



DEPARTMENT OF VETERANS AFFAIRS
Veterans Health Administration
Washington DC 20420

JUL 3 2003

In Reply Refer To:

Director (00)
VA Medical Center
10 Calle Casia
San Juan, PR 00921-3201

Dear

I am responding to the issue raised concerning the grievance filed by American Federation of Government Employees, Local 2408, on behalf of . The issue pertains to the determination of her professional conduct or competence and peer review.

Pursuant to delegated authority, I have decided, on the basis of the enclosed paper, that the issue presented is a matter concerning or arising out of the professional conduct or competence and peer review, and is thus exempted from collective bargaining by 38 U.S.C. 7422(b).

Please provide this decision to your Regional Counsel as soon as possible.

Sincerely yours,

A handwritten signature in black ink, which appears to read "Robert H. Roswell".

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

Enclosure

**Title 38 Decision Paper
VAMC San Juan**

FACTS

was a registered nurse in the Coronary Care Unit (CCU) and Intensive Coronary Care Unit (ICCU) for VAMC San Juan, Puerto Rico, and a title 38 employee. is also collective bargaining unit member of American Federation of Government Employees (AFGE or Union), Local 2408.

In May 2001, submitted medical documentation from a private physician showing a diagnosis of obstructive sleep apnea with excessive daytime somnolence. The physician opined that it was not advisable for to work any shifts.

On March 27, 2001, , Nurse Manager of CCU and ICCU, asked the Human Resources Management Service to evaluate fitness for duty.

indicated that for the preceding 8 months, the staff and co-workers had complained of repetitive somnolence during night and day shifts. The Nurse Manager provided special arrangements to aid under the circumstances. She placed on 8-hour day shifts, beginning in December 2002, assigned her light assignments and indirect patient care. however continued to suffer uncontrollable sleeping episodes while on duty.

On January 25, 2002, VAMC San Juan management found unfit for duty as a registered nurse. Thereafter, a Physical Standards Board was convened. On May 21, 2002, it determined that did not meet the physical requirements to perform her duties as a registered nurse in the CCU and ICCU. The Board recommended that the VAMC seek to accommodate pending medical evaluation, specifically a Polysomnogram (PSG) and Maintenance of Wakefulness Test (MWT) examinations to be submitted to the Agency within six months of reassignment. As a result, VAMC management temporarily reassigned to a position of staff nurse Hemo-Dialysis Unit (HU), outside the CCU in June 2002.

In December 2002, the VAMC management inquired about the status of the examination results as recommended by the Board. In response union representative alleged Agency harassment and discrimination of No results were submitted.

On February 26, 2003, AFGE filed a grievance on behalf of alleging violation of the Master Agreement and disability discrimination. The grievance was heard and an adverse decision rendered.

Thereafter, the Union invoked arbitration. After a hearing, the Arbitrator rendered a decision favorable to the Agency. [redacted] has since appealed the decision to the Equal Employment Opportunity Commission (EEOC). [redacted] remains assigned to the HU as a staff nurse.

At no time during the processing of the grievance or arbitration was a 7422 determination requested, nor did the VAMC seek the guidance of the Regional Counsel office.

In connection with the response to the EEOC appeal, the Under Secretary for Health (USH) was requested to make a determination on whether the issue constitutes a matter concerning the professional conduct or competence and peer review of a title 38 employee; and is therefore outside the scope of collective bargaining and the negotiated grievance procedure, pursuant to 38 U.S.C. § 7422.

ISSUE

Are the determinations as to whether a registered nurse meets the physical requirements to work in the CCU and ICCU, and the determination of her fitness for duty are matters concerning professional conduct or competence, and peer review; and hence are not grievable.

DISCUSSION

The Department of Veterans Affairs Labor Relations Improvement Act of 1991 granted limited collective bargaining rights to Title 38 employees, but specifically excluded from the collective bargaining process matters or questions concerning or arising out of professional competence or conduct, and peer review, and the establishment, determination, or adjustment of employee compensation as determined by the USH.

The issue of determining whether a registered nurse is fit for duty or meets the minimum physical standards to perform the duties of a registered nurse is an issue that is left to the unfettered discretion of the VA Secretary and/or USH as provided by 38 U.S.C. sections 7401, 7407, 7421, 7422, 7451, and 7458.

The Secretary, in consultation with the USH, has promulgated regulations pertaining to registered nurses' fitness for duty and physical standards to work. These regulations are contained in VA Handbook 5005, Part II and Appendix II-G-6.

Under Section 7422, collective bargaining for Registered Nurses may not cover or have any applicability to any matter or question concerning or arising out of professional conduct or competence which means any of the following: (1) direct patient care or (2) clinical competency.

