



DEPARTMENT OF VETERANS AFFAIRS
DEPUTY ASSISTANT SECRETARY FOR
HUMAN RESOURCES MANAGEMENT
WASHINGTON DC 20420

January 16, 2009

Bill Wetmore
Chair, Grievance and Arbitration Committee
National Veterans Affairs Council (NVAC) #53
American Federation of Government Employees (AFGE)
Board of Veterans Appeals
VA Central Office
810 Vermont Avenue, NW
Washington, DC 20420

Dear Mr. Wetmore:

This is in response to your grievance dated December 4, 2008 regarding "the denial of a union representative's right to participate in a Professional Standards Board (PSB) and right to be the recipient of a performance award." (Attachment 1) In your grievance, you allege violations of 5 USC §§ 7116 (a)(1), (2) and (4), Articles 2, 16, 26 and 46 of the VA/AFGE Master Agreement. We deny any violation of the statute and/or the Master Agreement.

You also state that the National Grievance is being filed because a local "volunteer union steward in Beckley, West Virginia...was automatically terminated as a potential Professional Standards Board (PSB) member as a result of his status of 'union activity' and union membership' for his local." You specifically state that an electronic mail from the Chief of Human Resources at the Beckley VA Medical Center (VAMC) to the Director of the facility cites VA Handbook 5005, Part II, Chapter 3, [Section C], Paragraph 2d stating that "termination of Board Membership is to occur as a result; 'of an election or appointment as a union official.'" We requested a copy of the cited e-mail from its author and have attached that document to this response as Attachment 1. Upon review, it would appear that you have misquoted the email in your grievance. Irrespective of that fact, the particulars of the specific issues arising at the Beckley VAMC should be addressed in a Local Grievance and not a National Grievance.

In addition to the issues arising at the Beckley VAMC, you state that the grievance is also being filed "as a result of recently discovered guidance (September, 2008) to the field from OHRM/LR about the role of union officials in PSB proceedings without clarifying guidance of the intent of non-discrimination under [5 USC] 7102 for all union officials." You specifically state that the

guidance was created by Doug Katcher and covers “the eligibility of union officials (100% and less than 100%) for membership on DAB (Disciplinary Appeal Boards) and/or PSB (Professional Standards Board), Performance Awards/ Performance Ratings for union official of less than 100% and 100%, denial of eligibility of certain union officials in Title 38, under 7452 for overtime/shift differential if they are 100%.”

You did not attach a copy of the referenced document to your grievance and we have been unable to find any such document. Please furnish us with a copy within 15 days to be able to properly address the allegation in your grievance. We are aware of similar guidance issued in Human Resources Management Letter (HRML) No. 05-08-12, *Instructions Concerning the Impact of Union Officials' Use of Official Time on Pay, Performance Appraisals, Awards and Eligibility for Membership on Peer Review Boards*, which was signed by Willie Hensley, Deputy Assistant Secretary for Human Resources Management, on October 27, 2008. (See Attachment 2)

The VA Office of Human Resources Management issues HRMLs to clarify existing policy or law with respect to human resources topics. VA policy prohibits the issuance of a HRML to set new policy or to mandate new procedures. (See VA Directive 6330, paragraph 2.b., attached hereto as Attachment 3.) As such, the October 27, 2008 HRML does not constitute any change in VA policy, but merely clarifies the pre-existing policy provisions and FLRA case law pertinent to the topics addressed therein. Moreover, the HRML does not contain the language you cite in paragraph five (5) of your grievance. Rather, the HRML states that union officials “have a **potential** conflict of interest that **may** preclude their service on [Disciplinary Appeals Boards] DAB’s, PSBs and Compensation Panels. This potential for conflict arises because DABs and PSBs must determine the propriety of discipline and other management-initiated actions imposed on bargaining unit employees, while Compensation Panel members recommend market pay amounts and adjustments for providers within the bargaining unit. If a union official is called upon to represent the interests of bargaining unit employees in a grievance or labor negotiations arising out of the same management action that is subject to peer review, that union duty **may** thus be in conflict with the duty of DAB, PSB and Compensation Panel members to act as agencies of the Under Secretary of Health.” (Attachment 2, page 1, question a., paragraph 2) (Emphasis added).

In paragraph six (6) of your grievance, you state that management is in violation of Article 46 of the VA/AFGE Master Agreement because it did not notify the union of a change in working conditions when interpreting that “union officials who are less than 100% union capacity and in any capacity representing employees” cannot be members of a PSB. The HRML does not state what you have alleged, but simply states that a union official authorized to spend 100 percent of his or her time on union duties has an inherent conflict of interest because such union officials perform only union assigned duties and cannot act

as agencies of the Under Secretary as required by VA policy. That statement does not constitute a change in VA policy, but merely reiterates the policy that has existed in VA Handbook 5005 since 2002 and existed in MP-5 for many years prior to the issuance of VA Handbook 5005.

The HRML also clarifies that the decision of whether a union official who performs less than 100 percent of his or her time on union capacity may serve on a PSB, DAB or Compensation Panel requires a case by case analysis "...to determine whether the employee has an actual conflict of interest that might prevent him or her from being impartial about matters the board must consider." (Question a., paragraph 4) Again, this is merely a clarification of pre-existing VA policy and does not constitute a change in working conditions. Moreover, the HRML clearly does not make an "automatic assumption that being any type of union (employee) representative...creates a nonrebuttable presumption...that [the representative] cannot divest [him or herself] or be concerned with the needs and problems of the entire VHA" or that "union affiliation prevents one from being interested, available or even qualified", as claimed in paragraphs 10 and 8 of your grievance.

In response to the allegation made in paragraph eleven (11) of the grievance, please note that the HRML states that "[p]eer review panels such as DABs, PSBs and Compensation Panels serve as 'agencies of the Under Secretary for Health....'" (Attachment 2, page 1, question a., paragraph 1). Question b. of the HRML addresses whether union officials are eligible to receive performance awards and performance ratings under title 5 and title 38 performance systems. Again, this is not a statement of new policy, but a clarification of pre-existing legal requirements based on case law, government-wide regulations, and long-standing VA policy. As a result, we do not believe there has been a violation of any Master Agreement provision and/or law as alleged in paragraph fifteen (15).

The HRML does not address the statement made in paragraph 17 of your grievance: "Title 38 RNs on 100% official time are not eligible for overtime pay or shift differential under 38 USC 7453 because such pay requires that the employee perform management-ordered and approved service during the qualifying period." However, we believe that statement accurately reflects the statutory requirements for Title 38 nurse premium pay as does the statement in paragraph 19 of the grievance that "if a RN on 100% official time 'is directed or would like to be considered for overtime (OT) as part of an equitable rotation among other employees, [the RN's union duties] should have no bearing in itself on whether they are directed to or capable to perform overtime...The only consideration in this regard should be if the management official deems the 100% union official qualified and competent for 'assignment of work.'"

In response to some of the remedies requested in paragraph 21 we need to remind you that we have not seen the September 24, 2008 document you

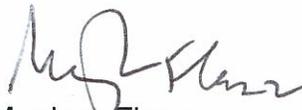
reference and do not know when or if it was ever posted on the VHA intranet, as alleged. Furthermore, the HRML referenced above was published on October 27, 2008, and has been available on the VA intranet since that time. We therefore believe the grievance is untimely filed.

In addition, as one of your remedies, you have requested that the Beckley facility allow the re-submission of the allegedly non-selected Physician's Assistant's name for membership in the PSB. Because PSBs are peer review entities, we believe the selection of PSB members is excluded from bargaining pursuant to 38 U.S.C. § 7422. Furthermore, the selection of a particular employee to be a member of a PSB is an assignment of work, one of management's reserved rights under 5 U.S.C. § 7106. As a result, we believe your requested remedy is inappropriate.

Finally, to the extent that the grievance requests training for management officials, such request is inappropriate because it is not confined to bargaining unit employees.

For the reasons stated above, the grievance is denied.

Sincerely yours,

A handwritten signature in black ink, appearing to read 'Meghan Flanz', is positioned above the typed name.

Meghan Flanz
Deputy Assistant Secretary
For Labor-Management Relations