DEPARTMENT OF VETERANS AFFAIRS
UNDER SECRETARY FOR HEALTH
WASHINGTON DC 20420

OCT 1 1 2006

Director
Hunter Holmes McGuire Medical Center
1201 Broad Rock Boulevard
Richmond, VA 23249

708 S. Rosemont Road, Suite 202
Virginia Beach, VA 23452

Dear Mr. and Mr.

I am responding to the issues raised in your memoranda of August 3 and August 24, 2006, respectively, concerning a grievance filed by AFGE Local 2145 regarding the reassignment of . RN, from the Cardiac Catheterization Lab to the Emergency Services Area.

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).

Sincerely yours,

Michael J. Kussman

Michael J. Kussman, MD, MS, MACP
Acting Under Secretary for Health

Enclosure

Title 38 Decision Paper – Richmond VA Medical Center
VA 06-06

FACTS:

In June 2002, in settlement of a complaint filed with the Equal Employment Opportunity Commission (EEOC), management at the Richmond VA Medical Center (VAMC) assigned , RN, as a Staff Nurse II in the VAMC's Cardiac Catheterization Laboratory (CCL). The parties' settlement agreement limited Ms. Harris' tour of duty in the CCL to 8:00 a.m. to 4:30 p.m. *Attachment A.* [1]

On February 23, 2004, Richmond VAMC management detailed Ms. to the Emergency Services Area (ESA). *Attachment B.* At the time of her detail, the Associate Chief of Staff (ACOS) for Nursing informed Ms. that "[b]ased on the increasing workload and the limited number of RN's assigned to this highly specialized patient care area, we have found that we are unable to accommodate your existing restrictions in the CCL. Additionally, with the planned implementation of paid on call responsibilities for all RN's in the CCL, you will be required to report to duty to assist with emergent cardiac catheterization procedures when called. Therefore, with existing patient care demands in the CCL, we cannot assure that you will not be required to work more than forty (40) hours per week." *Id., ¶ 2.*

On August 9, 2004, Ms. was permanently reassigned to the ESA. *Attachment C.* The ACOS for Nursing explained that this reassignment was necessary in light of the impact on the CCL of Ms. frequent absences from duty. More specifically, the ACOS stated:

> [I]n the highly specialized environment of the CCL, it is not possible to plan for safe, therapeutic patient care delivery when one of the 4.8 RN FTEE assigned to the CCL is required to be away from scheduled duty on a frequent basis. Due to the increasing workload and limited number of RNs with the specialized knowledge and skills required to safely function in the CCL, we must have staff that are able to report for their assigned duties on a regular basis. When one of the RNs is not able to maintain a consistent work schedule, the impact of their absence can necessitate the rescheduling of patients needing a highly specialized procedure in the CCL and could potentially have a negative impact on a patient's outcome.

Id, ¶ 4.

On August 6, 2004, AFGE Local 2145 (Union) submitted a Third Step grievance to the VAMC Director alleging that management was in violation of two articles of

[1] In 2004, Ms. ' physician returned her to "full duty with limited working conditions of '40 hrs/wk & may take call.'" *Attachment B, ¶ 1.*

the AFGE Master Agreement: Article 12, Details, Reassignments, and Temporary Promotions, and Article 17, Equal Employment Opportunity. *Attachment D.* The Union alleged that Ms. detail "...ha[s] equated to a reassignment...which is nothing more than punishment, harassment and reprisal for prior EEO activity."[2] *Id., page 2.*

On August 10, 2004, the President of AFGE Local 2145, , sent an email to the VAMC Director informing him of the Third Step grievance. *Attachment F.* In this email, Ms. Marshall requested "that Ms. ' assignment of rotational tours and weekends be held in abevance pending an arbitration hearing on [the] matter." *Id., page 2.* , Labor Relations Specialist at the Richmond VAMC, responded on the Director's behalf, informing Ms. that the reassignment of a RN is covered under 38 U.S.C. § 7422 and therefore not grievable. He further informed her that since the issue was not grievable, "a third step grievance hearing [would] not be scheduled."

On August 13, 2004, the Union amended the August 6, 2006 Third Step grievance to include a reprisal claim for whistle blowing. *Attachment G.* In the amended grievance, the Union also claimed that the issue was not excluded from the grievance procedure under the provisions of 7422 because the grievance was filed over Ms. detail to the ESA, not over a reassignment. On the same day, the Union filed a second Third Step Grievance over Ms. reassignment from the CCL to the ESA. *Attachment H.* The Union claimed that the grievance was over management's reassignment of Ms. out of the CCL "as reprisal for whistle blowing for reporting a [CCL] patient's death and the Agency's subsequent actions including reprisal for reporting this matter along with reprisal claim based on prior EEO activity." *Id., page 2.*

On October 21, 2004, Ms. submitted a letter to the VAMC Director with the following subject matter: "We Win Notification letter regarding the 3rd Step Grievance- Reassignment dated August 13th, 2004, 3rd Step Grievance- dated August 6th, 2004 and August 13th, 2004 Follow-Up letter to 3rd Step Grievance dated 8/6/4004-Deneen Harris." *Attachment I.* The Union alleged that Management had failed to timely respond to the grievances as required by Article 42 of the Master Agreement, and that the

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[2] Ms. ad filed a November 4, 2003 complaint with the Equal Employment Opportunity Commission (EEOC), Office of Federal Operations (OFO) alleging that her settlement agreement had been breached when her duty hours were changed. *Attachment E.* OFO rendered a decision on May 20, 2004 finding that there was no breach to the parties' settlement agreement. *Attachment E, page 2.* That decision was appealed to the U.S. District Court for the Eastern District of Virginia, Richmond Division. The District Court rendered its "Findings of Fact and Conclusions of Law" on September 20, 2005. *Attachment Q.* The Court concluded that "...decisions made with regard to the plaintiff's work schedule were motivated by the defendant's obligation to supply its patients with adequate medical care. Patient care was always the top priority for the defendant. The small number of nurses in the CCL combined with plaintiff's physical condition to produce a situation in which the defendant was forced to reassign Ms. in order for the defendant to continue to provide adequate medical care." *Id.,* ¶ 33. The Court found in favor of the Department and denied Ms. claim.

grievances should therefore be resolved fully in favor of the grievant.[3] In response, Mr. sent a letter, dated October 21, 2004, to Ms. acknowledging the information received during a Third Step Grievance hearing held on September 29, 2004, and denying the grievances. *Attachment J.*

Thereafter, the union moved both grievances to arbitration. The arbitration hearings were held on March 28, 2005 and May 6, 2005, both before Arbitrator . Arbitrator issued a decision addressing both grievances on July 29, 2005. *Attachment K.* In his decision, the arbitrator stated the issues as follows:

1) Did the hospital retaliate against for whistle blowing when it detailed and then reassigned her from the Lab?

2) Is the Union the prevailing party due to the Agency's failure to timely respond to the grievance?

3) Did the Agency retaliate against Harris for her prior EEOC activity when it detailed and then reassigned her from the Lab?

4) What if any is the proper remedy?

Id., page 1.

The arbitrator found that issues such as details, assignments and reassignments are not subject to arbitration in accordance with 38 U.S.C. § 7422. *Id., page 8.* Specifically, the arbitrator found that "[t]he Agency did not retaliate against the grievant for whistle-blowing when it detailed and then reassigned her from the cardiac catheterization lab; [t]he Agency did not retaliate against the grievant for her prior EEOC activity when it detailed and then reassigned here [sic] from the cardiac catheterization lab; [i]n view of the Agency's failure [to] make [a] timely response the grievant is still not the prevailing party because the remedy requested is not legal in the sense of following the law, nor reasonable under the circumstances of the grievances, even considering that there has been hearing on the merits and reasonable in the circumstance of the grievances; [t]he grievances in their entirety are denied, and there is no remedy to be named; [t]o the extent described above, the grievances were not arbitral." *Id., page 12.*

On August 26, 2005, the union filed exceptions to the arbitrator's decision. Management submitted objections to the Union's exceptions on September 14, 2005. On May 4, 2006, the Federal Labor Relations Authority (FLRA) rendered a decision in the matter. *Attachment L (AFGE Local 2145 and U.S. Dept. of*

[3] Article 42, section 9 states: "Should management fail to comply with the time limits at Step 1, the grievance may be advanced to Step 2. Should management fail to comply with the time limits for rendering a decision at Step 2 or Step 3, the grievance shall be resolved in favor of the grievant, provided that (1) receipt of the grievance had been acknowledged by management at the appropriate step in writing and (2) the remedy requested by the grievant is legal and reasonable under the circumstances of the grievance."

Veterans Affairs, Hunter Holmes McGuire Medical Center, Richmond, VA, 61 FLRA No. 109 (2006).) In that decision, the FLRA set aside the arbitrator's findings that the grievant's Whistleblower Protection Act claims and claims relating to the grievant's permanent reassignment were precluded by § 7121 (d); remanded the portion of the award concerning the grievant's permanent reassignment to the parties for submission to the Arbitrator, absent settlement or a determination by the Secretary or his designee under § 7422; and denied the Union's remaining exceptions. *Id., page 7.*

More specifically, the FLRA found that the Arbitrator improperly relied on a previous USH decision in holding that the reassignment of a RN involved professional competence and conduct. The FLRA stated that "[a]lthough the Arbitrator found the Under Secretary's § 7422 determination in the prior case established that the grievant's reassignment was 'not subject to arbitration[,]', it is not clear whether the determination relied on in that case does, in fact, extend to other similar cases, or whether it was limited to the facts of the case. In addition, there is no indication that the Secretary or his designee made a determination in this case that the grievant's reassignment involved the same 'matter or question' as the RN's reassignment in the prior case or that the grievant's reassignment standing alone was a 'matter or question' within the meaning of § 7422(b). Further, the Agency has not provided the Authority with a copy of the determination that it is relying on or the prior award relied on by the Arbitrator." *Attachment 7, page 6 (*citations omitted).) The FLRA further stated that without the case the Arbitrator relied on to make his decision, it could not determine whether he erred in finding that the Agency's § 7422 determination in the prior case applied to subsequent similar cases. *Id.*

In its decision, the FLRA noted that, "on remand, the Secretary or his designee is permitted to determine whether the grievance involves one of [the] subjects" excluded from the grievance procedure by § 7422. *Id.* If the Secretary or USH determines that "...the grievant's reassignment falls under §7422, then the portion of the grievance concerning the reassignment is excluded from the negotiated grievance procedure. [However, i]f no determination has been made regarding whether the grievant's reassignment falls within § 7422 (b), then the Arbitrator is directed to resolve the merits of the portion of the grievance concerning the permanent reassignment." *Id.*

On August 3, 2006, the Director of the Richmond VAMC submitted a request for a determination from the Under Secretary for Health (USH) on whether Ms. detail and eventual reassignment from the CCL to the ESA was an issue of professional conduct or competence and therefore non-grievable pursuant to 38 U.S.C. § 7422(b). *Attachment M.*

On August 16, 2006, Mr. , Chief of the Richmond VAMC's Human Resources Service, informed the Arbitrator that the FLRA had remanded the portion of the award concerning Ms. reassignment. *Attachment N.* He further informed the Arbitrator that the VAMC Director had requested the USH

render a decision on whether Ms. reassignment is excluded from collective bargaining pursuant to 38 U.S.C. § 7422.

On August 17, 2006, the Union was notified that management had requested a § 7422 decision from the USH and was given the opportunity to provide its input to the USH through the Office of Labor Management Relations (LMR). *Attachment O.*

By memorandum dated August 24, 2006 and received in LMR on September 13, 2006, the Union responded to the facility Director's 38 U.S.C. §7422 decision request. *Attachment P.* In that memorandum, the Union characterized management's request as an improper use of 38 U.S.C. §7422 "to avoid a hearing in a matter just because local management is looking for an easy out." *Id., page 1.* The Union further alleged that Ms. was detailed out of the CCL because she made protected whistleblower disclosures regarding medical errors by the chief physician there. (*Id.*, pages 1-2.) Finally, the Union asserted that management's 38 U.S.C. §7422 decision request was untimely and that "management at the Richmond VMC obviously never believed that this was a matter properly under 7422 or it would have raised the matter prior to this." *Id., page 3.*

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 reassignment of , RN, involves issues concerning or arising out 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.

Pursuant to 38 U.S.C. § 7421(a), the Secretary has prescribed regulations (contained in VA Directive/Handbook 5005, Part IV, Chapter 3, Sections A and B) to implement assignments, reassignments and details. Section A, paragraph 4(b) of Handbook 5005, Part IV, chapter 3, 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. The assignment and placement of Title 38 healthcare personnel is fundamental to the patient care mission of all VA health care facilities.

In the instant case, Ms. had a limited tour of duty in the CCL from 8:00 am to 4:30 pm. That tour had been agreed upon by the parties as part of a settlement agreement signed on June 29, 2002. (*See* Attachment B.) Thereafter, Ms. Harris' limitations and frequent absences became increasingly more difficult to accommodate without detriment to patient care in the CCL. As summarized by the U.S. District Court for the Eastern District of Virginia, Richmond Division, in Harris v. Principi, Civil Action No. 3:04cv746 (September 20, 2005) (*Attachment Q*), the facts in this regard are clear:

- Ms. settlement agreement tour of duty had to be changed in October of 2002 to "...provide proper nursing coverage for patient care, to allow the nurses to better plan their schedules, and to improve the morale among the nursing staff because the primary burden of overtime had fallen on two of the four nurses other than the plaintiff." *Attachment Q, ¶ 9.*

- VHA issued a National Directive [VHA Directive 2003-017] titled "Treatment of Acute Myocardial Infarction (AMI) and Unstable Angina" aimed at improving AMI care throughout VHA. To comply with the requirements of this Directive, CCL coverage had to be increased. *Attachment Q, ¶ 10.*

- On August 28, 2003, Ms. underwent surgery for an injury incurred in a motor vehicle accident. *Id, ¶ 11.*

- Ms. Harris produced a doctor's certificate limiting her hours and restricting against lifting, pushing or pulling more than five pounds with her right arm. *Id, ¶ 13.*

- In accordance with VA Regulations, the VAMC accommodated Ms. restrictions while she recuperated from surgery. After the 21 day recuperation period, Ms. produced another doctor's note continuing her restrictions. After careful consideration, it was determined that Ms. Harris' restrictions could not be further accommodated "...while providing for safe patient care and insuring safe conditions that would not aggravate the plaintiff's existing conditions." Ms. was placed in an off duty status until she was able to return and independently perform the functions of the CCL. *Id, ¶ 14.*

- On December 16, 2003 the plaintiff's physician continued her on restrictions for four more weeks. "The restrictions placed on [Ms. prohibited her from performing the essential functions of a Staff II nurse in the CCL." *Id, ¶ 16.*

- On January 20, 2004, Ms. was examined by her doctor who permitted her to return to regular work but restricted her to 40 hours per week. Because of overtime requirements, it became apparent that her 40 hour restriction could not be accommodated. *Id, ¶ 18.*

- Consequently, Ms. was detailed from the CCL to ESA, where her 40 hour restriction could be accommodated without compromising patient care or patient safety. *Id, ¶19; see also Attachment A.*

- On August 9, 2004, Ms was permanently reassigned to the ESA. "The decision was based on the fact that during the plaintiff's tenure in the CCL, she had been absent from work approximately 25 percent of the time. While not stated in the memorandum, the plaintiff had been absent from work approximately 30 percent of her scheduled duty time in the five month period from April through August 2004. Ms. [Associate Chief of Staff for Nursing] determined that it was not possible to plan for the safe, therapeutic patient care delivery in the complex, highly specialized environment of the CCL when one of the four nurses assigned to the CCL was required to be away from scheduled duty on a continuing, frequent basis." *Attachment Q, ¶ 26; see also Attachment C.*

- The Court concluded that "[d]ecisions made with regard to the plaintiff's work schedule were motivated by the defendant's obligation to supply its patients with adequate medical care. Patient care was always the top priority for the defendant. The small number of nurses in the CCL combined with the plaintiff's physical condition to produce a situation in which the defendant was forced to reassign Ms. Harris in order for the defendant to continue to provide adequate medical care." *Attachment Q, ¶ 33.*

The chronology of events leading to Ms. detail and subsequent reassignment from the CCL to the ESA demonstrates that the reassignment was motivated by patient care reasons. CCL could not accommodate Ms. restrictions without endangering patient safety and affecting patient care needs. As such, Ms. reassignment is exempt from collective bargaining as a matter of professional conduct or competence (i.e., direct patient care and clinical competence) within the meaning of 38 U.S.C. § 7422(b).

As the FLRA noted in its decision remanding the matter to Arbitrator Alprin, the Arbitrator made what seems to be a § 7422 determination when he concluded that issues such as details, assignments and reassignments are not subject to arbitration. The arbitrator based his decision on a previous 38 U.S.C. §7422 determination by the USH, VA Gulf Coast HCS, VA-04-17 (January 5, 2005), involving a management decision to reassign a number of RNs from one unit to another "to maximize the quality of patient care delivered throughout the facility." (Attachment R, page 4.) In the VA Gulf Coast matter, the USH concluded that the reassignment of the RNs concerned or arose out of professional conduct or

competence within the meaning of 38 USC § 7422 (b). Based on that decision, Arbitrator concluded that because Richmond VAMC management's decision to detail and ultimately reassign Ms. from the CCL to the ESA was based on patient care concerns, that decision was non-grievable and non-arbitral under 38 U.S.C. §7422(b).

While the arbitrator's analysis was correct, he lacked the authority to make the decision he made. As a matter of statutory law, only the Secretary of Veterans Affairs or his designee has authority to determine whether a matter concerns or arises out of professional conduct or competence or one of the other issues excluded from collective bargaining by 38 U.S.C. §7422 (b). *See* 38 U.S.C. § 7422(d). The Secretary has delegated that authority to the Under Secretary for Health. *See* VA Directive 5025, Part II, ¶ 4. As a result, while Arbitrator Alprin could certainly review and consider the prior USH determination to the extent that the issues in the VA Gulf Coast HCS matter were relevant to Ms. grievances, he did not have the authority to deem Ms. grievances non-arbitral under 38 U.S.C. §7422(b).

In its August 24, 2006 memorandum responding to the facility Director's request for a 38 U.S.C. §7422 determination, the Union suggests that management should not be permitted to invoke the protections of 38 U.S.C. §7422(b) at this late stage in the proceedings. While the USH shares the Union's frustration with the timing of this request, as a legal matter, 38 U.S.C. §7422(b)'s jurisdictional bar may be raised at any point in the processing of a grievance. *See* Attachment L, page 6, and *VAMC Asheville, NC and AFGE Local 446*, 57 FLRA No. 137, 57 FLRA 681 (2002). With respect to the Union's allegations that Ms. Harris' detail and reassignment were prompted by her whistleblowing rather than the patient care needs of the CCL, such allegations might – if timely and properly raised – be subject to consideration by the Office of Special Counsel, the Merit Systems Protection Board, or another authorized tribunal, but they are not dispositive here. Both the ACOS for Nursing and the Director of the Richmond VAMC articulated solid patient care-based reasons for detailing and then reassigning Ms. Harris out of the CCL, and those reasons are sufficient to support a 38 U.S.C. §7422 determination in this case.[4]

Based on all of the foregoing, the decision to detail and then reassign Ms. from CCL to ESA was based on patient care needs, and is therefore non-grievable and non-arbitral under 38 U.S.C. §7422(b). This decision is consistent with prior decisions of the USH. In several prior cases involving reassignments of Title 38 medical professionals, the USH has determined that where such reassignments are based on issues of clinical competence or are necessary to provide direct patient care, they involve professional conduct and competence

[4]Compare *AFGE Local 3306 v. FLRA*, 2 F.3d 6 (2d Cir. 1993) (affirming FLRA's decision, in unfair labor practice proceeding arising out of a VA Medical Center's termination of two RNs for patient abuse, that predecessor statute to 38 U.S.C. §7422 precluded review of such termination under the Federal labor relations laws) with *Ward v. Brown*, 22 F.3d 516 (2d Cir. 1994) (permitting challenge under the Administrative Procedure Act, 5 U.S.C. § 702, of the same RN termination).

within the meaning of 38 U.S.C. § 7422. *See* VAMC Chillicothe, Ohio VAMC VA-06-02 (September 6, 2006), VA Gulf Coast HCS VA-04-17 (January 5, 2005) and Northampton, MA VAMC VA-05-01 (February 8, 2005), where as here, management determined that Title 38 medical professionals should be reassigned to optimize patient care. In those decisions the USH determined that 38 U.S.C. § 7422 bars negotiations over the substantive decision and over any union proposal connected to that decision that would adversely impact patient care.

RECOMMENDED DECISION:

That the union grievance relating to the decision of the Director of the VA Medical Center, Richmond, VA to reassign RN involves issues concerning or arising out of professional conduct or competence within the meaning of 38 U.S.C. § 7422(b).

APPROVED ✓ DISAPPROVED _____

Michael J. Kussman

Michael J. Kussman, MD, MS, MACP
Acting Under Secretary for Health

10/11/06
Date