



DEPARTMENT OF VETERANS AFFAIRS
UNDER SECRETARY FOR HEALTH
WASHINGTON DC 20420

SEP 30 2008

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Bethany McIvor
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Dear Mr. Lawson, Ms. Pitts and Ms. McIvor:

I am responding to the issues raised in your memoranda of April 17, 2008, April 22, 2008, and April 25, 2008, respectively, concerning the negotiability appeals filed by NAGE Local R1-187 and AFGE Local 221 regarding the VA Boston Healthcare System policy on mandatory tuberculosis testing for all employees.

Pursuant to delegated authority, I have decided on the basis of the enclosed decision paper that the negotiability appeals involve matters concerning or arising out of professional conduct or competence within the meaning of 38 U.S.C. § 7422 and are therefore outside the scope of collective bargaining.

Sincerely yours,

A handwritten signature in cursive script that reads "Michael J. Kussman M.D." is positioned above the typed name.

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

Enclosure

**Title 38 Decision Paper
Boston Healthcare System, Massachusetts
VA 08-0**

FACTS

In 2005, the VA Boston Healthcare System (VA BHS) had a tuberculosis (TB) policy, Medical Center Memorandum (MCM) No. 00-036-LMS, "Occupational Health Services," that gave employees the opportunity to report annually to the Occupational Health Office to be tested for exposure to TB. The testing was voluntary.

In May 2005, the VA BHS became aware that a health care worker with active TB had been working at two different VA BHS facilities. As a result of this incident, approximately 730 patients and 1200 employees were screened for exposure to TB. Subsequently, the VA BHS initiated a series of bi-weekly meetings to discuss the development of a new TB policy. In December 2005, the VA BHS developed a new policy titled Patient Care Memorandum No. 11-039-LM, "Identification and Control of Tuberculosis." (Attachment A) The new policy mandated annual TB testing for all employees, contractors, and volunteers.

In January 2006, the National Association of Government Employees (NAGE), Local R1-187, submitted bargaining proposals to VA BHS management by manually deleting some of the provisions of the draft TB policy. (Attachment B)

On April 5, 2006, the American Federation of Government Employees (AFGE) Local 221 submitted proposals on the policy. (Attachment C)

On December 21, 2006, Rhonda DeChambeau, Chief of Employee and Labor Relations at the VA BHS, submitted a memorandum to NAGE stating that the decision to make TB testing mandatory to all employees was non-negotiable. (Attachment D) Ms. DeChambeau explained that the mandatory TB testing policy was needed to ensure the health and safety of employees and patients in the VA BHS. *Id.* ¶ 2. Ms. DeChambeau provided the following detailed explanation for the need to establish the mandatory policy:

Although the prevalence of TB in Boston is low, a single exposure to tuberculosis at one facility last year resulted in the infection of multiple patients and employees.¹ A more recent exposure this past summer also

¹ AFGE challenged management's assertion that VA patients and/or employees have been *infected* with TB through exposure to untested staff members. Attachment M. Although management did not initially address this issue in its 38 U.S.C. § 7422 decision request, it clarified that TB infection occurs when the TB organism is introduced into an individual. In most cases, the TB organism remains dormant and does not cause active disease unless the infected

made clear that the non-mandatory process for screening for TB has failed. Mandatory screening for TB is the standard for many of the hospitals in Boston, and it is our position that we cannot adopt a standard for tuberculosis screening that is less stringent than the community standard. The consequences of being infected with TB are significant. Antibiotic therapy is not innocuous, and there is an increasing prevalence of antibiotic-resistant TB worldwide. Because the consequences of infection with tuberculosis are significant and the risks of screening are low, we firmly believe that mandatory screening offers the best balance of risk and benefit. Accordingly, we contend that having a mandatory TB testing policy is a matter encompassed by 38 USC Section 7422, concerning professional conduct and competence. A testing program for employees ensures safe patient care practices across the facility.

Id.

Management at the VA BHS further asserted that the policy requiring mandatory TB testing was covered by 5 U.S.C. § 7106 (a)(2)(B). *Id.* ¶ 3. However, Management stated it was willing to negotiate appropriate arrangements with the union and agreed to changes that did not alter the mandatory nature of testing.

On October 15, 2007, AFGE submitted additional proposals. (Attachment E)

After meetings with both unions, management updated MCM 11-039-LM, "Identification and Control of Tuberculosis" on January 2008. (Attachment F)² The policy was revised to note that the VA BHS falls within the Intermediate Risk category based on OSHA's proposed Risk Stratification criteria.³ The policy was further revised to address concerns related to employees who may have medical conditions that conflict with TB testing.⁴

individual's immune system is compromised. Nevertheless, the infected individual has a risk of developing active disease and would need to take TB prophylaxis. When an infected individual develops active disease, the TB organism is not dormant and causes active infection. The 2005 OSHA investigation also indicated that four (4) patients and thirteen (13) health care workers were infected as a result of exposure to a TB-positive surgical resident who rotated through four (4) Boston area hospitals, including VA BHS. See footnote 10 below. AFGE also stated that it "receives all workers' compensation data and knows of no employees who were infected on the job." Attachment M. Management also clarified that although no workers compensation claims were filed in connection with TB infection during the time period in question, mere exposure or infection with TB, without active disease, is not a compensable injury.

² See Attachment J, ¶¶ 12-13.

³ Paragraph 4a.:

Risk Assessment (done annually): Based on the number of cases of active TB and the number of skin conversions among employees, the Boston VA Healthcare falls within the Intermediate Risk category based on OSHA's proposed Risk Stratification criteria....

⁴ Paragraph 4p.(1)(i)II, page 12:

II With proper medical documentation, alternatives to [Tuberculin Skin Test] TST testing will be considered.

On February 8, 2008, the VA BHS Chief of Staff issued a memorandum responding to AFGE 's proposals on the TB policy. (Attachment G) In the memorandum, the Chief of Staff noted that management would accept the proposals that did "not directly interfere with the exercise of rights reserved to management under the Federal Service Labor-Management Relations [Statute] (FSLMRS), e.g., updating references and deleting the language about loss of computer access. (However, please note that Management reserves the right to take appropriate action against employees who fail to comply with procedures in the policy, which may include terminating computer access until the employee is in compliance.)" *Id.* ¶ 4. The Chief of Staff's memorandum to the union provided the following detailed explanation of why the mandatory TB testing policy was non-negotiable:

At this time we continue to maintain that a mandatory Tuberculosis testing policy applicable to all employees is necessary to ensure the health and safety of our employees and patients, particularly considering the continued exposures that our facility has experienced. You contend that management must bargain over the decision to mandate the testing. Management disagrees for several reasons. First, we view the requirement that all employees be screened annually for the disease as a matter encompassed by 5 U.S.C. § 7106(a)(1) of the FSLMRS that permits management to determine the internal security practices of the agency. Additionally, Management maintains that 5 U.S. C 7106(a)(2)(B) precludes Management from negotiating over the decision to require the testing given its right to assign work. Furthermore, we maintain that pursuant to 5 U.S.C. § 7117 (a), there is a compelling need for the rule requiring mandatory testing that preempts the duty to bargain. Finally, it is Management's position that the decision to mandate Tuberculosis training concerns the professional conduct or competence of certain employees and thus, pursuant to 38 U.S.C. § 7422(b), is not subject to negotiations....

Id. ¶ 5

The Chief of Staff noted that the policy would be implemented no later than the end of March 2008. *Id.*⁵

On or about February 22, 2008, AFGE filed a negotiability appeal, Case No. 0-NG-2974, with the FLRA. (Attachment H) The proposals at issue are the following:

Proposal 1 (April 5, 2006 [proposals])
To amend Section 4q.(1)(e) of the policy to read, "All VA employees, VA paid trainees, researchers...will be offered ~~will be required to have~~ TB testing annually."

⁵ As of the day of this Decision, the policy has not been implemented.

Proposal 2 (April 5, 2006 [proposals])

To amend Section 4q. (1)(e) to read, "All prior positives, with a chest x-ray report on file, will be offered ~~will be required~~ to have a symptom screen annually."

Proposal 3 (April 5, 2006 [proposals])

To amend Section 4. (q)(k)(1) to read, "Annual chest x-rays are unnecessary for individuals with a (+) TST [Tuberculin Skin Test] without clinical evidence of active disease, however an annual symptom screen ~~is required~~ will be offered."

Proposal 4 (April 5, 2006 [proposals])

To delete the language of 4.q.(1)(i) II (Non-compliance)

Proposal 1 (October 11, 2007 [proposals])

To amend {8. PROCEDURES (page 4)} to read, "...should the number of active TB cases decrease and the BHS drop to a low risk category, TB testing program will revert to 'will be offered annually to employees.'"

Proposal 2 (October 11, 2007 [proposals]) H. exclusions/contraindications:

Add a section IV:

"An employee can refuse a TST in cases of pregnancy or breast feeding, Religious or personal beliefs, having had alive (sic) virus injected in the last 30 days or has a known allergy to the medication. A symptoms screen will be done in place of a TST if (sic) any employee who refuses a TST. In cases where the Occupational Health practitioner is questioning the results of the symptoms screen, a chest x-ray may be ordered or a consult could be sent to the Infection Control physician."

These proposals were later changed during a Post-Petition Conference before the FLRA.

On March 31, 2008, the VA BHS submitted a *Statement of Agency Position* to the FLRA in relation to the Negotiability Appeal filed by AFGE. (Attachment I) The Agency argued that mandated TB testing concerns the professional conduct and competence of employees appointed under Title 38⁶; that AFGE's proposals are inconsistent with Government-wide regulation, 5 C.F.R. Part 339 for Title 5 employees; that AFGE's proposals to make TB screening and testing discretionary for VA BHS employees violate management's reserved right to assign work; and that AFGE's proposals to make TB screening and testing

⁶ The Statement of Position noted that the "Agency is in the process of preparing a request for a decision by the VA Under Secretary for Health (USH) that the determination of whether TB testing should be mandatory is a matter of professional conduct or competence within the meaning of 38 U.S.C. § 7422(b) for the applicable Title 38 bargaining unit employees"

discretionary for VA BHS employees violate the Agency's right to determine its internal security practices.

On April 17, 2008, Michael M. Lawson, the Director of the VA BHS, submitted a request to the Under Secretary for Health (USH) for a determination that the policy mandating TB testing is a matter of professional conduct or competence within the meaning of 38 U.S.C. § 7422. (Attachment J) The Director argued that "[a] mandatory TB screening program is needed to ensure the health and safety of employees and patients." *Id.* ¶ 18. Furthermore, he argued that "[b]ecause the consequences of infection with TB are significant and the risks of screening are low, the Agency asserts that mandatory TB screening offers the best balance of risk and benefit." *Id.*

On April 18, 2008, NAGE submitted a negotiability appeal to the FLRA. (Attachment K)

On April 22, 2008, Ellen M. Pitts, RN, President of NAGE Local R1-187, submitted a request for a 38 U.S.C. § 7422 decision in response to the Director's request for a 38 U.S.C. § 7422 determination. (Attachment L) In that opposition, NAGE alleged that it had requested a determination from the USH on this same issue in January 2007 but never received a response to its request.⁷ Ms. Pitts asserted that NAGE seeks to "maintain the current voluntary TB testing arrangement as it does not adversely affect direct patient care, and has potential adverse impact on employees and their relatives."⁸

On April 25, 2008, Bethany McIvor, President of AFGE Local 221, submitted a request for a determination by the USH that the issues in the instant case are properly before the FLRA as negotiable arrangements and responded to the pending VAMC request. (Attachment M) AFGE argued that it had negotiated the original TB policy with management and that management unilaterally changed the negotiated policy. *Id.* ¶ 2. AFGE explained that "...the infected employee had been pre-employment TB skin tested and had tested positive. The VA BHS was reprimanded by OSHA for lack of communication and follow up regarding resident employees. OSHA's written recommendation to BHS does not include routine, annual TST for all employees, but calls for better documentation. (Attachment N⁹) Our original policy called for mandatory TB testing for all new

⁷ The process of submitting a request to the USH is outlined in the Guidance document available in the Office of Labor-Management Relations website, <http://www1.va.gov/lmr/docs/7422ProceduresandSampleRequest.doc>

As indicated in the Guidance document, the request should be sent to the USH through the Office of Labor-Management Relations (LMR). LMR did not receive a copy of a request for a determination by Ms. Ellen M. Pitts or NAGE Local R1-187. Nonetheless, even if LMR had received such a Request from NAGE, the USH would not have issued a 7422 decision because the FLRA mooted the issue when it dismissed the Petition for Review on March 1, 2007.

⁸ NAGE claims the TB testing procedure is: invasive; presents health risks for tested employees; uses known carcinogenic materials; has not been amply studied for mutagenic effects; has limited accuracy, (20%false positive); and is not curative.

⁹ OSHA Inspection 308107952, dated August 22, 2005.

employees and trainees, but had not been followed. The previously negotiated policy was obviously not the problem.” *Id.*

AFGE attached to its request to the USH the *Response to Agency’s Statement of Position*, submitted to the FLRA (Case No. 0-NG-2974). (Attachment O) In its position paper, AFGE argued that per CDC methodology, the BHS is a low TB facility and that management at the BHS arbitrarily re-categorized BHS as an intermediate risk facility for all employees.

AFGE specifically stated that it disagrees with the “Agency’s overbroad interpretation of 7422 (b).” Furthermore, AFGE stated that “7422(b), definitions for ‘professional conduct or competence’ are narrowly defined as those having to do with direct patient care or clinical competence. Without examining an individual employee’s duties or role, the Agency can not (sic) make the broad assumption that the topic is automatically one of professional conduct or competence.” The union further argued that “[t]o try to use 7422 (b) as a means to avoid developing and implementing a thoughtful, targeted TB program based on individual risk assessment and disease prevention is a disservice to our employees.”

AFGE stated its proposals are based on VHA Handbook 5019, Part I, Section 2 *Tuberculin Testing Program*, and CDC guideline, “Guidelines for Preventing the Transmission of *Mycobacterium Tuberculosis* in Health Care Settings, 2005.”¹⁰ (Attachment M, ¶¶ 10-12) In addition, AFGE noted a reference in DASHO Letter 00S-93-3-Tuberculosis, dated November 9, 1993, which states that “[p]rior to the implementation of the local Infection Control Plan, labor-management obligations must be met.” (Attachment P) The union further argued that Article 28, Section 24 B¹¹ of the VA/AFGE Master Agreement applies in the instant case and that Title 38 employees were not excluded from the Article. (Attachment M, ¶ 16)

Observations:

“The VA training director received a document with a list of HCWs and a general statement that all health screening had been completed. However, the VA did not ensure that doctors and medical residents working at their facility and employed by Boston Medical Center had completed TB testing and any follow-up care.”

Recommendations:

“As a result of the above situation, the VA has instituted a new documentation policy. OSHA recommends that the VA continue with the new policy of obtaining documentation from parent organizations that lists medical residents who will work at the VA, date of TB tests, TB skin test results, date when follow-up care is completed, and treatment status. The policy should extend to all HCWs with hospital privileges including volunteers, contractors, and physicians with hospital privileges. Review the new policy every 6 months to evaluate its effectiveness, and discuss results with parent organizations in order to make any needed improvements. Include the TB documentation policy in future training agreements with affiliated organizations.”

¹⁰ <http://www.cdc.gov/tb/pubs/slidesets/InfectionGuidelines/default.htm>

¹¹ Section 24- Safety and Health Records:

B. The Department and the Union will identify employees who occupy positions that carry potential risks to their health. The Parties will establish and maintain procedures for the medical surveillance of such employees.

AFGE concluded by requesting the USH give careful consideration to the issues presented. *Id.* ¶ 26

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 (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 negotiability appeals filed by NAGE Local R1-187 and AFGE Local 221 over the implementation of a mandatory annual TB testing requirement at VA BHS involve matters or questions that concern professional conduct or competence (i.e., direct patient care and clinical 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 (i.e., direct patient care or clinical competence), peer review and employee compensation as determined by the USH.

In the instant case, the VA BHS maintains that a mandatory TB testing policy is necessary to ensure the health and safety of all employees and patients and both unions object to the mandatory nature of the policy.

NAGE specifically argues that a voluntary testing arrangement for employees does not affect patient care, but that mandatory testing has a potentially adverse impact on employees and their relatives.¹² AFGE argues that each affected employee's duties should be considered before a determination of whether an issue is a matter or question of professional conduct or competence is made, that the mandatory TB testing requirement is not part of OSHA's recommendations to the facility, and that mandatory TB testing is inconsistent with CDC Guidelines,

¹² NAGE claimed that mandatory TB testing was invasive; presents health risks for tested employees; testing procedures use known carcinogenic materials; testing procedures have not been amply studied for mutagenic effects; testing procedures have limited accuracy (20% false positive); and testing procedure is not curative. See Attachment M.

VA Handbook 5019, and Article 28, section 24 of the AFGE Master Agreement¹³. AFGE further argues that the VA BHS's negotiation of appropriate arrangements for a prior, optional TB testing policy for non-hybrid Title 38 employees renders the instant proposed mandatory annual TB testing policy negotiable.

AFGE misconstrues the method by which the USH determines whether a matter is excluded from bargaining pursuant to the exclusions in 38 U.S.C. § 7422. Specifically, when determining whether a matter concerns or arises out of professional conduct or competence within the meaning of 38 U.S.C. § 7422, the USH examines the decision made by the facility and evaluates whether that decision concerns or arises out of matters or questions relating to direct patient care or impacts the competency of Title 38 employees to properly care for veterans. In the instant case, the mandatory TB testing requirement is intended to protect veterans and employees from exposure to TB infection. The VA BHS asserts that hundreds of patients and employees in the VA BHS were exposed to TB in 2005 and that the implementation of a mandatory TB testing policy is necessary to ensure the health and safety of employees and patients at the VA BHS. Attachment D. The VA BHS maintains that it falls within the Intermediate Risk category based on OSHA's proposed Risk Stratification criteria and that annual TB testing is therefore appropriate. As the policy is intended to control patients' risk of exposure to and infection from TB by VA BHS employees, it concerns direct patient care. Moreover, a VA BHS employee who has been infected with TB, regardless of whether the infection is dormant or has developed into active disease, is not competent, without taking appropriate measures, to engage in the direct care of patients at the VA BHS or interact with other VA BHS employees who are providing clinical care. Finally, the VA BHS's decision to negotiate over appropriate arrangements for a prior optional TB testing policy does not render the instant policy, which addresses mandatory annual TB testing policy due to direct patient care and professional competency concerns, negotiable.

¹³ The OSHA recommendations cited by AFGE concern the scope of the VA BHS's new documentation policy and available training on the recognition and control of workplace hazards. The CDC guidelines for healthcare settings classified as medium or intermediate risk state that all health care workers "should receive baseline TB screening upon hire, using two-step TST or a single BAMT to test for infection with *M. tuberculosis*" and that after "baseline testing for infection with *M. tuberculosis*, [health care workers] should receive TB screening annually (i.e., symptom screen for all [health care workers] and testing for infection with *M. tuberculosis* for [health care workers] with baseline negative test results)". See Guidelines for Preventing the Transmission of *Mycobacterium tuberculosis* in Health-Care Settings, 2005 at pg. 10. Although VA Handbook 5019 states that "employees who have been exposed to tuberculosis shall undergo tuberculin testing per current CDC guidelines", it also states "**NOTE:** *The examinations, tests and vaccinations contained in this appendix may not be current protocol and new standards will be issued in the future.*" Finally, Section 24 of Article 28 of the AFGE Master Agreement addresses Safety and Health Records and not the control of infectious disease at VA facilities. In sum, we find no evidence that the mandatory TB testing policy is contrary to OSHA recommendations, CDC Guidelines, VA Policy, the AFGE Master Agreement or any law, rules and regulations addressing this issue. While VA BHS's mandatory testing policy for all employees may exceed the minimum requirements recommended by OSHA or CDC, the policy does not conflict with any applicable rule or guideline.

For the reasons stated above, the clinical decision made by the VA BHS to mandate that all employees be tested annually for TB is a matter of professional conduct or competence (i.e., direct patient care and clinical competence) and is not negotiable pursuant to 38 U.S.C. § 7422. This decision applies to the Title 38 employees described in 38 U.S.C. § 7421(b) at the VA BHS.

RECOMMENDED DECISION

That the negotiability appeals filed by NAGE Local R1-187 and AFGE Local 221 over the VA BHS' implementation of a mandatory annual TB testing policy are matters or questions that concern professional conduct or competence (i.e, direct patient care and clinical competence) within the meaning of 38 U.S.C. § 7422(b).

APPROVED X

DISAPPROVED _____

Michael J. Kussman, M.D.

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