DEPARTMENT OF VETERANS AFFAIRS
UNDER SECRETARY FOR HEALTH
WASHINGTON DC 20420

FEB 0 8 2005

Acting Director
VA Medical Center (Northampton)
421 N. Main Street
Leeds, MA 01053

President, AFGE Local 218
Box 4, VA Medical Center
421 N. Main Street
Leeds, MA 01053

Dear Mr. and Dr.

I am responding to the issue raised in your memoranda of December 3, 2004 and December 13, 2004, respectively, concerning the grievance filed by AFGE Local 218 related to the restructuring of assignments for physician assistants in the Inpatient Mental Health Program.

Pursuant to delegated authority, I have determined, 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 is thus exempted from collective bargaining by 38 U.S.C. §7422(b).

Sincerely yours,

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

Enclosure

Title 38 Decision Paper
VAMC Northampton
VA – 05-01

FACTS:

In approximately December 2002, , MD, Program Manager of the Inpatient Mental Health Program at the Northampton VA Medical Center (VAMC) determined that certain midlevel mental health assignments should be restructured to provide better quality and continuity of care to inpatients and to provide for more equitable distribution of workload. After soliciting input from the midlevel providers – namely, three physician assistants (PAs) and one nurse practitioner (NP) (Attachment A) -- Dr. restructured the providers' assignments to reallocate primary responsibility for certain specified patient beds among the four employees.[1]

More specifically, the restructuring resulted in the following assignments:

a) , PA: 1 FTE to Ward 1 West, encompassing 5 detox beds, 9 Sustained Treatment and Rehabilitation (STAR) beds and 6 acute beds for a total of 20 patient beds
b) , PA: 1 FTE to Ward 8, encompassing 25 Specialized Inpatient PTSD beds
c) NP: .9 FTE to Ward 7, encompassing 35 STAR beds, plus .1 FTE to Cherry Street (Psychosocial Residential Rehabilitation Treatment Program
d) , PA: .9 FTE to Ward 9, encompassing 28 STAR beds, plus .1FTE to the Substance Abuse Intensive Outpatient Program.

In arriving at this particular workload allocation, Dr. took into consideration the fact that the patient population on Wards 7 and 9 was becoming increasingly difficult to treat due to aging, increased medical problems and increased level of complexity. Further, an increasing number of admissions to Ward 1 West had been transfers from West Haven VAMC, requiring less intensive physical evaluations than were needed for new admissions. Without the addition of 5 detox beds to the ward 1West mid-level provider's existing assignment of 9 STAR and 6 acute beds, the provider with primary responsibility for that ward would have 15 beds under his or her care, compared to 35, 25 and 32 beds, respectively, for the other midlevel providers. (See Attachments B and K)

In determining which provider to assign to which ward, management took into account the providers' respective areas of expertise and experience, as well as the fact that none of the four had expressed any interest in changing the primary assignment he or she had held before. Based upon these factors, management

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[1] Although the restructuring was originally scheduled to take effect in January 2003, it was not implemented until June 2003 due to the prolonged absence of one of the affected employees.

assigned each provider to at least one of the areas for which he or she had been responsible prior to the restructuring. (See Attachment K)

On June 20, 2003, the Mental Health Program Manager sent a memorandum to the four effected employees outlining the restructuring and setting an effective date of June 30, 2003. A copy of the memorandum was also provided to the President of the American Federation of Government Employees (AFGE) union local that represented the three PAs, and [2] (Attachment C)

Earlier, on June 17, 2003, one of the affected PAs, – who was also Secretary/Treasurer of AFGE Local 218 -- filed by e-mail a Step 1 Grievance. The grievance read, in part: "Last Thursday I was notified that the PA/NP work load was being redistributed.... There is no agreement between the involved parties or Local 218 to implement this change in workload. I am seeking AFGE representation by involving Dr. as a union representative." (Attachment D) No specific violation of policy or union contract was cited in the grievance, nor was any specific redress requested.

On June 26, 2003, the local AFGE president sent an e-mail to Dr. stating the following: "I am writing to inform you your action does not follow the spirit of partnership agreed to by Secretary Principi, that was signed January 9, 2003 and Master Agreement Article 3, section A, to address the issues of mutual interest, and Article 3, section 2I, Pre-decisional Involvement. Therefore, it is respectively requested to cancel the implementation date of June 30, 2003 until your plan is discussed with AFGE Local 218 and the parties involved. Also I would like to inform you that if Ms. was present in any of your meeting she was attended as an employee, not as an officer of Local 218." (Attachment D)

On June 27, 2003, Dr. responded to the union's email to state that the change could no longer be postponed. More specifically, Dr. stated that "these changes [in work assignment] were decided upon only after ample discussion with all four mid-level practitioners, both in group and individual meetings. Ms. has been present and involved in these discussions from the very beginning, and, since she has at times asked questions pertaining to all assignments, not only her own, as well as for information regarding the official status of the employee who went on extended medical leave, I took it to mean she was involved in the process not merely as an employee, but also as a Union Official, particularly since she never clearly stated that she was not acting as such." (Attachment E)

On July 1, 2003, Dr. provided a written response to Ms. step 1 grievance. (Attachment F) In this response, Dr noted that "Management has the right to assign work as well as to determine the personnel by which operations are conducted. Therefore there is no requirement or need for negotiation or agreement between the involved parties or Local 218 to implement the referred to

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[2] The Nurse Practitioner, Ms , who was also impacted by the changes, was at the time represented by the Massachusetts State Nursing Association.

redistribution in workload. Please remember that before arriving at the final structure, I sought and obtained input from all four inpatient midlevel [providers] and that the overall restructuring was discussed with all of you over six months ago. If you would like to meet to discuss the changes, I will be happy to do so, however, as you know, the reassignments took effect yesterday."

On July 3, 2003, the AFGE union president responded to Dr , saying in part that the union had a statutory right to bargain on the reassignments and that they were trying to resolve problems per the national VA partnership agreement, pre-decisional involvement, and sharing of information. (Attachment F)

On July 7, 2003, Ms. initiated via email step 2 of her grievance. At this time she stated that she was grieving the additional 0.5 FTE added to her current 1.0 FTE[3] and that she was not given a choice of assignments due to her seniority. (Attachment G)

On August 28, 2003, , MD, Manager, Mental Health and Behavioral Science, submitted to Ms. a step 2 grievance response. In that response, Dr. stated that "the assignment of work is a protected management right and therefore, I am not willing to negotiate that component of the issue[. However], I may be willing to consider your proposal to revisit who gets which assignment for members of AFGE's bargaining unit. This, of course, would have to be offered by the union President since management does not negotiate with individual members of that unit." (Attachment H) The union did not respond to this statement with any specific proposal, but the parties did make a series of attempts to resolve the matter, including a proposed switch of Ms. assignment with that of the Nurse Practitioner, Ms. , to which the union did not agree.

After the parties' informal efforts to resolve the matter failed, Ms. refiled her grievance at the third step in or about February 2004. The facility Director, , responded on February 27, 2004, stating that the grievance was untimely but directing Dr. and Dr. to examine the four providers' respective workloads to determine whether, as Ms. alleged, the work assigned to her was disproportionately difficult. (Attachment I)

On March 19, 2004, Ms and the union notified the Director that they were invoking arbitration to resolve the grievance. (Attachment J) In November 2004, management learned that an arbitration hearing had been scheduled for January 5, 2005.

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[3] We presume that Ms. meant by this comment to grieve the fact that she had been assigned to cover in 1.0 FTE a group of patient beds that had, prior to the restructuring, been covered by two employees in 1.5 FTE.

On December 3, 2005, the Director of the Northampton VAMC submitted the matter to the Under Secretary for Health (USH) for a determination as to whether the matter is outside the scope of collective bargaining and therefore non-grievable, because it meets one of the exclusions in 38 U.S.C. §7422(b).[4] (Attachment K)

By letter of December 13, 2004, the local union provided to the USH its written input regarding the Director's 38 U.S.C. § 7422 decision request. (Attachment L) In that letter, the union contended that it had the right to negotiate "appropriate arrangements" for its bargaining unit employees who are negatively impacted by the Agency's exercise of its rights under the Federal Labor-Management Relations Statute.[5]

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 union grievance over management's restructuring of workload assignments for physician assistants in the Inpatient Mental Health Care Line 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 employees compensation as determined by the USH.

Pursuant to 38 U.S.C. §7421(a), the Secretary has proscribed 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

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[4] Regional Counsel has obtained a stay of the arbitration hearing pending the issuance of the USH's 38 U.S.C. § 7422 determination.

[5] Although the union president characterizes the dispute with management as a "failure to bargain," the union has from the outset pursued the dispute solely through Ms. grievance. Ordinarily, complaints over management's alleged failure to meet its bargaining obligations are addressed through an unfair labor practice charge or a negotiability appeal filed with the Federal Labor Relations Authority.

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, management determined that the restructuring of the midlevel mental health assignments was necessary for patient care reasons. Specifically, as stated in the December 3, 2004, memorandum to the USH from the Acting Director at the Northampton VAMC, the reason for the restructuring was to provide better quality and continuity of care to inpatient veterans and a more equitable distribution of assignments. Management determined that particular beds should be assigned to particular providers based on the needs of the patients in each ward and the respective clinical competencies of the providers. That determination is exempt from collective bargaining, and from the negotiated grievance procedure, as a matter of professional conduct or competence within the meaning of 38 U.S.C. § 7422(b).

The union acknowledges management's right to make assignments, but argues that the union also has the right to negotiate "appropriate arrangements" for employees who are negatively impacted by the exercise of that management right. This argument fails as a matter of law. Although the general labor relations statute (5 U.S.C. § 7106(b)(2) and (3)) specifically provides for bargaining on procedures and appropriate arrangements to ameliorate the adverse effects of management's exercise of reserved rights, 38 U.S.C. § 7422 does not. As a result, proposals are non-negotiable under 38 U.S.C. § 7422 if they involve issues of professional conduct or competence (clinical competence or direct patient care), peer review, or employee compensation, irrespective of their procedural nature or tendency to reduce the burden imposed on employees by the exercise of a management right.[6]

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 uncompromised patient care, they involve professional conduct and competence within the meaning of 38 USC §7422. Three such determinations include Popular Bluff MO VAMC, February 12, 2003, VA Black Hills SD Health Care System (HCS), May 11, 2004 and the VA Gulf Coast HCS, January 5, 2005.

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[6] In the instant case, of course, the union never in fact did submit any specific written proposals, whether for "appropriate arrangements" or otherwise.

RECOMMENDED DECISION:

That the June 2003 grievance over the restructuring of the mid-level mental health assignments involves an issue of professional conduct or competence (direct patient care) within the meaning of 38 USC §7422(b) and is therefore outside the scope of collecting bargaining, excluding the matter from the grievance procedure as well as well as any obligation to negotiate with the union.

APPROVED ✓ DISAPPROVED _____

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

2-8-05
Date