ See footnote 1 above.

⁸ The Emergency Employee Treatment Form defines heavy work as "lifting 100 pounds maximum with frequent lifting and/or carrying of objects weighing up to 50 pounds." The form also stated that Mr. _____ was to work PM shifts only for no more than 12 hours at a time.

⁹ Nothing in this determination would preclude the VAMC and PSB from reconsidering its findings, if appropriate.

On January 22, 2007, Mr. [redacted] filed the first of four grievances related to his injuries, time away from work, the findings of the Physical Standards Board and his reassignment. (Attachment 18) The January 22 grievance requested restoration of comp time, annual leave and sick leave. Additionally, Mr. [redacted] requested to be paid for 42 hours of holiday overtime for holidays he did not work during his time off and the payment of retention allowance for the time he was off. In a written response dated January 29, 2007, VAMC management responded to the January 22 grievance, agreeing to restore Mr. [redacted] annual leave and sick leave but denying the requests for retention allowance based on VA Handbook 5007, Part VI, Chapter 3, paragraph 11.c. (which states that the termination of retention pay is not grievable or appealable), and for holiday pay based on VA Handbook 5007, Part V, Chapter 6, paragraph 1.C. (1) (which provides for payment of additional pay for working on a holiday only when the employee performs service on that holiday). (Attachment 19)

On February 10, 2007, Mr. [redacted] filed an addendum to the January 22 grievance, again requesting retention pay and holiday pay but also demanding that he be made whole in all other ways including shift differentials, weekend pay differentials, and holiday pay losses (past and future). In the February 10 addendum, Mr. [redacted] also requested prospective loss of advancement and educational opportunities due to his transfer from the night shift in the SCI unit to the day shift in TT. (Attachment 20) On February 23, 2007, VAMC management denied the February 10 grievance. (Attachment 21)

On March 18, 2007, Mr. [redacted] again amended the January 22 grievance to expand the basis for the grievance to include discrimination based on gender, disability and reprisal for union activity. (Attachment 22) In the March 18 amendment, Mr. [redacted] reiterated his requests for past and future holiday pay, overtime, retention pay, shift differentials and weekend differentials, but expanded his relief requests to include damage to his mental, spiritual and physical health, \$70,000 for loss of ability to work in his chosen area and a transfer back to midnight shift.

On February 16, 2007, Mr. [redacted] filed a second grievance based on his transfer to TT. (Attachment 23) As a remedy he demanded reassignment to the SCI unit on the midnight shift; reimbursement for all financial losses due to his transfer; reimbursement for prospective projected business losses associated with his ownership of a bed and breakfast; 60-90 minute breaks each day to permit him to maintain his physical fitness and promote weight loss; and prospective unspecified damages that could be related to weight gain, back pain or other diagnosis that may be related to his transfer. VAMC management denied the February 16 grievance on February 23, 2007, stating that Mr. [redacted] reassignment was based on the findings of a Physical Standards Board and, as such, not grievable. (Attachment 24) Additionally, management noted that Mr. [redacted] requested remedies appeared to be claims related

directly to compensation and/or professional conduct or competence and were therefore excluded from the grievance procedure.

On March 19, 2007 Mr. moved the February 16 grievance to Step 2. (Attachment 25) VAMC management denied the Step 2 grievance on March 26, 2007. (Attachment 26) On April 9, 2007, Mr. moved the grievance to Step 3, adding legal fees to his list of requested remedies and further requesting that all of his grievances be consolidated for purposes of arbitration. (Attachment 27)

On January 26, 2007, Mr. filed an appeal with the Under Secretary for Health (USH) requesting a Disciplinary Appeals Board. This appeal categorized his reassignment as a transfer. (Attachment 28) On April 13, 2007, the Office of Human Resources Management and Labor Relations (OHRM) notified Mr. in writing that his reassignment¹⁰ was not a major adverse action and therefore not within the jurisdiction of the DAB¹¹. (Attachment 29)

On May 31, 2007, Glen W. Grippen, VAMC Director, requested that the USH determine whether the grieved matters involved issues excluded from bargaining under 38 U.S.C. 7422. (Attachment 30) On October 15, 2007, Mr. requested that the USH find the grieved matters were not excluded from bargaining or from the negotiated grievance procedure. (Attachment 31) In his October 15, 2007 response, Mr. challenges the Physical Standards Board's findings, and argues that the Board's findings and his reassignment are because of his protected union activities.

PROCEDURAL HISTORY

The Secretary has delegated to the Under Secretary of Health the final authority in the 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).

¹⁰ Reassignment is defined in VA Handbook 5005, Part II, Appendix H5, paragraph 2.f. as "a change from one position to another." Transfer is defined in VA Directive 5021, Appendix A, Section A, paragraph 3.m. as "the involuntary movement of an employee from one VA facility to another (under separate managerial authority) based on conduct or performance and without a break in service."

¹¹ 38 U.S.C. §7461(b)(1) affords a DAB jurisdiction over appeals from major adverse actions involving professional conduct or competence. 38 U.S.C. § 7461(c)(2) defines "major adverse action" to include transfer but not reassignment.

It should also be noted that OHRM does not possess the delegated authority to reject appeals of adverse actions based on jurisdiction on behalf of the Under Secretary of Health. However, as the USH, I concur with OHRM's finding that the reassignment was not an adverse action, and as such was not appealable before the DAB.

ISSUE:

Whether the grievances raised by Mr. [redacted] surrounding his reassignment from the night shift on the SCI unit to the day shift on the TT unit involve issues concerning or arising out of professional conduct or competence (direct patient care) and/or peer review and the establishment, determination or adjustment of Title 38 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 clinical competence), peer review or employee compensation as determined by the USH.

A. The Physical Standards Board Process

Pursuant to 38 U.S.C. § 7421(a), the Secretary has prescribed regulations in VA Handbook 5019, Part III, governing the Physical Standards Board process. The Physical Standards Board is responsible for determining the physical and mental fitness of employees appointed under the authority of 38 U.S.C. ch. 73 and 74, and for recommending action based on examination findings. VA Handbook 5019, Part III, paragraph 2. The regulations provide that “[a]ll cases of a questionable nature which have not been resolved or have been resolved unfavorably by consultation will be referred by the VA Examining Occupational Healthcare Provider to the Physical Standards Board for determination of physical fitness ...” and that “[t]he board will render its opinion as to whether or not the individual examined can perform the required service satisfactorily without hazard to VA beneficiaries, employees or self.” VA Handbook 5019, Part III, paragraph 5. Moreover, the regulations state that a Physical Standards Board’s findings “cannot be changed or modified except by the board itself.” *Id.*, paragraph 2.

In this case, the Milwaukee VAMC’s Physical Standards Board reviewed the numerous and sometimes conflicting findings of Dr. [redacted] Dr. [redacted] and two Milwaukee VAMC Employee Health Providers¹² to determine whether Mr. [redacted]

[redacted] could safely perform the patient care duties of a staff nurse in the SCI. Having found that Mr. [redacted] could not safely perform those duties, the Board

¹² The third Employee Health Provider opined on January 5, 2007 that – contrary to the findings of Dr. [redacted] – Mr. [redacted] could return to work with only minor restrictions. However, in adopting the permanent restrictions recommended by Dr. [redacted] over the contrary opinion of Dr. [redacted] the Board clearly determined that Mr. [redacted] physical restrictions were permanent. The Board had adjourned before receiving the third Employee Health Provider’s Employee Emergency Treatment Form. See Attachment 13, *supra* note 9.

recommended that the VAMC attempt to identify other staff nurse positions that could permanently accommodate his physical restrictions.

In compliance with that recommendation, the facility researched where they would be able to accommodate Mr. [redacted] physical restrictions, ruling out any other night shift nursing assignments because none existed that met with his restrictions, and reassigned him from the SCI to the TT, which operates at the Milwaukee VAMC only during the day shift. The Physical Standards Board's determination that Mr. [redacted] could not safely remain in the SCI was based on issues of professional conduct or competence, arrived at through the Board's peer review process and subject to modification only by the Board itself, and precluded from the negotiated grievance procedure by 38 U.S.C. § 7422. As the USH held in VAMC San Juan (July 3, 2003):

That the issues of a registered nurse's fitness for duty and physical standards to perform those duties be deemed exempt from the collective bargaining process under 38 U.S.C. 7422(b) as matters concerning or arising out of professional competency and conduct and peer review under Title 38.

Likewise, in VAMC Richmond VA 06-06 (October 11, 2006), after determining that one unit of the VAMC could not accommodate a nurse's restrictions without endangering patient safety and affecting patient care needs, the USH held that management's decision to detail and then reassign a nurse from one unit to another was based on patient care needs and, therefore, was non-grievable and non-arbitrable under Title 38. The USH has consistently concluded that where such reassignments are based on issues of clinical competence or are necessary to provide direct patient care, they involve professional conduct and competence within the meaning of 38 U.S.C. § 7422. See VAMC Chillicothe, Ohio VAMC VA 06-02 (September 6, 2006), VA Gulf Coast HCS VA-04-17 (January 5, 2005) and Northampton, MA VAMC VA-05-01 (February 8, 2005).

B. Mr. [redacted] Reassignment from SCI to TT

The Secretary has prescribed regulations governing reassignments in VA Handbook 5005, Part IV, Chapter 3, Sections A and B. Section A 4(b) provides that in exercising the authorities covered in this handbook, primary consideration will be given to the efficient and effective accomplishment of the VA mission. The Secretary has held in numerous decisions that reassignments made out of concern for patient safety or for the efficient, effective accomplishment of the Department's mission are exempt from the collective bargaining process. (See, for example, VA-06-06, VAMC Richmond, VA (October 11, 2006) and VA-06-02, Chillicothe, OH VAMC (September 6, 2006)). The Milwaukee VAMC's determination in this case that Mr. [redacted] should be reassigned from the

midnight shift in SCI to TT, which at Milwaukee operates only during the day,¹³ is likewise excluded from the negotiated grievance procedure. The reassignment of Mr. [REDACTED] to the TT unit was made because it was the only unit at the VAMC that could accommodate Mr. [REDACTED] physical restrictions and there were no other off tour nursing assignments available for him. (Attachment 16)

C. Mr. [REDACTED] Requested Remedies

Mr. [REDACTED] has requested the payment of weekend and shift differentials and lost opportunities to work overtime and holidays, for the time he was away from work, as well as prospectively for the remainder of his career. The USH has determined that when an employee is reassigned from one shift to another, a loss of shift differential is an issue of employee compensation within the meaning of 38 U.S.C. 7422 and is excluded from the collective bargaining process. (VA 04-07, VAMC Portland, OR). Moreover, the Title 38 nurse premium pay statute, 38 U.S.C. 7453, authorizes premium pay for night, weekend, holiday or overtime only for nurses who actually perform service on a tour of duty during those times. Mr. [REDACTED] requested remedy is therefore legally impermissible as well as barred by 38 U.S.C. § 7422.

Mr. [REDACTED] has requested both retroactive and prospective payment of retention pay. The USH held in a prior decision that "the union grievance... over termination of a retention allowance... involves a matter arising out of the establishment, determination or adjustment of employee compensation within the meaning of 38 U.S.C. 7422 (b)." (VA 05-06, VAMC Asheville, NC (August 22, 2005)).

Mr. [REDACTED] has also requested financial compensation for alleged prospective business losses, medical expenses and \$70,000 to further his education. While we are aware of no authority to grant such relief in a grievance under the negotiated grievance procedure, to the extent these remedies are premised on the 7422 matters discussed above, 7422 would preclude these remedies even if there were legal authorities to grant them. Because 38 U.S.C. § 7422 precludes arbitration of the subject matter of Mr. [REDACTED] grievances, the legality of these requested remedies is moot.

Finally, Mr. [REDACTED] has alleged that he was discriminated against on the basis of sex, because female nurses have been allowed to continue to work in the SCI unit despite having a higher risk for injury and having greater physical restrictions. (Attachment 22) If Mr. [REDACTED] does believe that the decision to reassign him was based on a discriminatory reason, he could appeal the decision within the VA by contacting the Office of Resolution Management. Mr. [REDACTED]

¹³ The Milwaukee VAMC's off-tour TT functions are handled by a VISN-level TT team based in Madison, WI. See Attachment 32.

grievance, however, is not saved by his discrimination allegation. To the contrary, Mr. _____ may not circumvent the mandates of Section 7422 by alleging that his reassignment was discriminatory. See VA-04-11, VASNHCS, Reno, NV (December 17, 2004) (finding discrimination allegation did not alter or disturb the determination that the doctor's grievance was barred by 38 U.S.C. § 7422 (b)).

RECOMMENDED DECISION:

That the union grievances concerning the physical restrictions adopted and imposed on Mr. _____ by the Physical Standards Board involve issues concerning or arising out of professional conduct or competence and/or peer review within the meaning of 38 U.S.C. § 7422(b) and are therefore outside the scope of collective bargaining.

APPROVED _____

DISAPPROVED _____

That the union grievances relating to the reassignment of Mr. _____ from the midnight shift in the SCI Division to the day shift in the TT Unit of the Primary Care Division involve issues of professional conduct or competence within the meaning of 38 U.S.C. § 7422(b) and are therefore outside the scope of collective bargaining.

APPROVED _____

DISAPPROVED _____

That the union grievances requesting Title 38 shift differential, holiday pay and overtime pay for nighttime, holiday and overtime work that Mr. _____ did not actually perform involve the establishment, determination or adjustment of Title 38 employee compensation within the meaning of 38 U.S.C. § 7422(b) and are therefore outside the scope of collective bargaining.

APPROVED _____

DISAPPROVED _____

That the union grievances requesting compensation for prospective business losses and educational expenses as remedies for his reassignment from SCI to TT involve issues of professional conduct or competence within the meaning of 38 U.S.C. § 7422(b) and are therefore outside the scope of collective bargaining.

APPROVED X

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

DISAPPROVED _____

2/25/08
Date