DEPARTMENT OF VETERANS AFFAIRS
Veterans Health Services and Research Administration
Washington DC 20420

In Reply Refer To:

SEP 0 3 1993

Mr. Norman E. Hensley
Director (00)
VA Medical Center
16111 Plummer Street
Sepulveda, CA 91343

Dear Mr. Hensley:

This is in response to your request under the provisions of MP-5, Part II, Chapter 14 for a review and decision regarding the enclosed grievance filed by the American Federation of Government Employees (AFGE) local union.

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 question 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 overall competency of the staff at each facility and their ability to perform without compromising patient care, given the staff available.

Title 38 Negotiability
Decision Paper

FACTS:

VAMC Sepulveda bargaining unit employee Ms. Janet Valasquez, R.N., grieved her non-selection for reassignment to a position in the Quality Assurance(QA) and Utilization Management (UM) program.(TAB A) Personnel Service publicized the reassignment opportunity for VAMC Sepulveda employees only from November 27, 1992 to January 8, 1993. (TAB B) The "application" period was extended because there was concern that potential candidates would be taking leave during the holiday season. (TAB C) Ms. Valasquez was one of the RNs who indicated an interest during the extended period. (TAB D) Six VAMC Sepulveda nurses indicated an interest in the position. All six nurses were referred to the selecting official and all were interviewed. (TAB E) One of the six who applied was selected for the reassignment.(TAB F)

Janet Valasquez filed a grievance concerning her non-selection for the QA/UM position. The QA Coordinator met with Ms. Valasquez and showed her the criteria used in selection (TAB G) and outlined ways that she might strengthen her performance in order to be selected for future positions. At the request of Ms. Valasquez, the QA Coordinator also met with Ms. Valasquez and her union representative.(TAB H)

VAMC Sepulveda Management denied the grievance as being outside the scope of negotiated grievance procedure under 38 USC 7422. (TAB I) AFGE has informed management that they intend to invoke arbitration on behalf of Ms. Valasquez.(TAB J)

ISSUE:

Since AFGE has filed a grievance resulting from non-selection of an RN for a reassignment and informed management that they are invoking arbitration, it is necessary for a decision to be made by the Under Secretary for Health whether this matter is grievable.

DISCUSSION:

Under Public Law 102-40, the Department of Veterans 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 K). 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 Under Secretary for Health has been delegated authority to decide these matters. (TAB L) The Secretary's decision is not subject to collective bargaining or subject to review by any other agency. Id

This grievance concerns the non-selection of a nurse for reassignment to a position in QA/UM. MP-5, Part II, Chapter 11 (TAB M) and the corresponding VHA Supplement (TAB N) contain regulations concerning assignments. Paragraph 11.03c. of the Supplement states that reassignments and changes of duty assignments will be based primarily on patient care needs. Paragraph 3.b. of MP-5, Part II, Chapter 11 (TAB M) states that selection determinations and assignments will be based on the professional qualifications necessary to meet current and future health care needs. 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 overall competency of the staff at each facility and their ability to perform without compromising patient care, given the staff available.

This case presents issues already decided by the Under Secretary for Health in NG-05-92 (TAB O) (VACO and American Federation of Government Employees (AFGE) decided June 15, 1992), GR-07-92 (TAB P) (VAMC Fayetteville, NC and AFGE decided July 10 1992), GR-08-92 (TAB Q) VAMC Hampton, VA and AFGE decided July 20, 1992) and GR-18-93 (TAB R) (VAMC Long Beach, CA and AFGE decided January 12, 1993. In NG-05-92 the Under Secretary for Health determined that the placement of health care personnel is related to the professional competence or conduct of Title 38 employees. In GR-07-92 the Under Secretary for Health determined that assignments involve professional conduct or competency. In GR-08-92 and GR-18-93 the Under Secretary for Health determined that reassignments involved professional conduct or competence.
Consequently, this grievance raises "a matter or question concerning or arising out of professional conduct and competency." Accordingly, this grievance is nongrievable under the Act.

Mr. Norman E. Hensley, Director

Consequently, I believe any matter relating to the placement of such health care personnel at any VA facility is related to the professional competence or conduct 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,

James W. Holsinger, Jr., M.D.
Under Secretary for Health

RECOMMENDATION:

We recommend that the Under Secretary for Health determine that this grievance concerns or arises out of professional competency and conduct under Section 7422 or Public Law 102-40 and is outside the scope of collective bargaining.

Approve Recommendation _____

Disapprove Recommendation _____

James W. Holsinger, Jr., M.D.
Under Secretary for Health

SEP 0 3 1993