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

FEB 1 0 1994

In Reply Refer To:

Mr. Timothy Williams
Director
VA Medical Center
50 Irving Street
Washington, DC 20422

Dear Mr. Williams:

I am responding to the issues raised concerning the enclosed Unfair Labor Practice (ULP) complaint filed by the District of Columbia Nurse Association (DCNA).

Under 38 USC Section 7422, any matter affecting registered nurses hired pursuant to Title 38 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 make the determination 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.

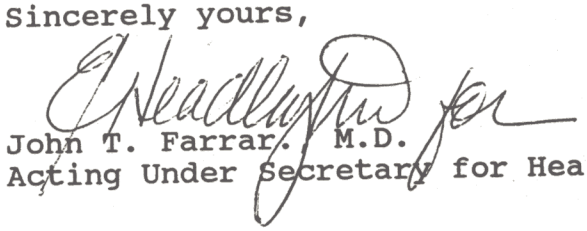
Acting pursuant to this authority I have determined that this ULP, concerning an employee's failure to receive a special advancement for performance involves professional conduct or competence. Performance ratings or proficiencies involve determinations of professional competence, and are used in making determinations regarding special advancements for performance. Special advancements for performance are subject to the Title 38 peer review process. In addition, advancements are part of the Title 38 compensation system: Section 7403(c) specifically authorizes advancements within grade, or step increases. Determining the competency of the staff at a facility and their ability to perform without compromising patient care concerns professional competence or conduct.

Accordingly, the issue raised in this ULP with respect to not receiving a special advancement for performance is outside the scope of collective bargaining under the "Department of Veterans Affairs Labor Relations Improvement Act of 1991" because it concerns a matter or question arising out of professional competence and conduct which affects direct patient care, peer review, and compensation.

Mr. Timothy Williams
Washington, DC 20422

However, the allegation in the ULP complaint that Head Nurse Riggins told nurse Shackleford that Riggins knew Shackleford went to the union and that because of Shackleford's so-called outside activities (including the union contact), she would not recommend Shackleford for an special advancement for performance does not itself involve professional conduct or competence, peer review or compensation. This issue is not excluded from the collective bargaining process by Title 38, here the ULP proceeding. Only determinations concerning the special advancement for performance itself are excluded.

Sincerely yours,



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

Enclosure

Title 38 Unfair Labor Practice
Decision Paper

Facts:
At VAMC Washington, D. C. the District of Columbia Nurses' Association (DCNA) filed an unfair labor practice charge, containing several allegations, on behalf of Barbara Shackleford, RN. It was alleged that the Head Nurse would not recommend Ms. Shackleford for a special advancement for performance because she had gone to the union and to a member of Congress for assistance. Ms. Shackleford did not receive and was not considered for a special advancement.

The Head Nurse, Marie Riggins, RN denies making the statement. However, Ms. Riggins contends she did not recommend Ms. Shackleford for a special advancement for performance because she had not successfully trained certain staff members that she had identified to be proficient in using the Haemonetic cell saver independently. She had at that time provided training for 3 nurses, only two were competent to operate the cell saver independently.

Issue:
Whether the denial of a special advancement for performance in the above matter is covered by Public Law 102-40.

Discussion:
Under Public Law 102-40, the "Department of Veterans Affairs Labor Relations Improvement Act of 1991" (the Act), employees 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 the issue of whether or not management can determine not to recommend/give a special advancement for performance to a nurse, which is based upon the individual's ability to competently train other employees in direct patient care matters. In the instant case the Head Nurse determined that the nurse did not meet the expectations for training other employees, and therefore, the Head Nurse did not recommend the nurse for a special advancement. Therefore, this case involves professional conduct and competence which concerns direct patient care, peer review, and compensation. Accordingly, the issue

raised is outside the scope of collective bargaining under the Act because it concerns a matter or question arising out of professional competence and conduct which is related to direct patient care, peer review, and compensation.

However, the allegation in the ULP complaint that Head Nurse Riggin's would not recommend Shacklford for special advancement because of union activities, does not itself involve professional conduct or competence, peer review or compensation. Thus, Title 38 does not exclude this alleged statement from collective bargaining, here, the ULP proceeding. However, determinations concerning the special advancement for performance itself are excluded.

Recommendation:
We recommend that the Under Secretary for Health determine that the issue of granting an employee a special advancement based on performance is a matter which concerns or arises out of professional conduct or competence under Title 38, United States Code and is outside the scope of collective bargaining.

Approve Recommendation ✓

Disapprove Recommendation _____

[illegible] for

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

2/16/94
Date