

JUL 20 1992

Mr. Allan S. Goss
Director (00)
VA Medical Center
100 Emancipation Road
Hampton, VA 23667

Dear Mr. Goss:

I am responding to the issues raised concerning the enclosed grievances filed by the American Federation of Government Employees (AFGE) on behalf of two registered nurses.

Under 38 USC Section 7422, any matter affecting health care personnel in positions described in 38 USC 7421(b) and concerning or arising out of professional conduct or competence, including direct patient care and clinical competence, is non-negotiable. The law authorizes the Secretary, or delegatee, to determine the grievability of any matter arising under its provisions. The Secretary has delegated to my office the authority to make any such determinations, which are not subject to administrative review under the law.

Acting pursuant to this authority, I have determined that the reassignment and performance evaluation of health care personnel described in 38 USC 7421(b) are fundamental to establishing the level and quality of patient care to be provided by the Department of Veterans Affairs. Determining staffing requirements and evaluating performance concerns overall competency of the staff at each facility and their ability to perform without compromising patient care, given the staff available. Consequently, I believe any matter relating to the assignment and performance of such health care personnel at any VA facility is related to the professional competence or conduct of those employees. Accordingly, the grievances concerning reassignment and performance evaluation are not grievable.

Sincerely yours,

James W. Holsinger Jr., M.D.
Chief Medical Director

Enclosures

Title 38 Grievability
Decision Paper

FACTS:

A. Grievance of Ms. Hanna Conyers, R.N.

The Union on behalf of Hanna Conyers, R.N., wrote the Director requesting an immediate reassignment to the Outpatient Clinic. The request stated that Ms. Conyers' Head Nurse had taken reprisal action against her, that her supervisor had attempted to issue a counseling on her time and attendance and her performance. The request further stated that Ms. Conyers had lost confidence in being able to work with her supervisor and could no longer tolerate working under the conditions set forth on her unit.

Prior to the time of the request for a reassignment there was a vacancy in Ambulatory Care (Outpatient Clinic). It was decided not to fill the position. Upon reviewing her reassignment and finding out that it was not to Ambulatory Care but rather to the Acute Surgical Unit, Ms. Conyers sought to defer her transfer until a position in Ambulatory Care became available. This request was denied.

The Chief of Staff responded that patient care would best be served by the reassignment of Ms. Conyers to the Acute Surgical Unit.

B. Grievance of Ms. Eileen Barbour, R.N.

Ms. Barbour was given a performance letter critical of her interpersonal relationships with both patients and staff. The letter stated that her performance did not promote nor was it conducive to the delivery of quality patient care, and did not reflect sound nursing judgement.

The union took issue with several statements in the letter.

AFGE has requested the following remedies:

Grievance A- (1) Reassignment to the Ambulatory Care Unit or MICU;
(2) Attorney Fees;
(3) \$10,000 punitive damages for the grievant.

Grievance B- (1) Performance note be rescinded;
(2) Attorney fees.

ISSUE:

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.

Professional conduct and competence include matters dealing with a nurse's performance. One of the grievances involves a reassignment and the other a performance note both relating to conduct and/or performance. How a nurse performs an assignment is a matter concerning or arising out of professional conduct or competence. It is clear from AFGE's requested remedies that both grievances concern or arise out of professional conduct or competence since they challenge performance determinations made by management. Consequently, both grievances raise "a matter or question concerning or arising out of professional conduct or competency" under Title 38. Accordingly, such grievances, are non-grievable under the Act.

RECOMMENDATION:

We recommend that the Chief Medical Director determine that each grievance concerns or arises out of professional conduct or competency under Title 38, United States Code.

DECISION:

Approve Recommendation _____ ✓

Disapproved Recommendation _____

James W. Holsinger Jr.

James W. Holsinger Jr., M.D.
Chief Medical Director

7-20-92

Date

Briefing Slip

PURPOSE: Decision paper and letter to the Director at the VA Medical Center, Hampton, Virginia, responding to issues raised concerning two grievances submitted by the American Federation of Government Employees (AFGE).
(TABS A & B)

DISCUSSION: P.L. 102-40 (TAB C) gives Title 38 employees the right to engage in collective bargaining under Federal employee labor laws, 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. The Act also authorizes the Secretary of Veterans Affairs, or designee, to determine whether a matter or question concerns any of the above issues. The Chief Medical Director has been delegated authority to decide these matters. (TAB D) That decision may not be reviewed by any other agency and is not subject to collective bargaining.

AFGE has filed two grievances (TABS A & B) on behalf of two registered nurses. The first grievance concerns a reassignment of a nurse due to her relationship with her supervisor and her admission she could no longer work under the conditions set forth by the supervisor. The second grievance concerns a written performance note dealing with a nurse's performance.

Consequently, each grievance raises "a matter or question concerning or arising out of professional conduct or competency" under Title 38. Accordingly, such grievances are non-grievable under the Act.

IMPLICATION: The decision on these grievances will set the precedent for how similar grievances will be treated in future cases at other facilities.