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

In Reply Refer To:

JAN 27 1993

Mr. Barry L. Bell
Director (00)
VA Medical Center
P. O. Box 1034
Portland, OR 97207

Dear Mr. Bell:

I am responding to the issue raised concerning the enclosed grievance filed by the American Federation of Government Employees (AFGE) local union.

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 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 proficiency report, performance counselings and a light duty assignment involves professional conduct or competence. The proficiency rating system and performance counselings are vehicles for evaluating a nurse's professional competence and conduct. Determining staffing requirements concerns overall competency of the staff at a facility and their ability to perform without compromising patient care, given the staff available. Consequently, I believe that each of the issues raised relate to professional competence or conduct. Accordingly, the issues raised in this grievance are outside the scope of collective bargaining under the "Department of Veterans Affairs Labor Relations Improvement Act of 1991" because they concern a matter or question arising out of professional competence or conduct.

Sincerely yours,

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

Enclosure

Title 38 Grievability
Decision Paper

FACTS

VAMC Portland bargaining unit employee Mr. Lee Little, R.N., alleges in his grievance that the Clinical Manager, Surgical Intensive Care Unit "did knowingly, deliberately and unfairly and inaccurately evaluate my performance for the period between January 14, 1991, and January 14, 1992". He alleges that his proficiency report and the verbal and written counselings on performance received during this period are not valid and based on false data.

He also alleges that he was unfairly denied a light duty assignment outside of Nursing Service which he needs because of his stress attacks.

The grievance makes numerous references to a nonexistent master labor agreement. The grievant is not covered by any master labor agreement. The grievant is covered by a local AFGE agreement.

ISSUE

Since AFGE has filed a grievance concerning unfair treatment Mr. Little received on his annual proficiency report and related performance counselings, it is necessary for a decision to be made by the Under Secretary for Health whether these matters are grievable.

DISCUSSION

Under 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 (38 USC 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 Secretary's decision is not subject to collective bargaining or subject to review by any other agency. Id

This case presents issues already decided by the Chief Medical Director, in GR-04-92 (VAMC Salem and AFGE decided May 14, 1992), NG-05-92 (VACO and AFGE decided June 15, 1992), and GR-11-92 (VAMC Long Beach and AFGE decided August 17, 1992). In GR-04-92 the Chief Medical Director determined that performance counselings relate to professional conduct or competence. In NG-05-92 the Chief Medical Director determined that the placement of health care personnel is related to the professional competence or conduct of those employees. In GR-11-92 the Chief Medical Director determined that the proficiency rating system is the vehicle for evaluation of a nurse's professional competence and conduct. Consequently this grievance raises "a matter or question concerning or arising out of professional conduct or competence" under Title 38. Accordingly, such grievance is nongrievable under the Act.

Recommendation:

We recommend that the Under Secretary for Health determine that this grievance concerns or arises out of professional conduct or competency under Title 38, United States Code and is outside the scope of collective bargaining.

Approve Recommendation f/10 C. Wayne Pickmann JAN 27 1993

Disapprove Recommendation _____