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

AUG 27 1992

Mr. J. Larmar Warnock
Director (00)
VA Medical Center Jackson
1500 East Woodrow Wilson Blvd
Jackson, MS 39216

Dear Mr. Warnock:

I am responding to the issues raised concerning the enclosed Unfair Labor Practice (ULP) charges filed by the National Federation of Federal Employees (NFFE) 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 of 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 any such determinations, which are not subject to administrative review under the law.

Acting pursuant to this authority, I have determined that these ULPs concerning the right to represent a nurse at a Summary Review Board involve professional conduct or competence and the peer review process. The Summary Review Board is the principal component of the peer review process utilized to determine the competence of a probationary registered nurse. Consequently, I believe any matter relating to the Summary Review Board including the right to union representation and the role of any representative at such a proceeding is related to professional competence or conduct and the peer review process. Accordingly, the issues raised in these ULPs 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, and peer review.

Sincerely yours,

James W. Holsinger Jr.

James W. Holsinger Jr. M.D.
Chief Medical Director

Enclosures

Title 38 Grievability
Decision Paper

Facts:

VAMC Amarillo professional bargaining unit employee Sally Wilson, R.N., was the subject of a Summary (Probationary) Review Board convened to determine whether to retain or discharge her based on competence during the probationary period.

When the employee requested to appear before the Board, she requested Union representation by the NFFE local. Management denied the Union representation time, but afforded the employee a "personal representative" if she desired. The employee elected to designate a "personal representative," who coincidently was a NFFE attorney not on the VA's rolls.

The NFFE president filed a grievance, alleging a violation of the VA-NFFE Master Agreement which authorizes official time for union representational duties. Management denied the grievance, stating that the employee was not entitled to Union representation before the Board, because Public Law 102-40 specifically excludes from collective bargaining matters related to or arising from professional conduct or competence, and the peer review process.

In a similar matter at VAMC Jackson, two Registered Nurses elected to appear before Summary Review Boards convened to determine whether, based on professional competence, to retain or discharge them during their probationary period. The NFFE local filed Unfair Labor Practice (ULP) charges, when management declined to allow union representational participation before the Board, because Public Law 102-40 specifically excludes from collective bargaining matters related to or arising from professional conduct or competence, and the peer review process.

The VA and NFFE National Council of Locals agreed in a memorandum of understanding that the provisions of the Master Agreement covering Title 38 professional employees would continue in effect, provided they did not conflict with provisions of the new Title 38 law.

Issue:

The Union argues in the grievance and the ULPs that Management is violating the Master Agreement, and has erroneously used Public Law 102-40 to improperly bar the Union from its statutory right to represent the bargaining unit employees on official time.

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.

The grievance and ULPs concerning the right to represent a nurse at a Summary Review Board involve professional conduct or competence and the peer review process. The Summary Review Board is the principal component of the peer review process utilized to determine the competence of a probationary registered nurse. Any matter relating to the Summary Review Board including the right to union representation is related to professional competence or conduct and the peer review process. Consequently, the grievance and ULPs raise "a matter or question concerning or arising out of peer review and professional conduct or competency." Accordingly, the issues raised in the grievance and ULPs 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, and peer review.

Recommendation:

We recommend that the Chief Medical Director determine that the grievance and ULPs concern or arise out of professional conduct or competency as well as peer review, under Title 38, United States Code and are outside the scope of collective bargaining.

Approve Recommendation _____

Disapprove Recommendation _____

James W. Holsinger, Jr. AUG 27 1992

James W. Holsinger, Jr., M.D. Date
Chief Medical Director

Briefing Slip

PURPOSE: Decision paper and letters to the Directors VA Medical Centers, Amarillo, Texas, and Jackson, Mississippi, concerning a grievance (TAB A) and ULPs (TAB B & C), submitted by the National Federation of Federal Employees (NFFE) local union, at each VAMC, respectively.

DISCUSSION: PL. 102-40 (TAB D) gives Title 38 employees and their exclusive labor organization representative the right to engage in collective bargaining under federal employee 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 the Department of Veterans Affairs, or designee, to determine whether a matter or question concerns any of the above issues. The Chief Medical Director has been delegated authority to decide these matters. (TAB E) That decision may not be reviewed by any other agency and is not subject to collective bargaining.

At VAMC Amarillo, the NFFE local has filed a grievance related to a question of representational rights in a matter involving the peer review (Summary Review Board) process concerning the competence of a probationary registered nurse. At VAMC Jackson, the NFFE local filed two ULPs concerning the same issue.

The nurse at VAMC Amarillo requested to appear before the Board, and asked that the NFFE represent her. The Medical Center Director decided to grant the nurse permission to have a "personal representative," although MP-5, Part II, Chapter 4 c.(3) states that an employee electing to appear before a Summary Review Board does not have the right to a representative.(TAB F) The NFFE representative was denied official time to represent the nurse before the Board, and filed the grievance over the denial of official time.

Two Registered Nurses at VAMC Jackson, requested to appear before the Summary Review Board proceedings held to determine their retention during their probationary period based on their professional conduct and competence. The NFFE local filed ULPs charging management with the denial of their representational rights.

The VA and NFFE National Council of Locals agreed in a memorandum of understanding (TAB G) that the provisions of the Master Agreement covering Title 38 professional employees would continue in effect, provided they did not conflict with provisions of P. L. 102-40.

Since peer review is excluded from collective bargaining by 38 U.S.C. 7422, the union is not entitled to official time to represent an employee during this process. Both the grievance and ULPs concern matters or questions arising out of professional conduct or competence, as well as the peer review process, under Title 38. Accordingly, such subjects are outside the scope of collective bargaining.

IMPLICATIONS: The decision on this matter will set the precedent for how similar matters will be treated in future cases. We need a decision by the CMD as soon as possible since the union has selected an arbitrator in the case at Amarillo and the Regional Director of the Federal Labor Relations Authority has issued a complaint in the cases at Jackson.

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