

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C. 20424-0001

MEMORANDUM

DATE: May 13, 1996

TO: The Federal Labor Relations Authority

FROM: GARVIN LEE OLIVER
Administrative Law Judge

SUBJECT: **DEPARTMENT OF VETERANS AFFAIRS,**
VETERANS AFFAIRS MEDICAL CENTER,
WASHINGTON, D.C.

Respondent

and

Case No. WA-CA-30584
(51 FLRA No. 74)

DISTRICT OF COLUMBIA NURSES'
ASSOCIATION

Charging Party

Pursuant to section 2423.26(b) of the Rules and Regulations, 5 C.F.R. § 2423.26(b), I am hereby transferring the above case to the Authority. Enclosed are copies of my Decision on Remand, the service sheet, and the transmittal form sent to the parties. Also enclosed is the Record sent to this office on February 29, 1996.

Enclosures

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
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WASHINGTON, D.C. 20424-0001

DEPARTMENT OF VETERANS AFFAIRS, VETERANS AFFAIRS MEDICAL CENTER, WASHINGTON, D.C. Respondent	
and DISTRICT OF COLUMBIA NURSES' ASSOCIATION Charging Party/ Union	Case No. WA-CA-30584 (51 FLRA No. 74)

NOTICE OF TRANSMITTAL OF DECISION

The above-entitled case having been presented to the undersigned Administrative Law Judge pursuant to the Statute and the Rules and Regulations of the Authority, the undersigned herein serves his Decision on Remand, a copy of which is attached hereto, on all parties to the proceeding on this date and this case is hereby transferred to the Federal Labor Relations Authority pursuant to 5 C.F.R. § 2423.26(b).

PLEASE BE ADVISED that the filing of exceptions to the attached Decision is governed by 5 C.F.R. §§ 2423.26(c) through 2423.29, 2429.21 through 2429.25 and 2429.27.

Any such exceptions must be filed on or before **JUNE 12, 1996**, and addressed to:

Federal Labor Relations Authority
Office of Case Control
607 14th Street, NW, 4th Floor
Washington, DC 20424-0001

GARVIN LEE OLIVER

Administrative Law Judge

Dated: May 13, 1996
Washington, DC

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C. 20424-0001

DEPARTMENT OF VETERANS AFFAIRS, VETERANS AFFAIRS MEDICAL CENTER, WASHINGTON, D.C. Respondent	
and DISTRICT OF COLUMBIA NURSES' ASSOCIATION Charging Party/ Union	Case No. WA-CA-30584 (51 FLRA No. 74)

Thomas J. McKeever, Jr.
Counsel for the Respondent

Bruce E. Goodman
Counsel for the Charging Party

Christopher M. Feldenzer
Counsel for the General Counsel, FLRA

Before: GARVIN LEE OLIVER
Administrative Law Judge

DECISION ON REMAND

Statement of the Case

On February 28, 1996, the Authority remanded this case to the undersigned to resolve the allegation that Respondent violated section 7116(a)(1) and (2) of the Statute. The Authority held that, although the allegation in the complaint that the employee did not receive an incentive award "does not clearly encompass a failure of the employee's supervisor to recommend her for an incentive award, . . . the Respondent had notice and fully litigated the issue concerning whether the supervisor's failure to recommend Shackelford for an incentive award violated section 7116(a)(2) of the Statute."

The Authority noted that the record was insufficient to resolve that issue and asked that the record be clarified.

The Authority requested that I (1) take appropriate steps to clarify the Respondent's position concerning the effect of 38 U.S.C. § 7422(b) on the Authority's jurisdiction to determine whether the supervisor's failure to recommend Shackelford for an award violated the Statute, (2) decide whether a credibility determination is necessary with respect to the conflicting testimony concerning whether Shackelford competently trained other nurses to operate the Cell Saver, a medical device used to filter and return a patient's own blood during surgery, and (3) along with the parties, consider two Authority decisions that issued after my decision.

Pursuant to the Authority's order, the Respondent was asked to submit the position of the Secretary, or his delegate, in light of the Authority's comments. The Respondent submitted a declaration from the Under Secretary, a copy of its regulations, and additional argument addressing the issues as requested. The Charging Party and the General Counsel did not object to the declaration or regulations or request an additional hearing. They responded with their positions on the issues posed by the Authority as requested.

Positions of the Parties

1. Respondent

The Respondent submitted a declaration from the Under Secretary for Health, Department of Veterans Affairs, who has been delegated authority by the Secretary of Veterans Affairs to make determinations under 38 U.S.C. § 7422 that a matter concerns or arises out of "professional conduct or competence, (2) peer review, or (3) the establishment, determination, or adjustment of employee compensation" and that the matter therefore is outside the scope of collective

bargaining.¹ The declaration of the Under Secretary provided, in pertinent part, as follows:

3. On February 16, 1994, the Acting Under Secretary for Health determined, in connection with Federal Labor Relations Authority (FLRA) case number WA-CA-30584, that the failure of a title 38 nurse to receive a special advancement for performance concerned a matter of professional conduct or competence, peer review, and compensation. In an Order dated March 12, 1996, a FLRA Administrative Law Judge requested that I make a further determination whether a supervisor's failure to make a recommendation concerning the special advancement also concerned professional conduct or competence,

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38 U.S.C. § 7422 provides, in relevant part:

(a) Except as otherwise specifically provided in this title, the authority of the Secretary to prescribe regulations under section 7421 of this title is subject to the right of Federal employees to engage in collective bargaining with respect to conditions of employment

(b) Such collective bargaining (and any grievance procedures provided under a collective bargaining agreement) . . . may not cover, or have any applicability 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 under this title.

(c) For purposes of this section, the term "professional conduct or competence" means any of the following:

- (1) Direct patient care.
- (2) Clinical competence.

(d) An issue of whether a matter or question concerns or arises out of (1) professional conduct or competence, (2) peer review, or (3) the establishment, determination, or adjustment of employee compensation . . . shall be decided by the Secretary and is not itself subject to collective bargaining and may not be reviewed by any other agency.

38 U.S.C. § 7421, referenced in 38 U.S.C. § 7422, provides, in relevant part:

(a) Notwithstanding any law, Executive order, or regulation, the Secretary shall prescribe by regulation the hours and conditions of employment and leaves of absence of employees appointed under any provision of this chapter in positions in the Veterans Health Administration

peer review, or the establishment, determination, or adjustment of employee compensation under title 38.

4. A supervisor's recommendation concerning a title 38 special advancement, is a part of the process of determining whether a title 38 employee should receive a special advancement. Accordingly, for the reasons set forth in the February 16, 1994, determination, such recommendation is a matter concerning "professional conduct or competence", "peer review", and "the establishment, determination, or adjustment of employee compensation". As a result, the issue of the supervisor's recommendation in this case is outside the scope of collective bargaining, and not subject to review by FLRA.

The February 16, 1994 determination referenced by the Under Secretary provided, in pertinent part, as follows:

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.

Based on the Under Secretary's determination, the Respondent contends that section 7422(b) excludes the supervisor's recommendation from collective bargaining, and section 7422(d) deprives the Authority of jurisdiction to review it.

The Respondent argues that because section 7422(d) excludes the recommendation from collective bargaining and Authority jurisdiction, there can be no unfair labor practice. Thus, in the Respondent's view, a credibility determination concerning whether the nurse performed certain duties is unnecessary.

The Respondent claims that the decisions referenced by the Authority, Department of Veterans Affairs, Veterans Affairs Medical Center, Hampton, Virginia, 51 FLRA 84 (1995), request for reconsideration filed (September 14, 1995) (VAMC Hampton) and International Association of Machinists and Aerospace Workers, Franklin Lodge No. 2135 and U.S. Department of the Treasury, Bureau of Engraving and Printing, 50 FLRA 677, 681-85 (1995), petition for review filed sub nom. U.S. Department of the Treasury, Bureau of Engraving and Printing v. FLRA, No. 95-1499 (D.C. Cir. Sept. 28, 1995) (BEP), do not control the resolution of this case.

With regard to VAMC Hampton, the Respondent claims that 7422(b) matters are clearly excluded even in the absence of VA regulations, but, nevertheless, in the instant matter, VA has promulgated regulations concerning special advancements for performance in VA Manual MP-5, Part II, Chapter 5, paragraph 8, and DM&S Supplement thereto, paragraph 5.11 and

appendix F.2 Thus, Respondent asserts that, even under VAMC Hampton, the instant matter is excluded from collective bargaining and Authority jurisdiction.

With regard to BEP, the Respondent claims that the Authority's narrow construction of "specifically provided for by statute" in 5 U.S.C. § 7103(a)(14) does not control here because 38 U.S.C. § 7422 excludes the instant matter from title 5 collective bargaining and Authority review, irrespective of any title 5 provisions or Authority construction of them. Furthermore, the Respondent points out

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The VA regulations were submitted as Attachment 8 to Respondent's Response to Order of Administrative Law Judge as corrected by Appendix 5F in the Respondent's Supplemental Response to Order of Administrative Law Judge. The criteria for a recommendation of a nurse for a special advancement for performance are that "[t]here must have been demonstrated a sustained high level of performance and ability over and above that normally expected of employees in the particular grade and profession or there must have been noted contributions in some phase of nursing. . . ." If the employee is recommended for advancement, the recommendation is submitted to the appropriate Professional Standards Board by the chief of service or Chief of Staff, as appropriate.

that, 38 U.S.C. 7425(b) provides that title 38 prevails over

any conflicting title 5 provisions.³

2. Charging Party

The Charging Party submits that the supervisor's failure to recommend Shackelford for an incentive award violated the Statute. The Charging Party claims that the Respondent's position that such a recommendation is excluded by section 7422(b) is erroneous because Shackelford's training of additional nurses does not involve a question concerning her professional conduct or competence as defined by section 7422(c), but only whether Shackelford performed the required tasks to receive Riggins' recommendation for the incentive award. The Charging Party asserts that Respondent cannot be permitted to exclude both the receipt of an incentive award and the recommendation for an award as if the recommendation is merely a formality.

With respect to the credibility issue, the Charging Party argues that such a determination is necessary, and the Administrative Law Judge should credit Shackelford's testimony relative to the training of the other nurses based on Shackelford's testimony, her in-service training form for 1992, and the corroborative testimony of Yvonne Moody, the in-service coordinator, now retired.

Finally, The Charging Party contends that the issues raised in the Authority's decisions in VA Hampton and BEP are inapplicable to the instant case.

3. General Counsel

The General Counsel contends that the Authority does have jurisdiction to consider the section 7116(a)(2) allegation in the instant case. The General Counsel claims that the considerable discretion retained by the supervisor to recommend the employee for an award coupled with the lack of precision set forth in the broad categories contained in 38 U.S.C. § 7422(b) compel a finding that the matter does concern a condition of employment and does not meet the

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38 U.S.C. § 7425(b) provides as follows:

Notwithstanding any other provision of law, no provision of title 5 or any other law pertaining to the civil service system which is inconsistent with any provision of section 7306 of this title or this chapter shall be considered to supersede, override, or otherwise modify such provision of that section or this chapter except to the extent that such provision of title 5 or of such other law specifically provides, by specific reference to a provision of this chapter, or such provision to be superseded, overridden, or otherwise modified.

exception under section 7103(a)(14)(C) as applied by the Authority in BEP.

The General Counsel also argues that, as in VA Hampton, there has been no exercise by Respondent of its authority under section 7421 to promulgate regulations which would override the rights of Nurse Shackelford to obtain a supervisory recommendation for an incentive award without regard to discriminatory treatment within the meaning of section 7116(a)(2) of the Statute. The General Counsel claims that the regulations relied upon by the Respondent in this case are mere procedural guidelines for incentive awards which do not address the rights of title 38 employees under the Statute. At a minimum, the General Counsel states, such regulations would have to provide that recommendations for incentive awards would not be subject to any protected rights a title 38 employee has pursuant to section 7102 of the Statute. According to the General Counsel, such hypothetical regulation would still face the inconsistency that violative statements are subject to the Authority's jurisdiction but violative actions are not.

The General Counsel notes that inasmuch as the Administrative Law Judge credited Nurse Shackelford in resolving the section 7116(a)(1) allegation in the initial decision, any credibility resolution necessary to resolve the 7116(a)(2) allegation should be similarly resolved.

ADDITIONAL FINDINGS, DISCUSSION, AND CONCLUSIONS

Jurisdiction

The issue presented is whether the supervisor's failure to recommend Shackelford for an incentive award violated section 7116(a)(1) and (2) of the Statute.

Section 7116(a)(1) and (2) of the Statute provides:

(a) For the purpose of this chapter, it shall be an unfair labor practice for an agency-

(1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter;

(2) to encourage or discourage membership in any labor organization by discrimination in connection with hiring, tenure, promotion, or other conditions of employment[.]

Section 7102 of the Statute expressly gives employees the right to form, join, or assist any labor organization, or to refrain from any such activity, freely and without fear of penalty or reprisal.

The Under Secretary's determination, under authority delegated by the Secretary of Veterans Affairs, that the issue of the supervisor's recommendation raised in this case is a matter concerning professional conduct or competence, peer review, and the establishment, determination, or adjustment of employee compensation, is not subject to review by the Authority. 38 U.S.C. § 7422(d); Wisconsin Federation of Nurses and Health Professionals, Veterans Administration Staff Nurses Council, Local 5032 and U.S. Department of Veterans Affairs, Clement J. Zablocki Medical Center, Milwaukee, Wisconsin, 47 FLRA 910, 913 (1993); Veterans Administration, Long Beach, California, 48 FLRA 970, 975 (1993); VA Hampton, 51 FLRA at 88.

In VA Hampton the Authority found that the respondent violated section 7116(a)(1) and (8) of the Statute by denying a union representative the opportunity to speak on behalf of a bargaining unit employee at an examination in connection with an investigation under section 7114(a)(2)(B) of the Statute. The Authority concluded that it had jurisdiction over the case as there was no assertion by the Respondent that it had exercised its authority under section 7421 to prescribe a regulation overriding unit employees' rights to union representation at quality assurance investigations. Nor had the union sought to bargain over the authority to prescribe regulations under section 7121. Therefore, the Authority concluded that, by its terms, section 7422 did not apply and section 7422(d) did not limit the Authority's jurisdiction.

In this case, the Respondent does assert that it has prescribed regulations governing special advancements for performance. While such regulations do not specifically exclude the protected rights of section 7102 of the Statute, as would be necessary in the General Counsel's view, 38 U.S.C. §§ 7421(a) and 7422 do exempt the Secretary's power to prescribe regulations in the three areas from "any law, Executive order, or regulation." Cf. U.S. Dept. of Veterans Affairs v. FLRA, 9 F.3d 123, 128 (D.C. Cir. 1993); National Federation of Federal Employees, Local 589 v. FLRA, 73 F.2d 390 (1996) (NFFE).

I also agree with the Respondent that the Authority's narrow construction in BEP of the exclusion "specifically provided for by Federal statute" from the definition of "conditions of employment" in 5 U.S.C. § 7103(a)(14) does

not control here because 38 U.S.C. § 7422 specifically excludes the three areas from title 5 collective bargaining and Authority review and 38 U.S.C. 7425(b) provides that title 38 prevails over any conflicting title 5 provisions. Cf. NFFE, 73 F.2d at 394.

Therefore, I agree with the Respondent that the instant matter is excluded from Authority jurisdiction.

Substantive Review

Assuming, however, that section 7422 does not apply and section 7422(d) and 7425(b) do not limit the Authority's jurisdiction to decide the alleged violation, the Authority held in U.S. Department of Veterans Affairs, Veterans Administration Medical Center, San Francisco, California, 40 FLRA 290, 302 (1991) (VA Medical Center), that where respondent "asserts a lawful reason for a disputed action, and such assertion is consistent with action taken pursuant to its exclusive authority under title 38 of the United States Code and is final, the determination made pursuant to that authority is not substantively reviewable in an unfair labor practice proceeding." See Department of Veterans Affairs, Washington, D.C. and Department of Veterans Affairs Medical Center, Canandaigua, New York, 46 FLRA 805 (1992) (VAMC Canandaigua), petition for review dismissed sub nom. AFGE, Local 3306 v. FLRA and Department of Veterans Affairs, 2 F.3d 6 (2d Cir. 1993).

The record reflects that Barbara Shackelford, a nurse hired under title 38 of the U.S. Code, was told by Head Nurse Marie Riggins, in connection with a discussion of her November 1991 proficiency report, that she would receive an incentive award if she would train other nurses to independently operate the Cell Saver, a medical device used to filter and return a patient's own blood during surgery, and document such training. Ms. Riggins had commented in Ms. Shackelford's proficiency report, "Mrs. Shackelford has potential to expand her role as the resource person in operating the Cell Saver by developing a program to train the majority of RNs in the OR to operate the Cell Saver and function independently. It is expected that she will plan for such a program during the next rating period." (General Counsel's Exhibit 2).

Head Nurse Riggins testified that a nurse is "proficient" in the use of the Cell Saver "when I make out a patient care assignment and assign that nurse to a particular case where the Cell Saver is used. . . [and] she can go in and assemble the Cell Saver, get it set up, and she can do that without the help of any other nurse." (Tr.

85). This definition was not disputed. Ms. Riggins testified that Ms. Shackelford only "proficiently trained three people" in the use of the Cell Saver and was not recommended for any type of advancement because she needed to continue to work with the staff. (Tr. 89, 94, 103).

In relying on that determination by Ms. Riggins, Respondent has asserted that "[d]etermining the competency of the staff at a facility and their ability to perform without compromising patient care concerns professional competence or conduct" and that a supervisor's failure to make a recommendation concerning a title 38 special advancement is a matter concerning "professional conduct or competence," "peer review," and "the establishment, determination, or adjustment of employee compensation" not subject to review by the Authority once that determination has been made.

Consistent with VA Medical Center, Respondent has asserted a lawful reason for a disputed action, and such assertion is consistent with action taken pursuant to its exclusive authority under section 7422(d) of title 38 of the United States Code. It is final, as "final" action, within the meaning of VA Medical Center, "encompasses a final administrative determination made pursuant to the exercise of exclusive authority under title 38." VAMC Canandaigua, 42 FLRA at 1068-69. Accordingly, consistent with VA Medical Center and VAMC Canandaigua, the determination made pursuant to that authority is not substantively reviewable in an unfair labor practice proceeding.

Alternative Conclusion

Assuming that the failure to recommend Shackelford for an incentive award is deemed to be within the jurisdiction of the Authority and that the Under Secretary's determination is substantively reviewable in this proceeding, and to avoid the possible necessity of a remand,⁴ I would credit the testimony of Shackelford and Nurse Yvonne Moody that Shackelford trained seven or eight of the 16 operating room nurses to proficiently operate the Cell Saver, that is, that after such training, they could set up and operate the Cell Saver on their own during operations, and Shackelford's testimony that she documented that training. The record reflects that the Cell Saver was

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The Authority stated in its remand that a credibility determination with respect to the conflicting testimony concerning whether Shackelford competently trained other nurses to operate the Cell Saver "may be necessary for the Judge to resolve whether the supervisor's decision not to recommend Shackelford for an award violated the Statute." Slip op. at 6.

not used that often at the Medical Center. So whether these nurses trained by Shackelford were capable of independently operating the Cell Saver in direct patient care on any specific date after such training would clearly involve a new assessment of their clinical competence, at the relevant time, by the supervisor making the work assignment. However, given the fact that Head Nurse Riggins advised Shackelford on May 24, 1992 that she was "doing a good job" in such training, but, in November 1992, that she could not be recommended for an incentive award because she "went outside" and sought the assistance of the Union in challenging a letter of counseling in an unrelated matter, I would conclude that Riggins' failure to recommend Shackelford for an incentive award was in reprisal for her protected activity in seeking representation by the Union and was not based on her failure to provide sufficient staff training. Therefore, if it is decided that the Authority has jurisdiction in this proceeding and the Under Secretary's determination is subject to substantive review, I would conclude that Respondent violated section 7116(a)(1) and (2) of the Statute by the supervisor's failure to recommend the employee for an incentive award.

Recommendation

Based on the above findings and conclusions, and those contained in my decision of January 13, 1995, it is recommended that the Authority issue the following supplemental order in this case:

ORDER

The allegation that Respondent violated section 7116(a)(1) and (2) of the Statute is dismissed.

Issued, Washington, DC, May 13, 1996

GARVIN LEE OLIVER
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that copies of this DECISION ON REMAND issued by GARVIN LEE OLIVER, Administrative Law Judge, in Case

No. WA-CA-30584 (51 FLRA No. 74), were sent to the following parties in the manner indicated:

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Dated: May 13, 1996
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