DEPARTMENT OF VETERANS AFFAIRS
Veterans Health Administration
Washington DC 20420

AUG 16 1994

In Reply Refer To:

Ms. Constance R. Tsokanis
c/o Harder Silber and Bergan
Attorneys at Law
2751/2 Lark Street
Albany, New York 12210

Dear Ms. Tsokanis:

This is in response to your June 15, 1994, request on behalf of the New York State Nurses Association for a review and decision by the Secretary of Veterans Affairs of the grievance of Ms. Judith Roberts R.N., an employee of the Veterans Affairs Medical Center in Buffalo, New York.

Under 38 USC Section 7422, any matter affecting health care personnel in positions described in 38 USC 7421(b) and concerning or arising out of professional conduct or competence is outside the scope of collective bargaining and is not subject to review by any other agency. The law authorizes the Secretary, or delegatee, to determine the grievability of any matter arising under its provisions. The Secretary has delegated to my office the authority to make such determinations which are not subject to administrative review under the law.

Acting pursuant to this authority, I have determined that this grievance concerning a registered nurse's non-selection for a reassignment involves professional conduct and competence. I have determined that the placement of health care personnel described in 38 USC 7421(b) is fundamental to establishing the level of patient care to be provided by the Department of Veterans Affairs. VA is responsible for the delivery and direction of the conduct of professional duties and services by such employees. 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.

Ms. Constance R. Tsokanis
Albany, New York 12210

Consequently, I believe any matter relating to the placement of such health care personnel at any VA facility is related to the professional conduct or competence of those employees. Accordingly, the issue raised in this grievance is nongrievable under the "Department of Veterans Affairs Labor Relations Improvement Act of 1991" because it concerns a matter or question of professional conduct or competence.

Sincerely yours,

John T. Farrar

John T. Farrar M.D.
Acting Under Secretary for Health

Title 38 Grievability
Decision Paper

FACTS:

VAMC Buffalo bargaining unit employee Ms. Judith Roberts R.N., grieved her non-selection for reassignment to a position in the Pulmonary Laboratory. (TAB A) In her grievance Ms. Roberts cites a violation of the local collective bargaining agreement that states "when all other relevant factors are approximately equal, an employees seniority shall prevail in getting a request for reassignment approved". (TAB B)

VAMC Buffalo management informed Ms. Roberts in their third step grievance response that a number of employees had applied for the position and in the opinion of Nursing Service the most qualified candidate was selected. They further denied the grievance as being outside the scope of the collective bargaining process in accordance with 38 USC 7422. (TAB C)

An attorney representing Ms. Roberts, on behalf of the New York State Nurses Association, is now requesting that in accordance with Title 38, the Secretary of Veterans Affairs review the matter and issue a formal decision. The attorney feels the local decision is in error. (TAB D)

ISSUE:

Since an attorney for the grievant at VAMC Buffalo has requested a further review of the local decision that the matter is related to professional competence, it will be necessary for the Acting Under Secretary for Health to confirm previous decisions.

DISCUSSION:

Under Public Law 102-40, The Department of Veterans Affairs Labor Relations Improvement Act of 1991 (the Act), persons hired pursuant to Title 38, United States Code, 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. (TAB E) The Act also authorizes the Secretary of Veterans Affairs, or designee, to decide any issue of whether a question concerns or arises from any of these issues. The Under Secretary for Health has been delegated authority to decide these matters. (TAB F) The Secretary's decision is not subject to collective bargaining or subject to review by any other agency.

This grievance concerns the non-selection of a Nurse for reassignment to a position in the Pulmonary Laboratory. This case presents an issue that has been previously addressed by the Under Secretary for Health in several previous cases, most recently in a September 3, 1993, decision involving the non-selection of a nurse for reassignment at VAMC Sepulveda. (TAB G) In the Sepulveda case as well as others it was held that determining staffing requirements concerns the overall competency of the staff at each facility and is fundamental to establishing the level of patient care to be provided.

RECOMMENDATION:

That the Acting Under Secretary for Health determine that this grievance concerns or arises out of professional competence or conduct under section 7422 of Public Law 102-40 and is outside the scope of collective bargaining.

Approved Recommendation ✓

Disapproved Recommendation _____

John T. Farrar

John T. Farrar, M.D.
Acting Under Secretary for Health

Briefing Paper

PURPOSE: Decision paper and a letter to an attorney representing the New York State Nurses Association concerning a grievance submitted by a nurse at the VA Medical Center, Buffalo, New York.

DISCUSSION: The Department of Veterans Affairs Labor Relations Improvement Act of 1991 gives Title 38 employees and their exclusive labor organization representative the right to engage in collective bargaining under Federal 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 Under Secretary for Health 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.

VAMC Buffalo bargaining unit employee Judith Roberts R.N., grieved her non-selection for reassignment to a position in the Pulmonary Laboratory. VAMC Buffalo management informed Ms. Roberts in the third step grievance response that a number of employees had applied for the position and that in the opinion of Nursing Service the most qualified candidate was selected. They denied the grievance as being outside the scope of the collective bargaining process in accordance with 38 USC 7422. An attorney representing Ms. Roberts on behalf of the New York State Nurses Association is now requesting a formal review and decision by the Secretary, and indicates that the local response is in error.

There have been several decisions by the Under Secretary for Health, most recently a case involving the reassignment of a nurse at VAMC Sepulveda, that the placement of Title 38 health care personnel is a staffing decision involving the competence and conduct of employees. This grievance, similar to the one at Sepulveda, concerning a reassignment, raises a "matter or question concerning or arising out of professional competence or conduct" under Title 38. Accordingly, such grievance is nongrievable under the Act.

IMPLICATIONS: The request from the attorney requires that the Secretary confirm earlier decisions on the issue of the placement of Title 38 health care personnel.