



DEPARTMENT OF VETERANS AFFAIRS
UNDER SECRETARY FOR HEALTH
WASHINGTON DC 20420

SEP 26 2008

Lou Ann Atkins
Director
VA Ann Arbor Healthcare System
2215 Fuller Road
Ann Arbor, MI 48105

Dear Ms. Atkins:

I am responding to the issues raised in your memorandum of April 4, 2008 concerning the grievance and request for arbitration filed by AFGE Local 2092 regarding the grievant's proficiency rating and the denial of a step increase as a result of the grievant's proficiency rating.

Pursuant to delegated authority, I have decided on the basis of the enclosed decision paper that the issues presented by this grievance are matters concerning or arising out of professional conduct or competence (i.e. direct patient care and clinical competence) and compensation within the meaning of 38 U.S.C. § 7422(b).

Sincerely yours,

A handwritten signature in cursive script that reads "Michael J. Kussman".

Michael J. Kussman, MD, MS, MACP
Under Secretary for Health

Title 38 Decision Paper – Ann Arbor Healthcare System
VA – 08 –

FACTS

On February 22, 2007, _____, RN at the VA Ann Arbor Healthcare System (VAAHS) received a memorandum from her supervisor, MICU Manager _____, that she would be receiving a low satisfactory rating under “Interpersonal Relationships” in her next proficiency report and be under a performance improvement plan (PIP).¹ (Attachment A) The memorandum identified reports of contact and electronic messages from staff members in support of the performance deficiencies. (Attachment B) These staff members described Ms. _____’s behavior as unprofessional, rude and disruptive toward her co-workers. In one report of contact, Dr. _____ stated to Ms. _____ that his concern was how Ms. _____’s behavior impacted patient care.

In a follow-up memorandum dated August 3, 2007, Ms. _____ notified Ms. _____ that she would, in fact, receive a low satisfactory rating in her August 5, 2007 proficiency report because she continued to demonstrate interpersonal relationships and customer service to co-workers and patient’s families that was unbecoming of a VAAHS employee and that she was not upholding the facility’s customer service philosophy and gold standard service despite being previously warned of her low satisfactory rating. (Attachment C) Ms. _____ stated further that Ms. _____ would no longer be able to perform the following functions: MICU charge nurse; code team responder; blitz mock code volunteer; MICU Recruitment/Retention chair; and PCS Recruitment/Retention Committee member. The August 3rd memorandum makes the following reference to a patient family complaint:

The report of contact that Ms. _____ submitted dated July 23, 2007 under the office door contradicts the report about the patient family complaint and is accusatory to a fellow MICU nurse based on hearsay that Ms. _____ supposedly learned from somebody.

On August 7, 2007, Ms. _____ received her proficiency report for the period of August 5, 2006 to August 5, 2007, which contained an overall rating of “low satisfactory” based on the same rating in Category II, Interpersonal Relationships. (Attachment D) In the narrative evaluation for that category, Ms. _____ wrote, “Ms. _____ demonstrates interpersonal relationship and customer service to co-workers and patient families that is neither becoming of a VAAHS employee nor upholding the VAAHS customer service philosophy and gold service despite notification of low satisfactory rating in interpersonal category dated February 22, 2007.” In accordance with VA Handbook 5013, Part II,

¹ In fact, management met with Ms. _____ to discuss the PIP but never issued it to her.

paragraph 12a(1)(b), Ms. [redacted] was also denied her periodic step increase because she failed to maintain a satisfactory proficiency rating.

On August 16, 2007, Ms. [redacted] wrote to [redacted], Director, AAHS, requesting that her proficiency be delayed 90 days in order to demonstrate improvement under a performance improvement plan. (Attachment E) The director supported management's decision to deny Ms. [redacted]'s within-grade increase in a response dated November 6, 2007.² (Attachment F) Ms. [redacted] advised Ms. [redacted] that the records supporting her low satisfactory rating in her proficiency report showed that she was rated low satisfactory in the interpersonal relationships category after she was "notified of the need to improve in this category of performance, and that you [Ms. [redacted]] did not sufficiently improve by the date of your annual rating."

The American Federation of Government Employees, Local 2092, (AFGE) filed a Step 3 grievance on January 14, 2008, alleging that management violated Article 26, Performance Appraisal System, and Article 37, Within Grade Increase, of the Master Agreement.³ (Attachment G) AFGE requested, as remedies to the grievance, that Ms. [redacted]'s nursing duties, committee memberships and periodic step increase be restored. AFGE invoked arbitration on January 14, 2008, the same day it filed the grievance.⁴ (Attachment H)

In a written response dated February 12, 2008, Ms. [redacted] denied the grievance because Ms. [redacted] was properly notified of the need to improve her interpersonal relationships and VA regulations require a satisfactory proficiency rating in order to receive a step increase. (Attachment I) In addition, Ms. [redacted] stated that the content of the proficiency rating, assignment of nursing duties and the denial of a within-grade increase are not grievable as matters covered by 38 U.S.C. § 7422(b).

On April 4, 2008, Ms. [redacted] sent a memorandum to the Under Secretary for Health (USH) requesting a determination that the issues in the grievance be excluded from collective bargaining under 38 U.S.C. § 7422(b). (Attachment J) [redacted], Human Resources Officer, notified the president of AFGE on April 29, 2008, that management asked the USH for a 7422 determination and that AFGE had 10 calendar days to provide comments. (Attachment K) AFGE never provided a response.

² Although Ms. [redacted] is clearly responding to the letter of August 16, she did not address Ms. [redacted]'s specific request for a delayed proficiency rating and a performance improvement plan.

³ Article 26, Performance Appraisal System, concerns Title 5 system not Title 38.

⁴ Although AFGE invoked arbitration the same day it filed the grievance, a representative from Human Resources stated that there was a Step 3 meeting with the director on February 8, 2008.

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

ISSUES:

Whether the grievance over Ms. [redacted] s proficiency rating is excluded from collective bargaining as a matter or question that concerns or arises out of professional conduct or competence (direct patient care or clinical competence) within the meaning of 38 U.S.C. § 7422(b)?

Whether the grievance over the denial of Ms. [redacted] s periodic step increase and reassignments concern or arise out of the establishment, determination or adjustment of employee compensation within the meaning of 38 U.S.C. § 7422(b)?

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 (i.e., 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 5013/4, Part II), to implement the proficiency rating system for Title 38 employees, including registered nurses. Paragraph 6.a of the referenced handbook provides that the purpose of “[t]he proficiency rating system is to ensure the effective and efficient utilization of covered employees and to ensure that dealings with the public are consistent with Department of Veterans Affairs (VA’s) mission to provide the best possible care to our country’s veterans.” Paragraph 8.c(1) states that “[t]he employee will be rated on elements which provide for consideration of proficiency and performance in terms of pertinent personal, professional, administrative...attributes, characteristics, skills, and service to the public as applied to the duties and responsibilities of the assignment.”

Based on reports of contact from staff members, MICU Manager [redacted], identified a number of performance deficiencies that resulted in a “low satisfactory” rating under the Interpersonal Relationship category and an overall

proficiency report rating of “low satisfactory” for the period of August 2006 to August 2007. As a member of the MICU Patient Care Team, Ms. must consistently demonstrate a collaborative relationship with all of the members of the patient care team and support staff to ensure that the needs of patients are met. Ms.’s proficiency report described her interpersonal relationships and customer service with co-workers and patient families as “neither becoming of a VAAHS employee nor upholding the VAAHS customer service philosophy and gold service.” For example, the reports of contact from Ms.’s colleagues describe Ms. as unprofessional, rude, disruptive and guilty of abusive behavior toward her co-workers. One ICU nurse at the medical center stated in a report of contact about Ms. that, “I noticed that she lacked professionalism when dealing with other hospital personnel as well does not mentor those she works with but is quick to criticize and point blame including physicians and yet she becomes verbally irate if she herself is questioned.” Another staff member stated in a report of contact his concern that Ms.’s behavior impacted patient care. Finally, as a Nurse II, Ms. is expected to apply the nursing process to systems or processes at the unit/team/work group level to improve patient care. Thus, Ms.’s interpersonal relationships with her colleagues are an important part of her involvement in the patient treatment team and patient care.

The USH has consistently found that substantive ratings in proficiency reports, irrespective of the details of the report, necessarily involve issues of professional conduct or competence within the meaning of 38 U.S.C. §7422(b). See VAMC Fort Wayne, 5-19-08 (the union’s requested remedies, that the employee be given a fair and accurate proficiency rating and that certain remarks be removed from the proficiency report, involve the employee’s substantive proficiency rating and are therefore non-grievable); VAMC Washington, DC, 1-6-06 (finding that substantive rating of “low satisfactory” based on doctor’s failure to implement consistent record keeping and failure to communicate with Oncology staff involves issues of professional conduct or competence); VAMC Fayetteville, NC, 5-16-94; VAMC Fayetteville, 8-2-93; VAMC Portland, 1-27-93; VAMC Manchester, 9-9-92.

For example, in VAMC Manchester, where a part-time staff nurse was discharged as a result of an unsatisfactory proficiency rating, the USH concluded that the matter involved professional conduct and competence and was excluded from collective bargaining within the meaning of section 7422. The USH found that “the proficiency rating system is the vehicle for evaluation of a nurse’s professional competence and conduct.”⁵

⁵ On the other hand, the USH has determined that a grievance involving proposals for procedures that are peripheral to an exempted issue, e.g., when, and if, a proficiency rating is performed, concerns a narrow procedural requirement and is not subject to an exemption under section 7422. See VAMC Long Beach, 8-31-94; VAMC Fort Wayne, 5-19-08.

Here, because the grievance at issue involves the substance of Ms. [redacted]'s proficiency report and not a procedure related to the report, the grievance falls inside the section 7422 exemption.

Ms. [redacted] was initially removed from several committees⁶ and roles within the VAAHC, and then restored her roles and membership on each of the committees except for the Recruitment and Retention Committee. Her participation as a member of the Recruitment and Retention Committee, however, does not involve professional conduct and competence within the meaning of 38 U.S.C. 7422 (b), and is purely an administrative function. As such, her removal from this committee is not excluded from collective bargaining or the negotiated grievance procedure.

The denial of Ms. [redacted]'s periodic step increase was also a result of her unsatisfactory proficiency rating and concerns professional conduct and competence and the establishment, determination or adjustment of employee compensation within the meaning of 38 U.S.C. 7422 (b). In order for a periodic step increase to be approved, VA Handbook 5013/5, Part II requires that a nurse meet all of the following conditions for acceptable level of competence: (a) the total measure of the effectiveness and conduct of the employee is fully satisfactory, with any weaknesses balanced by strengths;(b) a satisfactory current proficiency rating; and (c) no evidence or action is of record or in process that is contradictory to an overall judgment of current full satisfactory performance and conduct. See VAMC Fayetteville, 8-2-93 (finding grievance filed on behalf of a nurse concerning her unsatisfactory proficiency review, reassignment and denial of periodic step increase involved professional conduct or competence, and the establishment, determination, or adjustment of compensation).

⁶ In her August 3, 2007 Memo to Ms. [redacted] MICU Unit Manager Sabado removed Ms. [redacted] from the following committees and roles within the VAAHC: a) MICU charge nurse; b) Code team responder; c) Blitz Mock Code Volunteer; d) MICU Recruitment/Retention Chair; and e) PCS Recruitment/Retention committee member. As of December 20, 2007, however, Ms. [redacted] was returned to all of her previous roles and responsibilities except for her participation as a Recruitment and Retention committee member.

RECOMMENDED DECISION

The grievance over Ms. _____'s proficiency rating is excluded from collective bargaining as a matter or question that concerns or arises out of professional conduct or competence (direct patient care and clinical competence) within the meaning of 38 U.S.C. § 7422(b) and is not grievable.

APPROVED X

DISAPPROVED _____

Michael J. Kussman

Michael J. Kussman, MD, S, MACP
Under Secretary for Health

9/25/08

Date

The grievance over the denial of Ms. _____'s periodic step increase concerns or arises out of professional conduct or competence (direct patient care and clinical competence) and the establishment, determination or adjustment of employee compensation within the meaning of 38 U.S.C. § 7422(b) and is not grievable.

APPROVED X

DISAPPROVED _____

Michael J. Kussman

Michael J. Kussman, MD, S, MACP
Under Secretary for Health

9/25/08

Date

The grievance over Ms. _____ removal from the Recruitment and Retention Committee does not concern or arise out of professional conduct or competence (direct patient care and clinical competence) within the meaning of 38 U.S.C. § 7422(b) and is therefore grievable.

APPROVED X

DISAPPROVED _____

Michael J. Kussman

Michael J. Kussman, MD, S, MACP
Under Secretary for Health

9/25/08

Date