



DEPARTMENT OF VETERANS AFFAIRS
Veterans Health Administration
Washington DC 20420

OCT 1 0 2003

In Reply Refer To:

Director
VA Medical Center
1100 Tunnel Road
Asheville, NC 28805

Dear Mr.

I am responding to the issue raised in your memorandum of August 19, 2003 concerning a grievance filed by the American Federation of Government Employees (AFGE), Local 446, dated July 17, 2003. The issue pertains to union dissatisfaction over the Asheville VAMC's re-appointment, on a fee basis, of a recently retired nurse to fill in as an evening coordinator on four evenings in June 2003.

Pursuant to delegated authority, I have decided on the basis of the enclosed paper that there are issues presented in the subject grievance that concern or arise out of professional conduct or competence and are thus exempted from collective bargaining and negotiated grievance procedures by 38 U.S.C. § 7422(b). This decision does not preclude arbitration of the non-exempted matters raised by the grievance, e.g. whether management failed to post vacancies within the bargaining unit in accordance with the AFGE Master Agreement.

Please provide this decision to your Regional Counsel and Human Resources Officer as soon as possible.

Sincerely yours,

A handwritten signature in cursive script, reading "Robert H. Roswell", is written over the typed name.

Robert H. Roswell, M.D.
Under Secretary for Health

Enclosure

Title 38 Decision Paper -- VAMC Asheville, NC
VA - 03-06

FACTS

In April 2003, _____ a registered nurse, retired after more than 30 years of VA service. For 15 of those years, she had served as evening coordinator. Subsequent to Ms. _____ retirement, the facility found that it needed an evening coordinator on an emergency basis for four evenings in June, 2003. Management determined that Ms. _____ was well qualified to assume this role on the dates in question. On June 12, 2003, Ms. _____ agreed to return to the medical center on a fee basis appointment under 38 U.S.C. 7405(a)(2). On June 14, 15, 16 and 28, 2003, she served as the evening coordinator on an emergency basis. Her primary duties included granting sick leave to employees and arranging for appropriate, competent staff coverage on wards where staffing shortages were created by the absence of the sick employees; interacting with patients and staff to facilitate problem solving, including fielding and resolving patient complaints about particular nurses; and being available to retrieve equipment and supplies from SPD. She did not evaluate employee performance or counsel employees.

On July 17, 2003, AFGE Local 446 filed a grievance (Attachment A) alleging that management's utilization of the fee basis appointment authority to bring Ms. _____ on as evening coordinator on an emergency basis violated the AFGE Master Agreement, past practice, VHA Handbook 5005, VHA Directive 10-95-077, 38 U.S.C. 7405 and 5 U.S.C. 5532. To resolve the grievance, the union demanded that management comply with all of the cited contractual, statutory and policy provisions and cease and desist any further violations (Attachment A, page 2).

Management responded to the grievance in a July 28, 2003 memorandum from the facility's Associate Chief Nursing Operations, _____, RN (acting on behalf of the Director), to the president of the union's local (Attachment B). In that memorandum, Ms. _____ stated that the issues raised by the grievance were non-negotiable and non-grievable under 5 U.S.C. §§ 7106(a) and 7106(b)(1); that fee basis employees are not in the bargaining unit; and that the grievance is outside the scope of collective bargaining based on 38 U.S.C. 7422 because it involves a matter of professional competence related to direct patient care.

In a memorandum to the Director dated July 29, 2003, the president of AFGE Local 446, _____, invoked arbitration and agreed to hold the grievance in abeyance pending the Under Secretary's decision in this case. (Attachment C)

On August 19, 2003, the Director of VAMC Asheville requested a determination that the issues raised in the grievance were excluded from bargaining and negotiated grievance procedures under 38 USC § 7422. (Attachment D)

ISSUES

Whether a union grievance over the Asheville VAMC's use of a fee basis nurse as an evening coordinator on four evenings in June 2003 is a matter involving professional conduct or competence.

DISCUSSION

The Department of Veterans Affairs Labor Relations Act of 1991, 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, peer review, and employee compensation as determined by the USH.

The assignment and placement of Title 38 health care personnel is fundamental to establishing the level of patient care to be provided by the Department of Veterans Affairs. Determining staffing requirements and placement concerns the overall competency of the staff at each facility and their ability to perform without compromising patient care given the staff available. More specifically, the assignment of a particular employee to perform the duties of an evening coordinator directly impacts patient care, in that the evening coordinator must make substantive decisions regarding the competency of particular nurses to provide coverage for other nurses who have called in sick and must intervene when necessary to resolve patient complaints regarding the nurses providing care.

Pursuant to 38 U.S.C. § 7421(a), the Secretary has prescribed regulations contained in VA Directive/Handbook 5005, Part II, Chapter 3, regarding the appointment and placement of medical professional employees. These regulations govern staffing of registered nurses appointed under 38 U.S.C. § 7401(1), as well as those employed on a fee basis under 38 U.S.C. § 7405(a)(2). The regulations reflect (in Part II, Chapter 3, section 3(a)(1)) that "[t]he primary consideration in making appointments of ... nurses under 38 U.S.C., chapter 73 or 74, will be the professional needs of VHA."

On August 15, 2003, the USH determined in two VAMC Asheville cases that the use of fee basis registered nurses is a matter that concerns or arises out of professional conduct or competence (direct patient care or clinical competence.) Moreover, in several prior cases involving appointments and staffing of registered nurses, the USH has determined that such matters involve professional competence and conduct within the meaning of 38 U.S.C. § 7422(b). These include: West Haven VAMC on October 24, 2002, and Erie, PA VAMC on July 1, 2002.

RECOMMENDED DECISION

That the Asheville VAMC's use of a fee basis nurse as an evening coordinator on four evenings in June 2003 is a matter that concerns or arises out of professional conduct or competence (direct patient care or clinical competence).

APPROVED ✓

DISAPPROVED _____



Robert H. Roswell, M.D.
Under Secretary for Health

OCT 1 0 2003

Date