



DEPARTMENT OF VETERANS AFFAIRS
UNDER SECRETARY FOR HEALTH
WASHINGTON DC 20420

DEC 13 2005

VHA Health Revenue Center
3401 SW 21st Street
Building 9
Topeka, KS 66604

NFFE FD1 IAMAW, AFL-CIO
1016 16th Street, NW
Washington, DC 20036

Dear Ms. and Mr.

I am responding to the issue raised in your memoranda of August 17, 2005 and September 25, 2005, respectively, regarding the union's collective bargaining proposal relating to medical staff elections.

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/or peer review and is therefore exempted from collective bargaining under 38 U.S.C. § 7422(b).

Sincerely yours,

A handwritten signature in cursive script, appearing to read "Jonathan B. Perlin", is written over the typed name.

Jonathan B. Perlin, MD, PhD, MSHA, FACP
Under Secretary for Health

Title 38 Decision Paper
NFFE Master Contract Negotiations
VA – 05 – 09

FACTS

The Department of Veterans Affairs and the National Federation of Federal Employees (NFFE) began negotiations for a new master collective bargaining agreement in July 2002. During the negotiations NFFE proposed to include in the agreement a provision relating to medical staff elections, which are held at each VA Medical Center (VAMC) to ratify the facility's Medical Staff Bylaws and to elect the facility's Medical Staff Officers. Consistent with VA clinical policies set forth in VA Directive and Handbook 5005, *Staffing*, and VHA Handbook 1100.19, *Credentialing and Privileging*, each facility's Medical Staff Bylaws prescribe the qualifications and procedures by which providers are appointed, credentialed, and privileged to practice at the facility. Medical Staff Officers are, among other things, responsible for the enforcement of Medical Staff Bylaws and for the recommendation of sanctions against providers who do not comply. One or more of the elected Medical Staff Officers also serves on the Executive Medical Staff Committee, which has overall responsibility for the clinical care of patients, quality assessment and improvement activities, credentialing and privileging providers, and peer review activities.

NFFE revised the precise wording of its proposal on medical staff elections several times over the course of negotiations, including the following variations:

Recognizing that the medical staff is responsible for both quality and care delivered by its members, and accountable to the governing body for all aspects of care, both parties agree that the medical staff may freely organize themselves by the election of such meetings in accordance with MP1-Part 1 Chapter 26 Change 101 and 102 dated 12/12/91.¹

Both parties encourage all eligible bargaining unit members to participate freely in such elections that might be held in accordance with VA regulations and guidance.²

Management will not discourage eligible bargaining unit members from freely participating in such elections that might be held in accordance with VA regulations and guidance.³

¹ The union avers that it offered this version of its proposal at the parties' final negotiating session on August 25, 2004.

² In its August 17, 2005 request for a 38 U.S.C. § 7422(b) determination, the management bargaining team stated that this version was the union's final proposal.

³ In its September 28, 2005 position paper re the 38 U.S.C. § 7422(b) determination request, the union stated that it had proposed this version to management after August 17, 2005.

By memorandum dated August 17, 2005, the VA bargaining team requested that the Under Secretary for Health determine the union's proposal(s) to be excluded from bargaining under 38 U.S.C. § 7422(b). More specifically, the management team stated that medical staff elections involve professional conduct or competence because the Medical Staff Bylaws "provide the mechanism for each facility to appoint medical staff and delineate clinical privileges" and because "the medical staff governing body is responsible for continuing education, peer review and medical staff monitoring and evaluation." (Attachment A.)

On September 28, 2005, the Chief Spokesperson for the NFFE bargaining team submitted a Union Position Paper opposing the management team's request for a 38 U.S.C. § 7422(b) determination. In that paper, NFFE argued that

Nothing in the final proposal impacts the performance or professional conduct of employees and peer review. The proposal only speaks to the ability of eligible employees to organize, hold elections and conduct meetings, which are otherwise authorized by law and pertinent parts of MP-I, Chapter 26, Change 101 and 102. Further, the proposal is not even related to the performance unless the agency can successfully argue that the organizing, the conduct of the elections and meetings are part and parcel of the official performance and conduct of medical staff duties. Clearly, any argument by the agency must fail on this point because section MP-I, Part 1, chapter 26, Change 101 and 102 expressly authorize such activities and thereby recognize that such activities do not conflict with the performance and professional conduct of medical staff employees. Also, there is nothing in the proposal that expressly or impliedly subjects medical staff decision-making to the grievance procedure or further negotiations as suggested by the agency's memorandum dated 17 August 05. If the medical staff is indeed allowed to organize, participate in elections and hold meetings, nothing in the proposal allows employees to grieve any of the issues suggested in the agency's position.

(Attachment B.)

PROCEDURAL HISTORY

The Secretary has delegated to the USH the authority to determine 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 NFFE union's proposal(s) regarding medical staff elections involves an issue of professional conduct or competence (direct patient care) within the meaning of 38 U.S.C. § 7422(b).

DISCUSSION

The Department of Veterans Affairs Labor Relations Act of 1991, codified at 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 (i.e., direct patient care and clinical competence), peer review or employee compensation as determined by the USH.

Medical staff elections are used to ratify VA Medical Centers' Medical Staff Bylaws and to select Medical Staff Officers. As noted above, the Medical Staff Bylaws set forth the procedures and standards through which health care providers are credentialed and privileged to practice at the facility. These procedures and standards are purely clinical in nature and are controlled by national level clinical policies prescribed in VA Directive and Handbook 5005, VHA Handbook 1100.19, and VHA Manual M-1, Pt. I, Chapter 26, Hospital Accreditation and Appendix 26A thereto.⁴ At the local level, VA facilities compile local-level Medical Staff Bylaws and organize Medical Staff for self-governance in accordance with these national clinical policies. The Medical Staff Officers elected at each facility perform peer review functions as they enforce compliance with the Medical Staff Bylaws and oversee privileging and credentialing in accordance with the procedures and standards set forth in the Bylaws. Because Medical Staff Bylaws address clinical matters and Medical Staff Officers oversee peer review functions, the medical staff elections through which the former are ratified and the latter selected necessarily involve issues of professional conduct and competence and peer review within the meaning of 38 U.S.C. §7422.

The union argues that its proposal does not involve direct patient care or clinical competence because "the proposal only speaks to the ability of eligible employees to organize, hold elections and conduct meetings which are otherwise

⁴ Because the Bylaws concern solely clinical matters, they do not concern conditions of employment. What is more, because the substantive standards and procedures for privileging, credentialing, and peer review functions are set by national level VA policies and are not subject to change through local election, the right of individual providers to participate in local medical staff elections does not constitute a "condition of employment" subject to collective bargaining. See generally Dept. of Air Force, Eglin AFB and AFGE Local 1897, 58 FLRA 626, 627-28 (2003) (Chairman Cabaniss, concurring) ("[I]n determining whether a change concerns a condition of employment of unit employees, a distinction should be made between the subject matter of the changes and the effects of the changes. In particular . . . the effects of changes are relevant to determine whether, for example, the effects are sufficient (more than *de minimis*) to give rise to a bargaining obligation"); see also Department of Navy, Naval Weapons Station, Concord, California (1981) FLRA, GCO Case No. 9-CA-893 (the term "conditions of employment" is not intended to embrace every issue that might be of interest to unions and agencies; distinction is made between those subjects which materially affect and have significant or substantial impact on personnel policies, practices and matters affecting working conditions and those which are only indirectly, incidentally or remotely related to those subjects).

