DEPARTMENT OF VETERANS AFFAIRS
Veterans Health Administration
Washington DC 20420

JUL 01 2002

In Reply Refer To:

Mr. James A. Palmer
Chief Executive Officer
VA Medical Center
135 East 38th Street Boulevard
Erie, PA 16504-1596

Dear Mr. Palmer:

I am responding to the issue raised in your letter of April 4, 2001, concerning the grievance filed by the Local Nurse Unit of the Service Employees International Union (SEIU). The issue pertains to the union dissatisfaction over the selection by management of an external candidate for a Registered Nurse position in your facility's Primary Care Program.

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 professional conduct or competence and 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,

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

Enclosure

Title 38 Decision Paper – VAMC Erie

FACTS

On June 14, 2001, the Service Employees International Union (SEIU) filed a grievance on behalf of two Registered Nurses at the medical center alleging a violation of the local contract over their non-selection for a Registered Nurse position in the Primary Care Unit at the medical center, providing primary support to the Anti-coagulation clinic, the Oncology clinic, and the Cardiac Laboratory. (Attachment A) The grievance alleged that the specific provisions of Articles 6 and 23 of the SEIU Local Nurse Contract as shown below were violated when an outside candidate was selected for the position. (Attachment B)

The contract provisions cited in the grievance were as follows:

Article 6, Section A -The parties agree to abide by the provisions set forth in this Agreement and neither will make any changes except provided hereinafter.

Article 23, Section B -Competent employees will be given preference for available work areas or locations. When two (2) or more equally competent nurses request the open position, preference will be given to the most senior competent nurse.

Management responded to the grievance by indicating that seven RNs had applied for the position, including two from outside the VA. Performance based interviews were done on all the applicants and they were ranked and referred for selection. The highest ranked applicant was selected for the position. Neither of the grievants was selected because both lacked competencies relevant to the Oncology clinic support functions of the position and because they were ranked significantly lower than the successful candidate. When the union subsequently filed for arbitration, management rejected the grievance, because they considered it a matter of professional conduct or competence relating to direct patient care under 38 U.S.C. § 7422, and therefore outside the scope of collective bargaining and not subject to the negotiated grievance procedure.

PROCEDURAL HISTORY

The Secretary has delegated to the Under Secretary for Health the final authority in the VA to decide whether a matter or question concerns or arises out of professional conduct or competence. When labor and management disagree over such matters or questions, "The VA Partnership Council's Guide to Collective Bargaining and Joint Resolution of 38 U.S.C. 7422 Issues" provides a procedure for attempting resolution. If the parties are unable to resolve the dispute, the Under Secretary for Health is asked to render a decision.

In accordance with the Guide, the matter was referred to the Erie VAMC Partnership Council, but was not resolved at that level. Accordingly, in a letter dated April 4, 2002, the Director submitted the matter to the Under Secretary for Health. (Attachment C) A conference call was held on April 15, 2001, between

the SEIU members of the VA National Partnership Council, local Erie management and a VACO Labor Relations Specialist in a further attempt to resolve the issue, which was unsuccessful. It should be noted that a similar grievance was filed by SEIU at the Erie VAMC in November of 1999, but was withdrawn two years later prior to resolution.

ISSUE

Whether a grievance based on Article 23 of the Erie VAMC local Nurse contract involving non-selection for a reassignment opportunity concerns or arises out of professional conduct or competence. (Direct patient care, clinical competence)

DISCUSSION

The issue in this case is nearly identical to several earlier cases decided by the Under Secretary for Health involving employee grievances at Buffalo and Sepulveda Medical Centers as well as a case involving the negotiability of the Recruitment and Placement chapter of the former VA Title 38 Personnel Manual, MP 5 Part 2. Those cases all arose out of selection determinations for RN positions based on the candidates' professional qualifications, and in each case the Under Secretary for Health determined that such selections involve professional conduct or competence within the meaning of 38 USC § 7422. Each of these prior decisions stressed that the recruitment 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, and that determining staffing requirements concerns the overall competency of the staff at each facility and their ability to perform without compromising patient care, given the staff available. Accordingly, any grievance or bargaining proposal involving RN selection procedures based on professional qualifications raises "a matter or question concerning or arising out of professional conduct or competence" and is therefore non-negotiable and nongrievable under a negotiated grievance procedure.

VA Handbook 5005, Part 4, Chapter 3 A., outlines policy and procedures relating to Title 38 assignments. Chapter 3, section A 4(d) states, that employees will only be assigned duties and responsibilities for which they have appropriate credentials and there is a reasonable expectation that they will be able to perform satisfactorily. In the instant case, management at VAMC Erie determined that the Nurse selected had superior credentials and was more competent for the position than the grievants. In addition, the grievants lacked required competencies relevant to one of the position's primary functions, namely, supporting the Oncology clinic.

The contract provisions cited in the grievance may reasonably interpreted to provide only that where two or more fully qualified employees vie for an available work opportunity, preference will be given to union members and, if two or more fully qualified union members are equally competent, the senior of such candidates will be chosen. While that interpretation may not give rise to issues of questions of professional conduct or competence relating to direct patient care within the meaning of 38 USC § 7422b, the union's interpretation – that unqualified or less competent union members should be given priority over fully qualified, more competent external candidates – does seem to fall within the §

7422b exemption and, therefore, to be non-grievable under the negotiated grievance procedure.

RECOMMENDED DECISION

That the SEIU grievance alleging a contract violation in the non-selection of a Registered Nurse be deemed non-grievable and exempt from collective bargaining under 38 U.S.C. § 7422b as a matter that concerns or arises out of professional competence (direct patient care or clinical competence).

APPROVED ✓ _____ DISAPPROVED _____

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

7-1-02
Date