



DEPARTMENT OF VETERANS AFFAIRS
UNDER SECRETARY FOR HEALTH
WASHINGTON DC 20420

NOV 19 2008

Michael D. Adelman, M.D.
VA Medical Center Erie PA
Director (00)
135 East 38th Street
Erie, PA 16504

Joel Crandall
Chairperson, SEIU, Local 200 United (RNU)
135 East 38th Street
Erie, PA 16504

Dear Mr. Adelman and Mr. Crandall:

I am responding to your correspondence of June 18, 2008, concerning a grievance filed by SEIU Local 200 United over the non-selection of a registered nurse for a position on Unit 6 at the VA Medical Center in Erie, PA.

Pursuant to delegated authority, I have determined on the basis of the enclosed decision paper that the union's grievance concerning the non-selection of Mr. Monte Hoover is excluded from collective bargaining as a matter or question concerning or arising out of professional conduct or competence within the meaning of 38 U.S.C. 7422.

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, M.D., MS, MACP,
Under Secretary for Health

Enclosures

Title 38 Decision Paper – VA Medical Center Erie PA

FACTS:

On December 21, 2007, the nurse executive at the VA Medical Center in Erie, PA, posted a vacancy announcement for a registered nurse position on Unit 6. The position advertised was for a full time registered nurse on a day tour with support to evenings. The announcement stated that the selected RN would provide direct patient care as well as managing the nursing care provided by the non-professional staff, and that the successful applicant would have basic arrhythmia and Advanced Cardiac Life Support (ACLS) training. (Attachment A)

Four registered nurses applied for the vacant position. Of the four applicants, three were currently assigned to evening tours on Unit 6 and the fourth was assigned to Surgical Care. The three RNs who were assigned to Unit 6 were considered to be equally competent and qualified. All three had attended an annual competency renewal which included Glucometer Annual Competency Operator Re-Certification, Restraints Competency, Pain Competency, Basic Arrhythmia and Telemetry, Safe Patient Handling and Movement Policy, and Patient Controlled Analgesia. All three were also current in ACLS training. In addition, the three RNs possessed recent critical care experience as a result of working on the unit where the vacancy existed. The fourth applicant, Monte Hoover, RN, had been assigned to the Surgical Care program for approximately eleven years and did not attend the annual competency renewal, nor was he current in ACLS.

Once management determined that three candidates from within Unit 6 were equally competent, proper consideration was given to the seniority date of these individuals. The most senior of these three RNs, Patricia Page, was selected. On January 16, 2008, the acting nurse executive forwarded a memorandum to Human Resources indicating that Ms. Page had been selected. (Attachment B) On January 16, 2008, the acting nurse executive provided Ms. Page and the other applicants written notice regarding the selection for the position. (Attachment B)

On February 19, 2008, the Service Employees International Union, Local 200United (SEIU or Union) filed a written grievance challenging Mr. Hoover's non-selection (Attachment C). The nature of the grievance was identified as: "A more senior, more competent and qualified in-house RN was passed over for an in-house Staff RN job posting so that management could give a RN from the affected unit the posted position." The remedy requested in the grievance was that management "[c]ease and desist from this practice and abide by the RN Contract giving all bargaining unit RNs fair and equitable consideration for all applicable job postings based on seniority, competence, and qualifications."

On February 22, 2008, Ms. Cynthia Russell, Supervisor of Unit 6, provided a written response to the grievance at the first step of the grievance process. In her response, Ms.

Russell stated, "The selectee of this position must possess or must receive training in Advanced Cardiac Life Support (ACLS). All candidates were given equal consideration. After verifying that Monte Hoover was not current in ACLS, it was determined that Mr. Hoover, though most senior, was not as well qualified as the other candidates who did possess a current ACLS card. Since the remaining three candidates were equally qualified, the most senior of the remaining candidates was selected in accordance with Article XXIII, Section B¹ of the SEIU Local 200 United (RNU) contract." (Attachment E)

The union elevated the grievance to Step 2 on March 10, 2008. (Attachment C)

On March 24, 2008, Ms. Dorene M. Sommers, Acting Nurse Executive, met with SEIU to discuss the grievance at the second step of the grievance process. In attendance were Joel Crandall, SEIU Local 200 United Chairperson, and Ms. Sommers. After that meeting, Ms. Sommers responded at the second step as follows: "The posting for this position stated 'The RN will have or will receive basic arrhythmia and ACLS training.' It was determined that the candidate in question did not possess a current ACLS card. For this reason, it was determined that this candidate was not as competent as the candidate that was selected for the position as required by Article XXIII, Section B of the SEIU Local 200 United (RNU) contract. Selecting a candidate without a current ACLS card would require additional training time to perform the functions of the position. Therefore, the grievance is denied at the second step." (Attachment F)

On April 3, 2008, the union advanced the grievance to step 3 of the grievance process.

Michael D. Adelman, M.D., Director of the Erie VA Medical Center, denied the Step 3 grievance on April 18, 2008. (Attachment G) Dr. Adelman stated that the non-selection for the reassignment opportunity concerns or arises out of professional conduct or competence within the meaning of 38 USC 7422.

The union invoked arbitration on May 12, 2008. (Attachment H) On May 21, 2008, Arleen Romba, Human Resources Specialist notified the union that management intended to pursue a section 7422 decision on the matter from the Under Secretary for Health (USH), and asked that the selection of an arbitrator be deferred until after the decision was received. (Attachment H) Management's memorandum to the USH requesting that determination was dated June 18, 2008. On July 28, 2008, SEIU submitted a response to management's request for a 7422 determination.

PROCEDURAL HISTORY

The Secretary has delegated to the USH the final authority in the VA to decide whether a matter or question concerns or arises out of professional conduct or competence (i.e., direct

¹ Article XXIII, Section B of the SEIU Local 200 United contract provides,

Competent employees will be given preference for available work areas or locations. When two (2) or more equally competent nurses request the open position, preference will be given to the most senior competent Nurse. . .

patient care or clinical competence), peer review or employee compensation within the meaning of 38 U.S.C. 7422(b).

ISSUE

Whether the local union's grievance involving the non-selection of a registered nurse for a reassignment opportunity concerns or arises out of professional conduct or competence (direct patient care, clinical competence).

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 (direct patient care or clinical competence), peer review and employee compensation as determined by the USH.

Pursuant to 38 U.S.C. 7451(a)(4), the Secretary has prescribed regulations (contained in VA Handbook 5005, Part IV, Chapter 3, Section A, paragraphs 4. c. and d.) to implement assignments of Title 38 employees, including registered nurses. Paragraph 4.c. of the referenced handbook provides that "[a]pproving official will make maximum use of an employee's skills and capabilities..." In accordance with paragraph 4.d., "[e]mployees will only be assigned duties and responsibilities for which they will be able to perform satisfactorily." In the instant case the selecting official based her selection on the candidates' respective clinical competence qualifications.

The contract provision cited in the grievance may reasonably be interpreted to provide only that where two or more fully qualified employees apply for an available work opportunity, preference will be given to union members and, if two or more fully qualified union members are equally competent, the senior of such candidates will be chosen.² While that interpretation may not always give rise to issues of questions of professional conduct or competence within the meaning of 38 U.S.C. 7422(b), in this case the grievance seeks to override management's assessment of the applicants' relative clinical competence. Significantly, the contract provision is silent as to whether and how management might assess the relative clinical competence and qualifications of nurses during the selection process. While 38 U.S.C. §7422(b) does not preclude a provision of the contract that requires management to consider seniority when making selection decisions among internal candidates, the criteria that management uses to assess and compare clinical competence are not subject to collective bargaining. 38 U.S.C. 7422(b).

This decision is consistent with prior USH decisions involving grievances that arise out of management's selection of nurses for employment and reassignment opportunities. See Salisbury, NC VAMC (September 16, 2004)(requiring that management select the senior-most nurse for each vacancy rather than place nurses according to their relative levels of

² The SEIU Local 200 United contract was approved by the Under Secretary of Health. This provision, however, does not waive management's right to assess applicants' relative clinical competence when making selection decisions.

clinical competence has the potential to significantly impact the manner in which patient care is delivered and is therefore non-grievable); the Erie, PA VAMC (July 1, 2002)(finding that any grievance involving RN selection procedures based on professional qualifications raises a matter or question concerning or arising out of professional conduct or competence); the Buffalo, NY VAMC (August 16, 1994); and Sepulveda, CA VAMC (September 3, 1993).

RECOMMENDED DECISION

That the local union's grievance concerning a contract violation in the non-selection of Monte Hoover be deemed non-grievable and excluded from collective bargaining as a matter or question that concerns or arises out of professional competence (direct patient care or clinical competence) within the meaning of 38 U.S.C. 7422(b).

APPROVED X

DISAPPROVED _____

Michael J. Kussman

Michael J. Kussman; M.D., MS, MACP
Under Secretary for Health

11/19/08

Date