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

NOTICE OF TRANSMITTAL OF DECISION

The above-entitled case having been heard before the undersigned Administrative Law Judge pursuant to the Statute and the Rules and Regulations of the Authority, the undersigned herein serves his Decision, 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 **FEBRUARY 13, 1995**, 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: January 13, 1995

Washington, DC

MEMORANDUM DATE: January 13, 1995

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

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, the service sheet, and the transmittal form sent to the parties. Also enclosed are the transcript, exhibits and any briefs filed by the parties.

Enclosures

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

Dianne N. Parlow
Counsel for the Respondent

Susan E. Scheider
Counsel for the Charging Party

Christopher M. Feldenzer
Counsel for the General Counsel, FLRA

Before: GARVIN LEE OLIVER
Administrative Law Judge

DECISION

I. Statement of the Case

The unfair labor practice complaint alleges that Respondent violated section 7116(a)(1) and (2) of the Federal Service Labor-Management Relations Statute (the Statute), 5 U.S.C. §§ 7116(a)(1) and (2). The complaint alleges that Respondent violated section 7116(a)(1) when a supervisor advised an employee that because the employee had gone to the Union for assistance the supervisor would not recommend the employee for an incentive award as promised. The complaint alleges that Respondent violated section 7116(a)(1) and (2) because the employee did not receive the promised award.

Respondent's answer denied any violation of the Statute.

A hearing was held in Washington, D.C. The Respondent, Union, and the General Counsel were represented by counsel and afforded full opportunity to be heard, adduce relevant evidence, examine and cross-examine witnesses, and file post-hearing briefs. The parties filed helpful briefs. Based on the entire record,[1] including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions of law, and recommendations.

II. Findings of Fact

The Union is the certified exclusive representative of an appropriate unit of employees, professional nurses, at Respondent.

Barbara Shackleford is an employee of Respondent, hired pursuant to Title 38 of the United States Code, and has been an operating room staff nurse at Respondent since 1983. Her immediate supervisor is Marie Riggins, Operating Room Head Nurse. Shackleford's second-level supervisor is Geri Feaster, Assistant Chief of Clinical Practice for Surgical Services. The Chief of Nursing is Sue Hudec.

In November 1991, Shackleford received her annual performance rating from Marie Riggins. The overall rating was "highly satisfactory." While discussing the performance rating Head Nurse Riggins told Shackleford that if she would assume certain responsibilities for training staff nurses and documenting such training, Riggins would reward her with an incentive step award. Specifically, Riggins wanted Shackleford to provide training for operating room nurses in the "Cell Saver" apparatus, a device that collects and filters blood products from a patient during surgery for return to the patient.

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[1] Counsel for the General Counsel moved to strike attachments A and B to Respondent's brief. The motion to strike attachment A, Respondent's letter to the Regional Attorney concerning the pre-complaint investigation, is granted. It is also granted with respect to the "Decision Paper" in attachment B. However, the motion is denied with respect to the determination of the Acting Under Secretary for Health, pursuant to 38 U.S.C. § 7422(d), dated February 16, 1994, in attachment B. This determination was discussed at the hearing in terms of jurisdiction or remedy. The ruling was that it could be submitted as part of the Respondent's brief. (Tr. 10-13). It will be considered infra. See also 5 C.F.R. § 2423.19(o) (official notice).

Shackleford testified that Riggins never mentioned a particular number of nurses to be trained. Riggins testified that they agreed that six nurses would have to be trained to independently operate the device.

On May 24, 1992, Shackleford and Riggins were working together in connection with a Saturday morning operation. While discussing Shackleford's training, Riggins told Shackleford that she was "doing a good job" and that she still intended to put her in for a "step" award.

On June 5, 1992, Shackleford was involved in a disagreement with another nurse over the professional care of a patient. Part of the disagreement took place in front of the patient. As a result, Shackleford received a letter of counseling. Riggins advised Shackleford that her conduct could be viewed as patient abuse and, if the patient complained, would be dealt with accordingly.

Shackleford felt she had acted professionally under the circumstances and advised Riggins, upon receipt of the letter of counseling, that she was "going to the Union about it."[2]

Shackleford met with the Union representative at Respondent, Mary Gaines, and an attorney for the Union, Sue Scheider, and a July 8, 1992 memorandum was prepared for Shackleford rebutting Riggins' letter of counseling. It was delivered by Shackleford to the Chief of Personnel as well as Hudec, Feaster, and Riggins. Riggins, upon receiving her hand-delivered copy, shoved the memorandum back into Shackleford's hands and told her she could not accept it.

Shackleford also sought the assistance of Congresswoman Connie Morella's office in July 1992 concerning the letter of counseling. Respondent had to respond to the Congresswoman's inquiry concerning the matter. Geri Feaster was involved in preparing the response.

On August 12, 1992, Shackleford was informed that Geri Feaster wanted to see her. When Shackleford telephoned Feaster and stated she would have a Union representative with her and to let her know what time, Feaster said, "Well, that's o.k." and abruptly ended the conversation.

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[2] Head Nurse Riggins testified that Shackleford did not mention going to the Union over the issue. I credit Shackleford on this point. Riggins also initially claimed she was unaware that there was a union for professional nurses at Respondent. She later acknowledged that she had heard of the Union, or seen articles about its presence at Respondent, and had heard that Mary Gaines was the Union representative.

On August 18, 1992, Shackleford was advised that Sue Hudec, Chief of Nursing, wanted to see her right away. Shackleford telephoned Hudec and inquired whether some arrangement could not be made in order for Union representative Mary Gaines to be present. Hudec was immediately hostile to this suggestion and screamed at Shackleford that she didn't need a Union representative, it was not a disciplinary action, and she would not meet with her.

In late November 1992, Shackleford received her annual performance appraisal from Head Nurse Riggins and reviewed the appraisal in her presence. Shackleford received an overall rating of "highly satisfactory." The appraisal mentioned, in part, that Shackleford had taught "two nursing staff to operate the Cell Saver" and should teach more staff to operate the Cell Saver if needed in 1993. The appraisal also included the following comment by the approving official, Geri Feaster:

> [D]uring this rating period there was a practice issue in which Mrs. Shackleford had a difference in perception and much effort was expended to clarify these perceptions with documentation of the situation and to clarify expected behavior and to bring a closing to the incident conflict.

Shackleford discussed these matters with Riggins and asserted that she had trained the nurses in the Cell Saver. When Shackleford asked whether she would receive the incentive award, Riggins replied that there was "no way I can write you an incentive step because you talk too much. You went outside." When Shackleford asked Riggins why shouldn't she go "outside," Riggins told her that Geri Feaster would have to "write it" and Shackleford should "Just let things die down."[3]

Riggins testified that she did not recommend Shackleford for any type of advancement because she needed to continue to work with the staff. According to Riggins, Shackleford only "proficiently trained three people" in the use of the Cell Saver.

Shackleford testified that she trained six or seven nurses to proficiency in the use of the Cell Saver during the period. Yvonne Moody, an operating room nurse, now retired, who was Respondent's in-service training coordinator in 1992, testified that she received training from Shackleford and had the opportunity to use the Cell Saver independently

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[3] Head Nurse Riggins testified that she did not tell Shackleford that she would not be recommended for an incentive award because she had gone "outside." I credit Shackleford.

approximately 10-12 times during her last year. She also testified that four other operating room nurses, with whom Moody had regular and ongoing contact during the relevant time period, were capable of using the Cell Saver on their own during operations.

Head Nurse Riggins does not have independent authority to grant an incentive award, also called by Respondent a "special advancement for performance award." Her recommendation would go to Geri Feaster, Assistant Chief of Clinical Practice for Surgical Services, for concurrence and then to the Nurse Professional Standards Board for determination.

On February 16, 1994, John T. Farrar, M.D., Acting Under Secretary for Health, issued a letter to Mr. Timothy Williams, Respondent's Director, concerning the issues involved in this case. Dr. Farrar stated that, pursuant to the authority delegated to him by the Secretary, he determined that the issue raised in this unfair labor practice with respect to the employee's not receiving a special advancement for performance is outside the scope of 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. Dr. Farrar added that the allegation that Head Nurse Riggins told Nurse Shackleford that she would not recommend Shackleford for a special advancement for performance because of Shackleford's outside activities (including the union contact) does not itself involve professional conduct or competence, peer review, or compensation and is not excluded.

III. Discussion and Conclusions

A. Alleged Violation of Section 7116(a)(1) and (2) for Failure to Receive Award

The complaint alleges in paragraph 13 that "Shackleford did not receive the incentive award promised to her by Riggins in November 1991." Paragraph 15 of the complaint alleges that "By the conduct described in paragraph 13, the Respondent committed an unfair labor practice in violation of 5 U.S.C. § 7116(a)(1) and (2)."

Section 7116(a)(2) provides that it shall be an unfair labor practice for an agency to encourage or discourage membership in any labor organization by discrimination in connection with hiring, tenure, promotion, or other conditions of employment.

Section 7103(a)(14) defines "conditions of employment," in relevant part, to mean "personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions, except that such term does not include policies, practices, and matters -- . . . (C) to the extent such matters are specifically provided by Federal statute[.]"

The authority of the Secretary of the Department of Veterans Affairs to prescribe by regulation the hours and conditions of employment of bargaining unit employees is subject to their right to engage in collective bargaining in accordance with chapter 71 of title 5. 38 U.S.C. § 7422(a). However, 38 U.S.C. § 7422(b) provides that "[s]uch collective bargaining . . . 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." 38 U.S.C. § 7422(c) provides that "professional conduct or competence" means direct patient care or clinical competence.

An issue of whether a matter or question concerns or arises out of professional conduct or competence, peer review, or 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. § 7422(d). See 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 (1993).

Based on section 7103(a)(14)(C) of the Statute and 38 U.S.C. § 7422, I conclude that where the Secretary has determined, as in this case, that the issue raised in this unfair labor practice with respect to the employee's not receiving a special advancement for performance is outside the scope of 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, the Secretary's determination is not substantively reviewable in an unfair labor practice proceeding. Cf. Department of Veterans Affairs, Washington, D.C. and Department of Veterans Affairs Medical Center, Canandaigua, New York, 46 FLRA 805 (1992), petition for review dismissed sub nom. AFGE, Local 3306 v. FLRA and Department of Veterans Affairs, 2 F.3d 6 (2d Cir., 1993). Further, in light of this determination, the allegation in the complaint does not involve discrimination with respect to a "condition of employment" as the matters specifically exempted from collective bargaining by 38 U.S.C. § 7422(b) are not properly

considered to be "conditions of employment" as defined in the Statute. Accordingly, the allegation in the complaint in this respect must be dismissed.4

B. Alleged Violation of Section 7116(a)(1) by Statement

Section 7102 of the Statute protects each employee in the exercise of the right to form, join, or assist a labor organization, or to refrain from any such activity, without fear of penalty or reprisal. Section 7116(a)(1) provides that it is an unfair labor practice for an agency to interfere with, restrain, or coerce any employee in the exercise by the employee of such right.

The Authority has held that the standard for determining whether management's statement or conduct violates section 7116(a)(1) of the Statute is an objective one. The question is whether, under the circumstances, the statement or conduct would tend to coerce or intimidate the employee, or whether the employee could reasonably have drawn a coercive inference from the statement. Although the circumstances surrounding the making of the statement are taken into consideration, the standard is not based on the subjective perceptions of the employee or the intent of the employer. U.S. Department of Agriculture, U.S. Forest Service, Frenchburg Job Corps, Mariba, Kentucky, 49 FLRA 1020, 1034 (1994).

The record reflects that Nurse Shackleford sought and secured the assistance of the Union, in addition to her Congresswoman, in protesting a written counseling. Head Nurse Riggins was aware of her protected activity. When Shackleford later asked whether she would receive an incentive award, Riggins replied that there was "no way I can write you an incentive step because you talk too much. You went outside." When Shackleford asked Riggins why shouldn't she go "outside," Riggins told her that Geri Feaster would have to "write it" and Shackleford should "Just let things die down."

Riggins' statement implies that things would have gone smoother for Shackleford if she had kept the matter of the June 5 incident within the Respondent instead of going "outside" to the Union and others. The statement carries with it the additional implication that Shackleford should think twice about exercising her statutory right to seek the Union's assistance in the resolution of an employment problem. Riggins' statements were coercive and constituted interference

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In view of this determination, no credibility resolution was made with respect to the conflicting testimony concerning whether Nurse Shackleford competently trained other nurses to operate the Cell Saver in direct patient care matters.

with the protected right of a bargaining unit employee in violation of section 7116(a)(1), as alleged. See Navy Resale System Field Support Office Commissary Store Group, 5 FLRA 311 (1981).

Based on the above findings and conclusions, it is recommended that the Authority issue the following Order:

ORDER

Pursuant to section 2423.29 of the Federal Labor Relations Authority's Rules and Regulations and section 7118 of the Statute, it is hereby ordered that Department of Veterans Affairs, Veterans Affairs Medical Center, Washington, D.C. shall:

1. Cease and desist from:

(a) Making statements to employees which interfere with, restrain, or coerce employees in the exercise of their rights to form, join, or assist any labor organization, including the right to seek the labor organization's assistance in the resolution of an employment problem, or to refrain from any such activity, freely and without fear of penalty or reprisal.

(b) In any like or related manner interfering with, restraining or coercing its employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Federal Service Labor-Management Relations Statute:

(a) Post at its facilities copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Director, and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that such Notices are not altered, defaced, or covered by any other material.

(c) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, of the Washington Region, 1255 22nd Street, NW, 4th Floor, Washington, DC 20037-1206, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

3. The allegation that Respondent violated section 7116 (a)(1) and (2) of the Statute because Nurse Shackleford did not receive an incentive award is dismissed.

Issued, Washington, DC, January 13, 1995

GARVIN LEE OLIVER
Administrative Law Judge

NOTICE TO ALL EMPLOYEES

AS ORDERED BY THE FEDERAL LABOR RELATIONS AUTHORITY

AND TO EFFECTUATE THE POLICIES OF THE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT make statements to employees which interfere with, restrain, or coerce employees in the exercise of their rights to form, join, or assist any labor organization, including the right to seek the labor organization's assistance in the resolution of an employment problem, or to refrain from any such activity, freely and without fear of penalty or reprisal.

WE WILL NOT in any like or related manner interfere with, restrain or coerce our employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

(Activity)

Date: By:

(Signature) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director of the Washington Region, 1255 22nd Street, NW, 4th Floor, Washington, DC 20037-1206, and whose telephone number is: (202) 653-8500.

CERTIFICATE OF SERVICE

I hereby certify that copies of this DECISION issued by GARVIN LEE OLIVER, Administrative Law Judge, in Case No. WA-CA-30584, were sent to the following parties in the manner indicated:

CERTIFIED MAIL:

Ms. Dianne N. Parlow
Office of Regional Counsel (372/02)
1120 Vermont Avenue, NW, Room 1013
Washington, DC 20421

Ms. Susan E. Scheider
District of Columbia Nurses' Association
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Christopher Feldenzer, Esq.
Federal Labor Relations Authority
1255 22nd Street, NW, Suite 400
West End Court Building
Washington, DC 20037

REGULAR MAIL:

Mr. Joseph Pishioneri
Department of Veterans Affairs
VA Medical Center
50 Irving Street, NW
Washington, DC 20422

Dated: January 13, 1995
Washington, DC