



THE SECRETARY OF VETERANS AFFAIRS
WASHINGTON
December 17, 2012

Mr. Michael J. Murphy
Director
Fargo VA Health Care System
2101 N. Elm Street
Fargo, ND 58102

Dear Mr. Murphy:

I am responding to the issues raised in your March 23, 2011, memorandum concerning the National Federation of Federal Employees unfair labor practice ("ULP") charge over management's decision to temporarily detail two physicians to a different Community-Based Outpatient Clinic.

I have decided on the basis of the enclosed decision paper that the issues presented by this ULP are matters or questions concerning or arising out of professional conduct or competence and employee compensation under 38 U.S.C. § 7422(b) and are thus excluded from collective bargaining.

Sincerely,

A handwritten signature in black ink, appearing to read "Eric K. Shinseki".

Eric K. Shinseki

Enclosure



THE SECRETARY OF VETERANS AFFAIRS
WASHINGTON
December 17, 2012

Mr. Robert E. Redding
President
National Federation of Federal Employees Local 225
2101 N. Elm Street
Fargo, ND 58102

Dear Mr. Redding:

I am responding to the issues raised in your response to the March 23, 2011, Fargo VAHCS memorandum concerning the National Federation of Federal Employees unfair labor practice ("ULP") charge over management's decision to temporarily detail two physicians to a different Community-Based Outpatient Clinic.

I have decided on the basis of the enclosed decision paper that the issues presented by this ULP are matters or questions concerning or arising out of professional conduct or competence and employee compensation under 38 U.S.C. § 7422(b) and are thus excluded from collective bargaining.

Sincerely,

A handwritten signature in black ink, appearing to read "Eric K. Shinseki". The signature is fluid and cursive, with a prominent initial "E".

Eric K. Shinseki

Enclosure

**Title 38 Decision Paper
Fargo VA Health Care System**

FACTS

In February 2011, Dr. [REDACTED] the Acting Chief of Medicine, Primary and Specialty Medicine Service Line, at the Fargo, North Dakota, VA Health Care System ("VAHCS"), determined that there was a need to adjust provider coverage at the Bemidji, Minnesota, Community-Based Outpatient Clinic ("CBOC"). (Attachment A) Specifically, Dr. [REDACTED] reviewed information on panel size (i.e., the number of patients assigned to a physician) and noted that the providers at the Bemidji CBOC were over-paneled (i.e., assigned too many patients) while at the same time two providers at the Grand Forks, North Dakota, CBOC (Dr. [REDACTED] and Dr. [REDACTED] were under-paneled (i.e., assigned too few patients). (*Id.*)

On March 1, 2011, Mr. [REDACTED] Fargo's Human Resources Director, advised the National Federation of Federal Employees ("NFFE"), Local 225 President Bob Redding via e-mail that the Bemidji CBOC was short-staffed. (Attachment B) Mr. [REDACTED] informed Mr. Redding that two providers at the Grand Forks CBOC were likely to be asked to go to Bemidji "a couple of days a week" to help with the staffing shortage. (*Id.*)

On March 7, 2011, Dr. [REDACTED] held a conference call with Dr. [REDACTED] and Dr. [REDACTED] in which he noted that they were under-paneled. He asked the two doctors whether they would be interested in working at other locations – including Bemidji. The doctors responded that they were not interested. (Attachment A)

On March 9, 2011, Dr. [REDACTED] led a telephone conference call with Dr. [REDACTED], Mr. Redding, and others. Dr. [REDACTED] reviewed the need for provider coverage at Bemidji and proposed that Dr. [REDACTED] and Dr. [REDACTED] travel to Bemidji and render services for 2 days each week beginning on March 21, 2011, and to rotate doing so for the foreseeable future. (*Id.*) Mr. Redding then submitted to the facility an e-mail demanding to bargain on the suggested change and requesting information including a list of all Primary Care panel sizes, a Primary Care organizational chart, and the open positions in Primary Care. Mr. Redding also requested that the facility cease and desist implementation of the proposed change. (Attachment C)

On March 11, 2011, the facility submitted to the Union a memorandum proposing provider coverage at Bemidji. (Attachment D) The proposal noted that the providers at Bemidji ([REDACTED] and [REDACTED]) were over-paneled, while the providers at Grand Forks were significantly under-paneled. The facility proposed to temporarily detail two Grand Forks physicians to work at Bemidji for 2 days each week beginning the week of March 21, 2011. (*Id.*)

On March 15, 2011, the Agency responded to the Union's March 9 request for information. (Attachment E)

On March 15, 2011, Dr. [redacted] and Labor-Relations Specialist [redacted] met with Mr. Redding and [redacted] a member of the NFFE negotiating committee, at a regularly scheduled negotiating session. During those negotiations, one of the items discussed was the need for more provider coverage at Bemidji. Dr. [redacted] noted that the providers at Bemidji were over-paneled and that Dr. [redacted] and Dr. [redacted] at Grand Forks were under-paneled. He indicated that another care provider would leave Bemidji the following week. He stated that Management wanted to move forward with the proposal for Dr. [redacted] and Dr. [redacted] to temporarily perform work 2 days a week in Bemidji on a rotational basis. (See Attachment A)

On March 15, 2011, Mr. Redding traveled to Grand Forks and met with Dr. [redacted] and Dr. [redacted]. On March 16, 2011, he sent an e-mail to [redacted] indicating that the start date of the temporary detail of March 21, 2011, was too soon, and he requested a delay of 2 weeks. (Attachment F) He additionally advised that he would file an Unfair Labor Practice charge ("ULP").

That same day, [redacted] sent an e-mail to Mr. Redding responding to an earlier e-mail about the temporary detail. (Attachment G) Management specifically informed the Union that it believed this issue was a Management right to assign work to its providers in order to address patient care needs. Furthermore, Management informed the Union that Management believed this issue to be non-negotiable under the 38 U.S.C. § 7422's professional conduct and competence (direct patient care) exclusion. Management informed the Union that it would proceed with the temporary detail as planned.

On March 19, 2011, the Union filed a ULP, arguing that "VA Fargo is using pretext, citing 7422 when in fact the detailing is fully negotiable as it isn't a matter of Direct Patient Care, PCC [professional conduct or competence] or Compensation; falls outside the scope of 38 USC. The Union asserts VA Fargo is abusing 7422 to violate the FLMRS, Ch. 71, 5 USC." [sic] (Attachment H) The Union further alleged that the Agency owed "monetary compensation" to the physicians.

On March 23, 2011, the Director of the VA Medical Center (VAMC) submitted a request to the Secretary that the temporary detail of Dr. [redacted] and Dr. [redacted] to travel to Bemidji and render patient care services for 2 days each week is outside the scope of collective bargaining pursuant to 38 U.S.C. § 7422. (Attachment A)

The Union then submitted an undated position paper in response to Management's request for a 7422 decision (Attachment I), alleging the following violations:

- (1) Failure to follow Executive Order 13522;
- (2) Failure to follow the 1997 NFFE Labor Management Agreement, Article 16 (Part B); and
- (3) Failure to follow the Secretary's Decision Document on 38 U.S.C. § 7422.

The Union further explained its request, contained in the ULP, for "monetary compensation" to the physicians by noting that the physicians were required to work more than 8-hour work days. Thus, the Union alleged that the Agency owed overtime pay to the physicians.

On December 6, 2011, representatives from the Office of Labor-Management Relations contacted _____ to inquire about the status of the temporary detail. _____ stated that the detail of Dr. _____ ended on October 18, 2011, while Dr. _____ detail ended on November 11, 2011.

PROCEDURAL HISTORY

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

ISSUE

Whether the Union's ULP regarding the detail of physicians to the Bemidji CBOC, including a request for overtime pay, involves matters or questions that concern or arise out of professional conduct or competence and employee compensation 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(b), 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 or clinical competence), peer review, and employee compensation as determined by the Secretary.

Pursuant to 38 U.S.C. § 7421(a), the Secretary has prescribed regulations contained in VA Handbook 5005, Part IV, Chapter 3, Sections A and B to implement assignments, reassignments, and details. Section A, paragraph 4(b) provides that in exercising the authorities covered in the handbook, primary consideration will be given to the efficient and effective accomplishment of the VA mission. Further, section B, paragraph 3(b) states that "[e]mployees may be detailed to other assignments at their facility and to other VA facilities." Thus, Management was authorized by Agency regulations to detail the physicians in the instant case.

Management determined that patient care needs required the adjustment of physician coverage at Grand Forks and Bemidji to correct an imbalance in workload. Specifically, a workload imbalance existed that resulted in two providers at Grand Forks having too few patients, while the Bemidji workload was too large. The temporary detail corrected this imbalance and allowed Management to properly allocate providers in accordance

with direct patient care needs. The decision to detail the two physicians is thus directly related to patient care and is exempt from collective bargaining under 38 U.S.C. § 7422(b). In several prior cases concerning the assignment of title 38 staff, we have determined that reassigning staff to better address patient care needs concerns direct patient care within the meaning of 38 U.S.C. § 7422(b). *Connecticut HCS* (Oct. 25, 2002) (RN reassigned from VAMC to CBOC); *Maryland VA Health Care System* (Feb. 4, 2003) (RN reassigned to different VA facility); *Poplar Bluff VAMC* (Feb. 12, 2003) (RN reassigned within VAMC from over-staffed clinic to under-staffed clinic); *Memphis VAMC* (Oct. 28, 2003) (reassignment of health care personnel to new clinic); *Gulf Coast HCS* (Jan. 5, 2005) (reassignment of RNs due to unit reorganization); *Northampton VAMC* (Feb. 8, 2005) (physician assistants and nurse practitioners reassigned to ensure equitable distribution of workload); *Chillicothe VAMC* (Sep. 6, 2006) (reassignment of RNs from over-staffed unit to under-staffed units); *Connecticut HCS* (Oct. 9, 2008) (RN reassignment).

As noted above, the Union alleged three “violations of law, rule or regulation” in its response to Management’s request for a § 7422 decision—that the detail violated Executive Order 13522, the NFFE-VA collective bargaining agreement, and the 7422 Decision Document. These arguments are without merit. Executive Order 13522, signed by President Obama on December 9, 2009, provides, in relevant part, that each Agency will “allow employees and their union representatives to have pre-decisional involvement in all workplace matters to the fullest extent practicable.” The Executive Order also states that “[n]othing in this order shall be construed to impair or otherwise effect . . . authority granted by law to an executive department, agency, or head thereof[.]” Thus, within the Executive Order itself, the President states that the Order cannot override a statute such as 38 U.S.C. § 7422. The result is that pre-decisional involvement is not required in situations that are exempt from collective bargaining under 38 U.S.C. § 7422. At the same time, it is clear that Management did, in fact, involve the Union pre-decisionally in this situation. Thus, the Agency did not violate Executive Order 13522 when it detailed the physicians at issue.

The Union also argued that the Agency violated Article 16, Part B, of the VA-NFFE Master Agreement (1997). This provision provides timeframes for local-level bargaining of proposed changes that affect personnel policies, practices, or conditions of employment. The Union alleged that Management violated this provision by withdrawing from negotiations and implementing the detail without proper notice. The Union alleged that this is a violation of “law rule or regulation” [*sic*]. However, all Master Agreement provisions are subject to 38 U.S.C. § 7422. Specifically, the Agency cannot negotiate an issue in accordance with the Master Agreement if the issue is exempt from collective bargaining under 38 U.S.C. § 7422. Therefore, the Agency did not violate the Master Agreement.

Lastly, the Union argued that the Agency violated two provisions of the 7422 Decision Document, which is a document through which the Secretary communicated VA’s position regarding several issues related to 38 U.S.C. § 7422. The Decision Document provides, in part, that “VA’s failure to follow its own regulations and policies is not excluded by 7422” (paragraph A1) and that “issues indirectly related or not related at all

to patient care, including, but not limited to, the guidelines for otherwise qualified employees (as determined by management) who want to trade days off, are negotiable.” (paragraph C2) The Union argued that the Agency violated paragraph A1 because it violated Article 16 of the VA-NFFE Master Agreement. This is incorrect, not only because the Agency did not violate the Master Agreement, as explained above, but also because the Master Agreement is a contract between the Agency and the Union—it is neither regulation nor policy. The Union argued that the Agency violated paragraph C2 because any qualified primary care physician—not the just the two who were detailed—could have been detailed to Bemidji. The Union apparently believes that because any two physicians could have been detailed to Bemidji, the issue does not concern direct patient care. However, Management specifically selected these providers for detail because they were underworked at Grand Forks. As explained above, detailing underworked providers to a facility that has too few providers is an issue that concerns direct patient care.

The Union made two additional arguments. First, the Union alleged that the Agency owed compensation to the two detailed providers as, according to the Union, the detail required the providers, due to travel to and from Bemidji, to work more than 8 hours per day. This claim for compensation is meritless, as VA regulations make clear that physicians are considered to be available for duty 24 hours per day. VA Handbook, 5011, Part II, Chapter 3, Paragraphs 2a, d (“Full-time physicians, dentists, podiatrists, chiropractors, and optometrists to whom provisions of this chapter apply shall be continuously subject to call unless officially excused by proper authority. This requirement as to availability exists 24 hours per day, 7 days per week.”) Further, “[b]ecause of the continuous nature of the services rendered at hospitals, the facility Director, or designee (in no case less than a chief of service), has the authority to prescribe any tour of duty to ensure adequate professional care and treatment to the patient, consistent with these provisions.”) Finally, in enacting the physician pay system, Congress did not provide for overtime pay. 38 U.S.C. § 7431 (pay for physicians consists of three elements: base pay, market pay, and performance pay, none of which provide for overtime pay, while Congress specifically provided for overtime pay for other title 38 employees, such as registered nurses (38 U.S.C. § 7453)). Even if statutes and regulations provided for physician overtime pay, the grievance requesting overtime pay would be prohibited by 38 U.S.C. § 7422(b) because it would arise from and concern the “establishment, determination, or adjustment of [physician] compensation[.]” *Louisville VAMC* (Mar. 19, 2008) (grievance concerning RN overtime pay is prohibited by 38 U.S.C. § 7422(b)); *Buffalo VAMC* (Feb. 22, 2008) (grievance concerning RN Saturday premium pay is prohibited by 38 U.S.C. § 7422(b)); *Asheville VAMC* (Mar. 5, 2001) (grievance concerning RN overtime pay is prohibited by 38 U.S.C. § 7422(b)); *AFGE, Local 446 v. Nicholson*, 475 F.3d 341, 355 (D.C. Cir. 2007) (determining that a grievance concerning RN overtime pay “clearly concerns the determination or adjustment of employee compensation under title 38.”)

Second, the Union argued that the detail is not a direct patient care issue because it arose from Management’s inability to properly manage panel size. The Union provided no evidence to support this contention. However, assuming, *arguendo*, that Management failed to sufficiently monitor panel size at its facilities or failed to hire

needed staff, these facts, were they true, would not change the nature of the issue at hand—that the detail of underutilized staff to a facility that is understaffed is inherently a direct patient care issue.

Recommended Decision

The detail of two physicians from the Grand Forks CBOC to the Bemidji CBOC, as well as requests for overtime compensation, concerns professional conduct or competence and employee compensation within the meaning of 38 U.S.C. § 7422(b).

APPROVED  _____

DISAPPROVED _____


Eric K. Shinseki
Secretary

Date: 12/17/2012