DEPARTMENT OF VETERANS AFFAIRS
DEPUTY ASSISTANT SECRETARY FOR PERSONNEL AND LABOR RELATIONS
WASHINGTON DC 20420

AUG 0 2 1993

Mr. A. G. Branch
Director (00)
VA Medical Center
Fayetteville, North Carolina 28301

Dear Mr. Branch:

I am responding to the issues raised concerning the enclosed grievance filed by the American Federation of Government Employees on behalf of a registered nurse.

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, 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 an unsatisfactory proficiency review, reassignment and denial of a periodic step increase involves professional conduct or competence, and the establishment, determination, or adjustment of employee compensation. The assignment and determination of staffing requirements concern the overall competency of the staff. The proficiency rating system is the vehicle for evaluation of a nurse's professional competence and conduct. Title 38 employees must have a satisfactory current proficiency rating to be eligible for a periodic step increase. Additionally, periodic step increases relate to compensation. Consequently, I believe that the matters raised in the union's grievance on behalf of Ms. Ellerbe involve professional conduct and competency and compensation. Accordingly, the grievance is not grievable.

Sincerely yours,

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

Enclosure

Title 38 Grievability
Decision Paper

Facts:

The Union on behalf of Linda Ellerbe, R.N., filed a grievance (TAB A) which stated that the employee received a proficiency report (TAB B) with an overall unsatisfactory rating, that this rating was in reprisal and retaliation and contrary to the procedures in MP-5, Part II, Chapter 6. Additionally the grievance states that Ms. Ellerbe was reassigned (TAB C) and a periodic step increase was disapproved (TAB D). The Union contends that these actions are reprisals and part of management's harassment toward this employee because of incidents which occurred between the grievant and the Director.

AFGE has requested the following remedies:

(1) Ms. Ellerbe's proficiency rating should be objective rather that subjective;
(2) Cease and desist harassment;
(3) Place employee back in her original work area.

Issue:

Since the American Federation of Government Employees (AFGE) has filed a grievance concerning Ms. Ellerbe's unsatisfactory proficiency report, her reassignment and the disapproval of her periodic step increase it is necessary for a decision to be made by the Under Secretary for Health whether these matters are grievable.

Discussion:

The union's allegation that management's actions were taken as reprisal, harassment and retaliation for incidents with the Director relate to Ms. Ellerbe being counseled for holding prayer meetings during duty hours after being told to stop and, Ms. Ellerbe receiving a reprimand, reduced to a written counseling for making comments to others concerning alleged personal problems of the Director. However, management's actions were unrelated to the above incidents.

DM&S Supplement, MP-5, Part II, Chapter 6 (TAB E) contains the regulations concerning proficiency ratings. Paragraph 6.06c.(3) states that for a nurse, proficiency ratings will be used to summarize how the employee meets the criteria in the Nurse Qualification Standard and the appropriate functional statement (TAB F). The Nurse Qualification Standards in place at the time of Ms. Ellerbe's proficiency rating are found in VA Circular 00-91-7, "Locality Pay System." (TAB G) Attachment C pages 5, 6 and 7 list the standards for Senior Grade. A grade level not normally achieved by staff nurses but utilized for Nurse Practitioners and other specialized nurse positions. Senior Grade nurses are expected to make significant and sustained contributions to the nursing profession such as publication, membership on task forces, committees, consulting, development of educational media, scientific inquiry, or use of creative approaches to enhance quality of patient care and productivity or providers. There is no evidence in Ms.

Ellerbe's proficiency that she has made significant contributions to the nursing profession during the rating period. Ms. Ellerbe has not submitted any evidence that she is meeting the qualification standards for a senior grade nurse. Paragraph 6.06b. of the Supplement states that the employee can submit comments concerning the Proficiency Report through the rating and approving officials for filing in the Official Personnel folder and/or Board Action Folder if they disagree with the rating.

The disapproval of her periodic step increase and the reassignment were actions that were taken based on her unsatisfactory proficiency rating. DM&S Supplement, MP-5, Part II, Chapter 6, paragraph 6.08c. requires that when an unsatisfactory rating has been approved, supervisory officials will review the employee's services and clinical privileges, and determine what action is appropriate. One of the actions recommended is reassignment or change in duty assignment. The facility elected to reassign her to a Staff Nurse position where she could receive closer supervision. (TAB C)

VHA Supplement MP-5, Part II, Chapter 5 (TAB H) contains the regulations concerning periodic step increases. Paragraph 5.12a. requires a satisfactory current proficiency rating to be eligible for a periodic step increase. Since Ms. Ellerbe did not have a satisfactory proficiency rating she was not eligible for a periodic step increase. Paragraph 5.12b. outlines the procedures for processing disapprovals of periodic step increases and the procedure the employee is to use to request reconsideration of a decision to deny a periodic step increase.

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). (Tab I) 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. (Tab J) The Secretary's decision is not subject to collective bargaining or subject to review by any other agency. Id.

This case presents several issues already decided by the Under Secretary for Health, in GR-07-92 (VAMC Fayetteville, North Carolina and AFGE decided July 10, 1992)(TAB K), GR-08-92 (VAMC Hampton, Virginia and AFGE decided July 20, 1992) (TAB L), GR-11-92 (VAMC Long Beach, CA, and AFGE decided August 17, 1992)(TAB M), GR-19-93 (VAMC Portland, Oregon, and AFGE decided January 27, 1993)(TAB N). In GR-07-92 the Chief Medical Director determined that reassignments related to professional conduct or competence. In GR-08-92 the Chief Medical Director determined that reassignment and performance matters related to professional conduct or competence. In GR-11-92 and GR-19-93 the Chief Medical Director determined that the proficiency rating system relates to professional conduct or competence. Additionally the disapproval of a periodic step increase relates to professional conduct and competence and compensation because the step increase cannot be processed unless the employee has a satisfactory current proficiency rating.

Recommendation:

We recommend that the Under Secretary for Health determine that the grievance concerns or arises out of professional conduct or competency and the establishment, determination, or adjustment of employee compensation under Title 38, United States Code.

Decision:

Approve Recommendation _____

Disapproved Recommendation _____

C Wayne Holsinger 8-2-93

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