



DEPARTMENT OF VETERANS AFFAIRS
Veterans Health Administration
Washington DC 20420

MAR 02 2004

In Reply Refer To:

Medical Director (00/05)
VA Northern Indiana Health Care System
2121 Lake Avenue
Ft. Wayne, IN 46805

Dear Mr.

I am responding to the issue raised in your memorandum dated January 13, 2004, concerning a grievance filed by the American Federation of Government Employees (AFGE), Local 1020, regarding the reassignment of MD from the Extended Care and Rehabilitation Medicine Unit to the Primary Care Unit of the VA Northern Indiana Health Care System.

Pursuant to delegated authority, I have decided on the basis of the enclosed decision paper that the issue presented is a matter concerning or arising out of professional conduct or competence and thus exempted from collective bargaining by 38 U.S.C. § 7422(b).

Please provide this decision to your Regional Counsel as soon as possible.

Sincerely yours,

A handwritten signature in cursive script, appearing to read "Robert H. Roswell", is written over a horizontal line.

Robert H. Roswell, M.D.
Under Secretary for Health

Enclosure

**Title 38 Decision Paper – VA Northern Indiana Health Care System
VA 04-04**

FACTS:

In early October 2003, management at the VA Northern Indiana Health Care System (NIHCS) determined that there was a need for additional physician support in the Primary Care area due to increased patient visits and the resignation of two staff physicians. As a result, management decided to reassign _____, from the Geriatric and Extended Care unit to the Primary Care unit. Dr. _____ was considered a good choice for Primary Care for several reasons. First, he had worked in Primary Care at the NIHCS Marion Campus from 1992 through 1998, and therefore had clinical experience in that area. Second, Dr. _____ had received medical training in Internal Medicine, Nephrology, and Hypertension, all of which were relevant to the Primary Care duties to which he was reassigned.

Management notified the AFGE Local 1020 (union) of Dr. _____ reassignment on October 21, 2003. Management notified Dr. _____ himself of the reassignment on November 26, 2003. Dr. _____ reassignment took effect on December 28, 2003. *Attachments A and B.*

On December 19, 2003, the union filed a third step grievance relating to Dr. _____ reassignment. *Attachment C.* In the grievance, the union took issue with VA NIHCS management's decision to hire Dr. _____ to work in the Geriatric and Extended Care unit from which Dr. _____ was reassigned. The union asserted that "the position of geriatrician [for which Dr. _____ was hired] is a bargaining position [but] was never announced internally" as required by the AFGE Master Agreement. The union further argued that as a result of Dr. _____ training and clinical experience, "he is well qualified to handle or treat geriatrics patients" but "was never allowed to compete for his own job" within the Geriatrics and Extended Care service. The union asserted that the management violated Articles 16¹ and 22² of the AFGE Master Agreement in reassigning Dr. _____.

¹ Article 16 of the AFGE Master Agreement is entitled "Employee Rights." The union did not specify in the grievance which provision of Article 16 it believed management to have violated in reassigning Dr. _____. A copy of Article 16 is attached as *Attachment D.*

² Article 22, entitled "Merit Promotion," provides (in section 8) that "all positions to be competitively filled in the bargaining unit" must be posted and that management must consider internal candidates prior to external candidates in filling such positions. However, competitive promotion procedures, which are governed by Title 5 and 5 CFR Parts 332 and 335, are inapplicable to Title 38 physicians such as Dr. _____. A copy of Article 22, section 8 is attached as *Attachment E.*

As a remedy, the union requested that Dr. be permanently assigned to the Geriatrics and Extended Care unit and that "the agency...make Employee M.D. whole."

VA NIHCS management responded to the union's grievance in writing on December 22, 2003. *Attachment F*. In its response, management stated that "the issue of this grievance appears to fall within a 38 U.S.C. 7422 exclusion and is not subject to the negotiated grievance procedures."

The union invoked arbitration on December 24, 2003. *Attachment G*.

On January 13, 2004, management submitted a memorandum to the Under Secretary for Health (USH) requesting a determination that the issues involved in the union's grievance over Dr. reassignment were excluded from collective bargaining under 38 U.S.C. § 7422(b). *Attachment H*. Management clarified some of the facts underlying its request in a written memorandum dated February 6, 2004. *Attachment I*. On February 3, 2004, management provided a copy of its request to the union and solicited the union's input into the issue presented to the USH. *Attachment J*. However, the union did not submit any input into the issues raised by management.

PROCEDURAL HISTORY

The Secretary has delegated to the USH the final authority in the VA to decide whether a matter or question concerns or arises out of professional conduct or competence (direct patient care, clinical competence), peer review, or employee compensation within the meaning of 38 U.S.C. § 7422(b).

ISSUE:

Whether the grievance over the reassignment of Dr. to VA NIHCS' Primary Care unit involves issues concerning or arising out of professional conduct or competence within the meaning of 38 U.S.C. § 7422(b).

DISCUSSION:

The Department of Veterans Affairs Labor Relations Act of 1991, 38 U.S.C. § 7422, granted collective bargaining rights to Title 38 employees in accordance with Title 5 provisions, but specifically excluded from the collective bargaining process matters or questions concerning or arising out of professional conduct or competence, peer review, and employee compensation as determined by the USH.

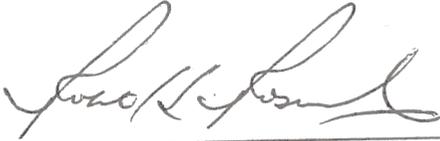
³Article 56 of the Master Agreement, entitled "Title 38 Vacancy Announcements," provides (in section 1) that "[a]ll Title 38 bargaining unit positions will be announced facility-wide." However, the union did not cite nor allege any violation of Article 56 in its grievance.

RECOMMENDED DECISION:

That the union third step grievance relating to the decision of VA NIHCS to reassign Dr. _____ to the Primary Care unit involves issues concerning or arising out of professional conduct or competence within the meaning of 38 U.S.C. § 7422(b).

APPROVED ✓

DISAPPROVED _____



Robert H. Roswell, M.D.
Under Secretary for Health

3-2-04

Date