



DEPARTMENT OF VETERANS AFFAIRS  
ASSISTANT SECRETARY FOR HUMAN RESOURCES AND ADMINISTRATION  
WASHINGTON DC 20420

SEP 09 1992

Director (00)  
VA Medical Center  
718 Smyth Road  
Manchester, NH 03104

Dear

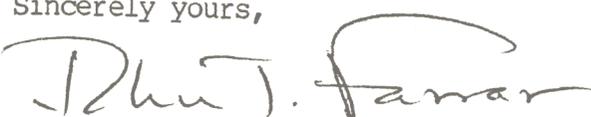
I am responding to the enclosed grievance filed by the National Association of Government Employees (NAGE) on behalf of

RN.

Under 38 USC Section 7422, any matter affecting registered nurses hired pursuant to Title 38 and concerning or arising out of professional conduct or competence, peer review, or the establishment, determination or adjustment of employee compensation is nongrievable. The law authorizes the Secretary, or delegatee, to determine the grievability of any question arising under its provisions. The Secretary has delegated to my office the authority to make any such determinations, which are not subject to administrative review under the law.

Acting pursuant to this authority, I have determined that this grievance concerning the discharge of a part-time staff nurse as a result of an unsatisfactory proficiency rating involves professional competence and conduct. The proficiency rating system is the vehicle for evaluation of a nurse's professional competence and conduct. Consequently, I believe that this matter involving the discharge of a nurse is related to professional competence or conduct. Accordingly, the grievance concerning the separation of Ms. Burnham for unsatisfactory performance is non-grievable.

Sincerely yours,

for   
James W. Holsinger Jr., M.D.  
Chief Medical Director

Enclosure

TITLE 38 GRIEVABILITY  
Decision Paper

FACTS:

On May 29, 1992, a permanent part-time registered nurse was terminated due to an unsatisfactory proficiency rating.

The National Association of Government Employees (NAGE) Local union has filed a timely grievance on this matter under the negotiated grievance procedure provided by the VA/NAGE Master Agreement covering registered nurses. The complaint alleges a violation of Article XVI, Section A of the agreement which states "that disciplinary action will not be taken in cases of error of professional judgement when negligence is not involved nor in cases of differences of professional opinion."

NAGE has requested as a resolution the rescission of the termination, with Ms. Burnham made whole for all lost wages and benefits and all reference to the termination to be expunged from her file.

The NAGE Master Agreement covering registered nurses specifically excludes from the negotiated grievance procedure grievances concerning the separation of employees who are serving under a part-time appointment.

ISSUE:

Since NAGE has filed a grievance on the termination it is necessary for a decision to be made by the Chief Medical Director regarding whether this matter is grievable.

DISCUSSION:

Under Public Law 102-40, the Department of Veterans Affairs Labor Relations Improvement Act of 1991 (the Act), employees in positions described in 38 USC 7421 (b), have the right to engage in collective bargaining pursuant to the Federal Labor-Management Relations Statute, except as to any matter or question concerning or arising out of (1) professional conduct or competence, (2) peer review, or (3) the establishment, determination, or adjustment of employee compensation. 38 U.S.C. sec. 7422. The Act also authorizes the Secretary of Veterans Affairs, or designee, to decide any issue of whether a matter or question concerns or arises from any of these issues. The Chief Medical Director has been delegated authority to decide these matters. That decision may not be reviewed by any other agency and is not subject to collective bargaining.

This grievance concerning the discharge of a part-time staff nurse as a result of an unsatisfactory proficiency rating involves professional competence and conduct. The facility provided the nurse with a two month period in which to demonstrate satisfactory performance after problems were identified in her annual proficiency although this is not required by regulation. Her performance did not improve sufficiently to merit a satisfactory rating. The special proficiency report that was prepared after the two month period noted deficiencies relating to patient safety, transcribing orders, organizing assignments, and patient care priorities.

Briefing Slip

S 10A  
9/9/92

PURPOSE: Decision Paper and letter to the Director at the VA Medical Center, Manchester, New Hampshire responding to an issue raised concerning a grievance submitted by the local National Association of Government Employees union (NAGE). (TAB A)

DISCUSSION: P.L. 102-40 (Tab B) gives Title 38 employees the right to engage in collective bargaining under Federal employee labor laws, except as to any matter or question concerning or arising out of (1) professional conduct or competence, (2) peer review, or (3) the establishment, determination, or adjustment of employee compensation. The law also authorizes the Secretary of Veterans Affairs, or designee, to determine whether a matter or question concerns any of the above issues. The Chief Medical Director has been delegated authority to decide these matters. (TAB C) That decision may not be reviewed by any other agency and is not subject to collective bargaining.

NAGE has filed a grievance (TAB A) on behalf of a part-time registered Nurse who was separated effective May 29, 1992, based on an unsatisfactory proficiency report (TAB D). The facility provided her with a two month period in which to demonstrate satisfactory performance after problems were identified in her annual proficiency although this is not required by regulation. Her performance did not improve sufficiently to merit a satisfactory rating. The special proficiency report that was prepared after the two month period noted deficiencies relating to patient safety, transcribing orders, organizing assignments, and patient care priorities.

DM&S Supplement, MP-5, Part II, Chapter 9, paragraph 9.13 (TAB E) states that involuntary separations of Title 38 employees serving under this type of appointment are not subject to review by Professional Standards Boards or Disciplinary Boards. Furthermore, the employee is not entitled to review of the involuntary separation under VA regulations.

The union argues that termination violated Article XVI, Section A of the agreement (TAB F) because it involved errors of professional judgement when negligence was not involved or cases of differences of professional opinion. The deficiencies cited on her proficiency are not matters of professional judgement or professional opinion.

Article XI, Section B. 6 of the NAGE Master Agreement covering registered nurses specifically excludes from the negotiated grievance procedure grievances concerning the separation of employees who are serving under a part-time appointment. (TAB G)

This grievance concerning the discharge of a part-time staff nurse as a result of an unsatisfactory proficiency rating involves professional competence and conduct. The proficiency rating system is the vehicle for evaluation of a nurse's professional competence and conduct. Consequently, this matter involving the discharge of a nurse is related to professional competence or conduct. Accordingly, this grievance is non-grievable under the Act.

IMPLICATIONS: The decision on this grievance will set the precedent for how similar grievances will be treated in future cases at other facilities. Since it is anticipated the union will invoke arbitration, we need a decision by the Chief Medical Director as soon as possible.

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