



DEPARTMENT OF VETERANS AFFAIRS
UNDER SECRETARY FOR HEALTH
WASHINGTON DC 20420

DEC 15 2005

Interim Director
VA Medical Center
400 Foot Hill Avenue
Canandaigua, NY 14424

Assistant General Counsel, AFGE-NVAC
80 F Street, N.W.
Washington, DC 20001

Dear Dr. nd Ms.

I am responding to the issues raised in your correspondence of July 15, 2005, and November 21, 2005, respectively, concerning a grievance filed by the American Federation of Government Employees (AFGE). The grievance concerns the reassignment of RN, President of AFGE Local 3306 at the Canandaigua VA Medical Center (VAMC), from non-clinical duties to direct patient care duties on a .5 FTE basis.

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,

A handwritten signature in black ink, 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
VAMC Canandaigua
VA-05-11

FACTS:

This matter arises out of the Canandaigua VA Medical Center's reassignment of _____, a registered nurse, from non-clinical duties to a staff nurse position on the facility's acute psychiatric unit.

Ms. _____ is the Executive Vice President of the AFGE local union at the Canandaigua VAMC and is authorized 50% official time for union activities. Prior to July 27, 2004, Ms. _____ had spent the other 50% of her time on a number of assignments, including several psychiatric nursing assignments and education and committee work in Nursing Education.¹ It is not clear from the record precisely what duties Ms. _____ performed while she was assigned to Nursing Education; however, the union alleges that prior to her July 2004 reassignment to Behavioral Health, Ms. _____ was "allowed to use duty time, as a past practice, in an amount equal to almost 50 percent, in addition to her official time of 50 percent." The AFGE master agreement generally provides that employees will be on "duty time" when they participate in Partnership activities on the union's behalf.

On July 27, 2004, following an earlier notification to both Ms. _____ and the union, Canandaigua management reassigned Ms. _____ from Nursing Education to a .5 FTE staff nurse direct patient care position on Unit 3B of the facility's Behavioral Health Care Line.² (Attachment A.) The reassignment was based on the facility's need to increase psychiatric nurse staffing levels as the long term psychiatric unit was being restructured to include geriatrics. Ms. _____ was chosen for the reassignment because she had specialized skills and prior experience as a psychiatric nurse. (See Attachments A, D, F and I and footnote 1.)

On September 8, 2004, AFGE filed a national level grievance over Ms. _____ reassignment, alleging that the Canandaigua VAMC had violated the ground rules then

¹ Ms. _____ has worked in Canandaigua's Behavioral Health/psychiatric nursing service since at least 1991, serving in the acute psychiatric care unit from March 1991 to June 1994; in the long term psychiatric unit from June 1994 through March 1995, in the substance abuse treatment unit from March 1995 through July 1998, and in the behavioral health clinic at various times between 1998 and July 2004. She has also performed non-clinical duties in Nursing Education at times between 1998 and July 2004. (See Attachment I.)

² Ms. _____ was initially assigned to Unit 3B on the basis of "fair and equitable rotation," meaning that she would be required to rotate between day and night shifts along with the other RNs on the unit. At the union's request, however, Canandaigua management reconsidered this aspect of the reassignment and agreed that patient care needs could be met if Ms. _____ worked a .5 FTE fixed day tour in Unit 3B. Her reassignment thus effected a change in her duties during the 50% of the time that she had previously spent on Partnership, Nursing Education, and/or clinical duties, but did not impact her 50% local union official time allocation.

in place for renegotiating the AFGE master collective bargaining agreement. (Attachment B.) More specifically, the union alleged that whereas Ms. Washburn

has been allowed to use duty time, as a past practice, in an amount equal to almost 50 percent, in addition to her official time [allocation] of 50 percent[,]t has come to the attention of AFGE that VA management at her facility has attempted to prevent Ms. Washburn from engaging in her union work entirely.

(Attachment B, page 1.) The grievance alleged that by changing this alleged past practice, Canandaigua VAMC management had violated a provision of the national parties' July 17, 2003 Ground Rules Memorandum of Understanding, Section X, "Supplemental and Official Time Negotiations," which provided that "[a]ny local official time or local supplemental or past practices as of the effective date of this MOU shall remain in effect."³ However, the grievance did not set forth any specific instance in which management had precluded Ms. from performing union duties during her 50% official time allocation, nor even from participating in Partnership activities during the 50% of the time she was assigned to Unit 3B. As a remedy, the grievance requested that "VA immediately cease and desist from preventing [Ms. 1 ... from using her duty time [to perform Partnership activities on the union's behalf] in an amount equal to almost 50 percent, in addition to her official time of 50 percent as established by past practice." (Attachment B, pages 1-2.)

Upon receipt of the union's grievance, the Associate Deputy Assistant Secretary (DAS) for Labor Management Relations (LMR) and members of his staff contacted local management officials and the 2nd Executive Vice President of the AFGE VA National Council in an attempt to satisfactorily resolve the matter. The parties held a number of discussions but were unable to resolve the matter in its entirety. On March 11, 2005, the Associate DAS for LMR formally responded to the grievance. The response indicated that there had been no violation of past practice, that Ms. would continue to receive her 50% local official time allocation, and that Ms could continue to participate in Partnership activities outside of her official time allocation when she could be spared from patient care duties. The response further asserted that Canandaigua management had reassigned Ms. on a .5 FTE basis from non-patient care duties to direct patient care duties "because Ms. specialized skills and experience as a Psychiatric Nurse in an acute care setting are currently needed by the medical center for patient care." (Attachment D.)

On March 24, 2005, the union invoked arbitration on the grievance. (Attachment E.)

³ It should be noted that VA management terminated master agreement negotiations with AFGE in May 2005. The legality of that termination and the continuing viability of the July 17, 2003 ground rules after the termination are the subjects of a national grievance filed by AFGE on May 27, 2005. That grievance is scheduled to be heard by an arbitrator on November 29-30, 2005. Whether the ground rules are or are not still in effect is irrelevant to the propriety of Ms. reassignment, however, because her reassignment did not displace her 50% local official time allocation. (See discussion on page 5 herein distinguishing official time from duty time under relevant statutory and case law authorities.)

On July 15, 2005 the interim Director of the Canandaigua VAMC submitted a request to the Under Secretary for Health (USH) for a determination that the matter is exempted from collective bargaining and the negotiated grievance procedure as it pertains to a matter or question concerning or arising out of professional conduct or competence (direct patient care) pursuant to 38 U.S.C. §7422 (b) (Attachment F.) Because VAMC management did not properly route that request nor solicit the union's input as required by VA Handbook 5023, Part II, paragraph 5, the request was resubmitted and a copy sent to the union on August 26, 2005. (Attachment G.)

On November 21, 2005, the union submitted a written statement and exhibits opposing management's 38 U.S.C. §7422 decision request. (Attachment H.) In this statement, the union contended that Ms. _____ "has not been able to use her .5 FTEE for fulltime union activities as authorized or to conduct Partnership activities when she can be spared from [sic] patient care duties as agreed to by VA management officials." (Attachment H, page 2.) However, the union's statement, like the grievance, provided no detail with respect to a particular date or dates that Ms. _____ had been prohibited from using her official time allocation or denied permission to participate in Partnership activities while on duty time.⁴ The union also asserted in its statement that its grievance related solely to Canandaigua management's failure to adhere to past practices with respect to Ms. _____ official time and duty time activities, "not [to] the issue of her reassignment" as suggested by management's 38 U.S.C. §7422 decision request. However, the union did not explain in its submission how the remedy requested in the grievance – i.e. that Canandaigua management "cease and desist" from preventing Ms. _____ from using 50% of her time as the union's representative in Partnership activities and the other 50% on official time – could be granted without rescinding Ms. _____ reassignment to patient care duties on a .5 FTE basis.⁵

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).

⁴ Moreover, while the union did provide a multi-page document entitled "Partnership-Duty Time Report for _____, Ex. VP of AFGE Local 3306 at the Canandaigua VAMC," that document appears to reflect hours that Ms. Washburn *did* spend on union and/or partnership activities between January 2001 and December 2003, it did not identify a single time that Ms. _____ should have been permitted to participate in such activities but was precluded from doing so by her reassignment to patient care duties or some other management action. (See Attachment H, Exhibit 4.)

⁵ The union's submission also alleges that management's grievance response was untimely and that Canandaigua management failed to comply with provisions of the parties' Master Agreement in choosing an arbitrator for this matter. This decision will not respond to those allegations because 38 U.S.C. §7422(d) authorizes the USH to determine whether the substantive issues raised by a particular grievance fall within one of the 38 U.S.C. §7422(b) exclusions, not whether the parties have met the procedural requirements of their negotiated grievance procedure.

ISSUE:

Whether the issues raised by the union grievance over the reassignment of [REDACTED] RN, concern or arise out of professional conduct or competence within the meaning of 38 U.S.C. § 7422.

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 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&B to govern assignments, reassignments and details of Title 38 medical professionals, including Registered Nurses. Section A, paragraph 4(b) of Handbook 5005, Part IV, Chapter 3, provides that when Title 38 assignments and reassignments are made, primary consideration will be given to the efficient and effective accomplishment of the VA mission. Patient care is thus the primary consideration in assigning or reassigning Title 38 personnel at health care facilities such as the Canandaigua VAMC.

In the instant case, management reassigned Ms. [REDACTED] to meet the medical center's need to increase nurse staffing to care for patients in the acute psychiatric unit. Ms. [REDACTED] was chosen for this reassignment because of her specialized skills and prior experience as a psychiatric nurse in an acute care setting. Management's decision to reassign her to these duties on a 50% basis did not disturb her 50% local official time allocation, and for that reason was not governed by the provision of the national parties' ground rules preserving local official time arrangements.⁶

The union alleges in its grievance that VAMC management violated the national contract negotiation ground rules by discontinuing a past practice of permitting Ms. [REDACTED] to use "duty time" for union activities. This allegation is disingenuous because the ground rules, by their terms, preserve only pre-existing official time

⁶ While this reassignment did not impact Ms. [REDACTED] 50% official time allotment, it should be noted that the union's right to assign official time to a particular employee is not absolute. The Federal Labor Relations Authority has stated that "an exclusive representative cannot claim that it is entitled to the allocation of official time to a particular employee without regard to management's needs and requirements regarding the performance of assigned work." Federal Railroad Administration and AFGE Local 2814, 21 FLRA 68 (1986). Under this case law as well as 38 U.S.C. § 7422, contractual official time allocations to Title 38 health care providers are necessarily subject to overriding patient care needs.

arrangements, not duty time. The Federal Service Labor Management Relations Statute (FSLMRS) distinguishes between duty time and official time allocations. The latter may be negotiated, pursuant to 5 U.S.C. § 7131(d), "in amounts ... which are reasonable, necessary and in the public interest" for employees engaged in representational activities. AFGE, Local 2761 and Department of the Army, Army Publications Distribution Center, St. Louis, MO, 32 FLRA No. 144; 32 FLRA 1 (1988). In authorizing official time for union activities, section 7131 "'carves out an exception' to management's right to assign work," allowing the parties to bargain over official time for union representatives to use in carrying out the labor-management relations activities contemplated by the FSLMRS. Id., quoting Military Entrance Processing Station, Los Angeles, California, 25 FLRA 685, 688 (1987). By contrast, a proposal that union representatives be granted duty time to conduct specified activities "conflicts with the Agency's right to assign work ... [because t]he Agency would not be able to assign work to the employee during that [duty] time even if the Agency determined that it had need of the employee's services to accomplish the Agency's mission." AFGE, Local 2761 and Department of the Army, Army Publications Distribution Center, St. Louis, MO, 32 FLRA No. 144; 32 FLRA 1 (1988). In other words, duty time is governed by, rather than carved out of, management's reserved right under the FSLMRS to assign employees work.⁷ Because official time and duty time are not interchangeable, Canandaigua VAMC management did not change the local parties' prior official time arrangements by reassigning Ms. [redacted] to direct patient care during the 50% of her work week she spends on duty time. Moreover, because Ms. [redacted] was reassigned to meet patient care needs based on her skills and experience in psychiatric nursing, her reassignment involved professional conduct or competence within the meaning of 38 U.S.C. §7422 and may not be challenged through the negotiated grievance procedure. The union alleges that the grievance challenged the facility's refusal to continue to permit Ms. [redacted] to spend 50% of her time on Partnership activities and the other 50% on official time, not the patient-care based decision to reassign her from Nursing Education to Unit 3B. Because the remedy requested in the grievance was a return to the pre-reassignment status quo, however, the grievance necessarily involves management's determination that the 50% of Ms. [redacted] time that is not allocated to official time should be directed to patient care rather than non-patient care duties. The grievance is excluded from the negotiated grievance procedure pursuant to 38 U.S.C. §7422 because an arbitrator could not grant the requested remedy without disturbing management's patient care-based decision to reassign Ms. [redacted] to Unit 3B.

⁷ Under FLRA case law, where a union seeks to designate the employees who will participate on its behalf in duty-time activities, the union impermissibly interferes with management's right to assign work to those employees. AFGE, Local 2761 and Department of the Army, Army Publications Distribution Center, St. Louis, MO, 32 FLRA No. 144; 32 FLRA 1 (1988). This is true whether the union assigns an employee to participate in joint labor-management activities or purely union representational duties. See NFFE Local 1482 and DOD Defense Mapping Agency Hydrographic/Topographic Center, Washington DC, 44 FLRA 637 (1992) (union representatives' participation on joint labor-management committee did not involve officially prescribed duties); NFFE Local 466 and Department of Agriculture Forest Service Regional Office, Atlanta, GA, 45 FLRA 1063 (1992) (union representational duties are not agency work). See generally VA OGC Advisory Opinion VAOPGCADV 6-2003.

