



DEPARTMENT OF VETERANS AFFAIRS  
Veterans Health Administration  
Washington DC 20420

July 15, 2004 In Reply Refer To:

Director, Portland VAMC  
P.O. Box 1034  
Portland, OR 97207

Professional Vice President  
AFGE Local 2157  
Portland VAMC  
P.O. Box 1034  
Portland, OR 97207

Dear Dr. \_\_\_\_\_ and Ms. \_\_\_\_\_

I am responding to the issue raised in your memoranda of June 11, 2003, and April 24, 2004, concerning a grievance filed by AFGE Local 2157 regarding the detail and reassignment of \_\_\_\_\_, RN, BSN pending the outcome of a sentinel event investigation.

As explained in the attached decision paper, the issues raised by the subject grievance concern or arise out of professional conduct or competence and employee compensation. As such, they are non-grievable under 38 U.S.C. § 7422(b).

Sincerely yours,

Jonathan B. Perlin, MD, PhD, MSHA, FACP  
Acting Under Secretary for Health

Enclosure

Title 38 Decision Paper – VAMC, Portland, OR  
VA 04-07

FACTS:

RN, BSN worked in Patient Care Services at the VA Portland Medical Center (VAMC). Her tour of duty was a compressed work schedule (CWS) from 5:00 p.m. to 5:30 a.m., including weekends. On August 5, 2002, a patient under her care died in the intensive care unit, leading management to initiate an informal investigation into the events leading to the death. Pending the outcome of the investigation, [redacted] was placed on authorized absence for the period August 9 through August 12, 2002, and detailed to unclassified duties on a non-CWS weekday day tour at the Primary Care Division on August 15, 2002, for a period not to exceed 60 days. (Attachments A, B)

On August 15, 2002, [redacted] and her attorney, accompanied by the local union president, met with VAMC Portland management officials to discuss her reassignment. At that time, management gave assurances that if the investigation cleared Ms. [redacted] of wrongdoing, she would be reimbursed for the night and weekend shift differential she lost as a result of the reassignment. (Attachment C)

On August 16, 2002, AFGE filed a 1<sup>st</sup> Step Grievance alleging that Ms. [redacted] "was adversely impacted by loss of compressed work schedule and night differential." The union also alleged that "the employee's work schedule was changed without proper notice or justification." (Attachment D)

On August 26, 2002, VAMC Portland management notified the union that an administrative board of investigation had been convened to further investigate [redacted] role in the August 5, 2002 sentinel event. (Attachment E)

On September 4, 2002, management responded to the August 16 grievance, denying the charges but proposing to resolve the matter by reinstating Ms. Faulkner to her CWS while in Primary Care. (Attachment F) To comply with the proposed resolution to the grievance, on September 9, 2002, [redacted] was placed on a CWS day shift in Primary Care pending completion of the referenced investigation.

The union did not accept management's proposed resolution to the grievance and filed a Step 2 and Step 3 grievance. Management responded to both step grievances informing the union that the issues related to the case were a "matter or question concerning or arising out of professional conduct or competence and compensation" pursuant to 38 U.S.C. § 7422 and the Master Agreement between AFGE and the VA, Article 42, section 2, and were therefore outside the scope of

bargaining. (Attachment G) In response, the union sent a "Notice of Intent to Invoke Arbitration" dated October 31, 2002. (Attachment H)

At the conclusion of the administrative investigation, which lasted several months, \_\_\_\_\_ was cleared of wrongdoing. However, management did not reimburse her for her lost shift differential pay as promised during the August 15, 2002 meeting. (See Attachment J)

Subsequently, \_\_\_\_\_ applied for a position at the Primary Care Cascade Call Center in the VAMC. \_\_\_\_\_ was selected for the position and her reassignment was effective January 26, 2003 with a tour of duty from 8:00 a.m. to 4:30 p.m. (Attachment I)

By letter dated June 11, 2003, the local union requested that the Under Secretary for Health (USH) determine that the issues addressed in the instant case "do not involve issues excluded from collective bargaining under 38 U.S.C. § 7422." As part of its request for a USH determination, the union alleges that VA Handbook 5021, Part II, Chapter 1, was used improperly because there "was never a reason to believe that \_\_\_\_\_ was a threat to safety, etc." The union further alleges that VAMC Portland's local policy re tours of duty and leave, MCM 05-07, were "not followed in changing \_\_\_\_\_ tour of duty". Finally, the union alleges violations of Articles 12, 13, 16, 21 and 32 of the Master Agreement. (Attachment J)

By memorandum dated April 24, 2004, VAMC Portland management joined in the union's request for a determination under 38 U.S.C. § 7422, but urged that the USH find the grievance to be non-grievable as raising issues of professional conduct or competence and employee compensation. In its memorandum, management cited prior USH decisions (Long Beach VAMC, January 12, 1993, re RN reassignment from night to day shift to facilitate closer supervision; Ashville VAMC, March 5, 2001, Little Rock VAMC, November 18, 2001, and Reno VAMC, May 6, 2002, re title 38 employee compensation) finding similar issues to be non-grievable, and urged that "the decision on this matter should be consistent with previous decisions made on the same issues." (Attachment K)

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

## ISSUES:

1. Whether a grievance over the reassignment of a registered nurse from a compressed nighttime tour to a weekday day tour pending investigation of the death of a patient under the nurse's care raises issues of professional conduct or competence within the meaning of 38 U.S.C. § 7422.
2. Whether a grievance over the loss of shift differential resulting from the reassignment of a registered nurse from a compressed nighttime tour to a weekday day tour pending investigation of the death of a patient under the nurse's care raises issues of employee compensation within the meaning of 38 U.S.C. § 7422.

## 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.

Pursuant to 38 U.S.C. § 7421(a), the Secretary of Veterans Affairs is authorized to prescribe by regulation the hours and conditions of employment and leaves of absence of title 38 medical professionals, including registered nurses. The Secretary has exercised this authority by promulgating regulations in VA Directives and Handbooks 5005, Staffing; 5007, Pay Administration; 5021, Employee-Management Relations; and 0700, Administrative Investigations.

Several VA regulations are pertinent to the issues raised by the subject grievance. Handbook 5005, Part IV, Chapter 3 provides (at paragraph 4.b.) that in assigning, reassigning and detailing title 38 employees, "primary consideration will be given to the efficient and effective accomplishment of the VA mission." Handbook 5021, Part II, Chapter 1, paragraph 6.b., "Status of Employee Pending Inquiry or Investigation," provides that where an employee's continued presence at his or her worksite during an inquiry or investigation "might pose a threat to the employee or others," the employee may be detailed to other duties to eliminate any threat to safety. In Handbook 5007, Part V, Chapter 6, paragraphs 1.a. and 1.b. -- tracking the statutory weekend and nighttime premium pay authorities in 38 USC 7453(b) and (c) respectively -- provide for the payment of weekend and nighttime shift differential pay when an employee "*performs service* on a tour of duty" falling within qualifying hours.

Where, as here, a sentinel event (e.g. a patient death) triggers an administrative investigation into the cause of the event, the VA regulations cited above authorize facility management to detail or reassign potentially implicated

employees pending the outcome of the investigation. That the investigation may ultimately clear the employee of wrongdoing does not render the initial reassignment or detail invalid or improper; nor does an exculpatory outcome operate to relax the statutory and regulatory requirements for premium pay so as to entitle an employee to shift differential pay for shifts on which he or she did not actually "perform service."

It is unfortunate that VAMC Portland management in this case compounded what was by all accounts a traumatic event for the grievant nurse by erroneously promising her compensation not authorized by the applicable statute or regulations. That error, however, neither alters the legal requirements for shift differential pay nor removes this case from the grievance exclusions of 38 USC 7422.

RECOMMENDED DECISION:

1. That the subject grievance over the reassignment of a registered nurse from a compressed nighttime tour to a weekday day tour pending investigation of the death of a patient under the nurse's care raises issues of professional conduct or competence within the meaning of 38 U.S.C. § 7422.

APPROVED \_\_\_\_\_



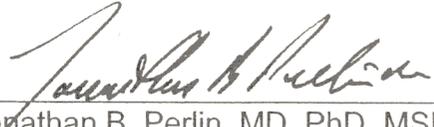
DISAPPROVED \_\_\_\_\_

2. That the subject grievance over the loss of shift differential resulting from the reassignment of a registered nurse from a compressed nighttime tour to a weekday day tour pending investigation of the death of a patient under the nurse's care raises issues of employee compensation within the meaning of 38 U.S.C. § 7422.

APPROVED \_\_\_\_\_



DISAPPROVED \_\_\_\_\_

  
Jonathan B. Perlin, MD, PhD, MSHA, FACP  
Acting Under Secretary for Health

7-15-04  
Date