



DEPARTMENT OF VETERANS AFFAIRS
UNDER SECRETARY FOR HEALTH
WASHINGTON DC 20420

AUG 15 2003

Director
VA Medical Center
1100 Tunnel Road
Asheville, NC 28805

Dear

I am responding to the issue raised in your memorandum of June 23, 2003 concerning a grievance filed by the American Federation of Government Employees (AFGE), Local 446, dated January 4, 2002. The issue pertains to union dissatisfaction over the Asheville VAMC's use of fee basis nurses.

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 black ink, appearing to read "Robert H. Roswell", is written over the typed name.

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

Enclosure

FACTS

On January 4, 2002, AFGE Local 446 filed a grievance (Attachment A) alleging that the Director of the Asheville VAMC had "misused [his] authority in the employment of Fee Basis Nurses, Technicians, etc." The grievance further alleged that VAMC management's employment and use of fee basis nurses violated VA policy and the AFGE Master Agreement by the following alleged conduct:

- failing to notify and allow the union to negotiate "appropriate arrangements" on the facility's policy of employing fee basis nurses
- failing to "canvass ... bargaining unit members to determine if they would prefer to be assigned to the OR, SICU, MICU, Primary Care, Specialty Clinics, etc." prior to placing fee basis nurses in those units
- assigning fee basis nurses to supervise bargaining unit members and/or using statements made by fee basis nurses to discipline bargaining unit nurses
- failing to "pull" fee basis nurses from their assigned units to areas that are short-staffed
- failing to require fee basis nurses to rotate
- placing fee basis nurses in desirable weekday shifts, thereby depriving senior nurses within the bargaining unit of preferred tours
- employing fee basis nurses so as to avoid paying bargaining unit nurses overtime shift differential pay
- filling positions with fee basis nurses without first posting vacancies for which bargaining unit nurses might apply
- failing to afford bargaining unit nurses "first consideration" for positions prior to filling such positions with fee basis employees
- unduly burdening bargaining unit nurses with on call duty, mandatory overtime, weekend duty, off tours, etc. by not requiring fee basis nurses to fill such undesirable assignments

To resolve such grievance, the union demanded that management (1) "post and fill positions in the bargaining unit as required by" the AFGE master agreement and agency rules and regulations prior to filling a position with a basis nurse; (2) "only resort to Fee Base employment when the conditions of the controlling agency rules and regulations apply;"¹ and (3) "abide by the governing Laws, Regulations, Rules, and the Master Agreement before employing any Fee Basis Employee." (Attachment A, page 3.)

Management responded to the grievance in a January 14, 2002 memorandum from the facility's Chief of Staff, _____, to the president of the union's local (Attachment B). In that memorandum, _____ asserted that the issues raised by the

¹ Even if the union were correct in asserting that management failed to comply with VA rules and regulations in using fee basis nurses, the union would lack standing to contest such violation because fee basis employees are not in the bargaining unit.

grievance were non-negotiable and non-grievable under 5 U.S.C. §§ 7106(a) and 7106(b)(1); that the facility's use of fee basis nurses was consistent with applicable VA policy; and that management had not violated the AFGE Master Agreement. further assured the union that he would evaluate the facility's use of fee basis appointments to ensure that they were being appropriately utilized.

A grievance arbitration hearing, originally scheduled for January 22, 2003, was cancelled due to inclement weather.

On May 27, 2003, _____ Chief of the Asheville VAMC's Human Resources Service, wrote to the arbitrator, Helen Hoffman, to state that the issues raised in the grievance were covered by 38 U.S.C. § 7422 and that the facility would be requesting a grievability determination pursuant to that statute from the Under Secretary for Health (USH). (Attachment C.) _____ requested that the case be held in abeyance pending the USH's decision.

In a letter to the arbitrator dated June 3, 2003, the union objected to management's request that the case be held in abeyance, asserting that the grievance concerned the misuse of fee basis authority, not with the issues excluded from bargaining under 38 U.S.C. § 7422(b), and stating that "[n]othing in Title 38 7422 give [sic] the Secretary and/or the Under Secretary the right to violate the law, their own regulations." (Attachment D.)

By letter dated June 9, 2003, the arbitrator granted management's request and asked that the Under Secretary's decision be provided to her as soon as possible. (Attachment E.)

By letter dated June 11, 2003, the union requested that the USH determine whether the issues raised by the grievance were "arbitral." (Attachment F.)

By memorandum dated June 23, 2003, the Director of VAMC Asheville responded to the union's request to the USH, stating that "limiting or otherwise controlling our utilization of fee basis employees as the union outlines in their list of resolutions [sic] is outside the scope of collective bargaining. No arbitrator has authority to impose restrictions or dictate our use of fee basis individuals. In addition to the statutory allowance for hiring fee basis employees, their utilization involves a determination of professional competence and staffing levels necessary to provide direct patient care." (Attachment G.)

In memoranda dated June 27, 2003 (Attachment H) and July 16, 2003 (Attachment I), management provided further information to support its assertion that the issues raised by the grievance fall within 38 U.S.C. § 7422(b). In these memoranda, management explained that the facility uses fee basis nurses, appointed under 38 U.S.C. § 7405, to provide short-term coverage in specialty areas until qualified candidates can be hired. It needs to use these fee basis nurses to meet patient care needs because many areas within the Asheville nursing service have been difficult to recruit for. Within the Operating Room (OR) and the Surgical Intensive Care Unit (SICU), vacancies have gone unfilled for more than a year. In 2002, vacancies for the OR were averaging four

per month with a 40% turnover rate and an average time of 6-9 months to fill a vacancy. In the SICU, vacancies for 2002 averaged eight per month with a turnover rate of 28% and an average of 6 months to fill a vacancy. During these periods of hiring lag, the facility has used fee basis nurses to cover the OR and SICU until qualified candidates can be hired because there were no RNs working elsewhere in the medical center who had the requisite qualifications or competencies to cover these specialized areas.

ISSUES

Whether a union grievance over the Asheville VAMC's use of fee basis nurses 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.

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."

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.

It must be noted that the grievance filed by AFGE Local 446 complains of violations of the AFGE Master Agreement that are separate from the substance of the Asheville VAMC's decision to use fee basis nurses to staff vacant nursing positions. Resolution of those issues may not be precluded by 38 U.S.C. § 7422(b).

RECOMMENDED DECISION

That the Asheville VAMC's 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.)

APPROVED _____

DISAPPROVED _____



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

8.15.03

Date