



DEPARTMENT OF VETERANS AFFAIRS
Veterans Health Services and Research Administration
Washington DC 20420

JAN 12 1993

In Reply Refer To:

Director (00)
VA Medical Center
5901 East Seventh Street
Long Beach, CA 90822


Dear

I am responding to the issues raised concerning the enclosed grievance filed by the American Federation of Government Employees (AFGE) local union.

Under 38 USC Section 7422, any matter affecting registered nurses hired pursuant to Title 38 and concerning or arising out of professional conduct or competence, peer review, or the establishment, determination or adjustment of employee compensation is outside the scope of collective bargaining and is not subject to review by any other agency. The law authorizes the Secretary, or delegatee, to determine the grievability of any question arising under its provisions. The Secretary has delegated to my office the authority to make such determinations which are not subject to administrative review under the law.

Acting pursuant to this authority, I have determined that this grievance concerning a registered nurse's performance counselings and reassignment to the day tour involves professional conduct or competence, peer review and compensation. Performance counselings are vehicles for evaluating a nurse's professional competence and conduct. Determining staffing requirements concerns overall competency of the staff at a facility and their ability to perform without compromising patient care, given the staff available. The requested remedy of no monetary loss would imply that backpay is being requested for the amount of night differential the nurse would have received absent assignment to the day tour. Providing assistance to qualify for intermediate grade involves the peer review system. Consequently, I believe that the issues raised relate to professional competence or conduct as well as peer review and compensation. Accordingly, the grievance concerning performance counselings and reassignment to the day tour is not grievable.

Sincerely yours,

for 
James Holsinger Jr., M.D.
Under Secretary for Health

Enclosure

Title 38 Grievability
Decision Paper

FACTS

On January 3, 1992, the American Federation of Government Employees (AFGE) Local union at the VAMC Long Beach, California filed a first step grievance on behalf of _____ an R.N., alleging that _____ is being retaliated against for seeking information on how to attain a higher grade, that she has been discriminated against with vague counselings and that her transfer to days will adversely affect her health.

AFGE has requested the following remedies:

- (1) That _____ remain on the night tour.
- (2) That _____ suffer no monetary loss.
- (3) That _____ be given assistance so she can qualify for intermediate grade.
- (4) That _____ be given the opportunity to correct any deficiencies on her own tour.
- (5) That _____ be given the opportunity to address and rebut allegations in writing.

ISSUE

Since AFGE has filed a grievance alleging unfair treatment _____ received on her reassignment and related performance counselings, it is necessary for a decision to be made by the Under Secretary for Health whether these matters are grievable.

DISCUSSION

Under the "Department of Veterans Affairs Labor Relations Improvement Act of 1991" (the Act), persons hired pursuant to Title 38, United States Code, have the right to engage in collective bargaining pursuant to the Federal Labor-Management Relations Statute, except as to any matter or question concerning or arising out of (1) professional conduct or competence, (2) peer review, or (3) the establishment, determination, or adjustment of employee compensation (38 USC 7422). The Act also authorizes the Secretary of Veterans Affairs, or designee, to decide any issue of whether a matter or question concerns or arises from any of these issues. The Secretary's decision is not subject to collective bargaining or subject to review by any other agency. Id

This case presents issues already decided by the Under Secretary for Health, in GR-04-92 (VAMC Salem and AFGE decided May 14, 1992), NG-05-92 (VACO and AFGE decided June 15, 1992), and GR-11-92 (VAMC Long Beach and AFGE decided August 17, 1992). In GR-04-92 the Under Secretary for Health determined that performance counselings relate to professional conduct or competence. In NG-05-92 the Under Secretary for Health determined that the placement of health care personnel is related to the professional competence or conduct of those employees. In GR-11-92 the Under Secretary for Health determined that

the requested remedy of promotions with backpay involved peer review and compensation. In this case the remedy of no monetary loss would imply that backpay is being requested for the amount of night differential the nurse would have received absent assignment to the day tour. Providing assistance to qualify for intermediate grade involves the peer review system. Consequently this grievance raises "a matter or question concerning or arising out of professional conduct or competence, peer review and compensation" under Title 38. Accordingly, such grievance is nongrievable under the Act.

Recommendation:

We recommend that the Under Secretary for Health determine that this grievance concerns or arises out of professional conduct or competency, as well as peer review and compensation under Title 38, United States Code and is outside the scope of collective bargaining.

Approve Recommendation

Disapprove Recommendation

John T. Farrar

Jr. James Holsinger Jr., M.D.
Under Secretary for Health

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