



DEPARTMENT OF VETERANS AFFAIRS
Veterans Health Administration
Washington DC 20420

SEP 16 2004

In Reply Refer To:

Director (00)
VA Medical Center
1601 Brenner Avenue
Salisbury, North Carolina 28144

President.
AFGE, Local 1738
VA Medical Center
1601 Brenner Avenue
Salisbury, NC 28144

Dear Mr. and Mr.

I am responding to the issue raised in your memoranda of August 3, 2004 and August 9, 2004, respectively, concerning the grievance filed by AFGE Local 1738 related to the reassignment of registered nurses.

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 competence or conduct and is thus exempted from collective bargaining by 38 U.S.C. 7422(b).

Please provide this decision to your Regional Counsel as soon as possible.

Sincerely yours,

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

Enclosure

INTRODUCTION

This matter arises out of the parties' efforts, over a twenty-year period, to agree upon procedures by which management will consider seniority when reassigning registered nurses within the Salisbury VA Medical Center. Although the issues to be determined at this time arise out of a June 2004 grievance, some of the background of the parties' historical dealings on the subject is necessary to provide context to the current grievance.

FACTS

In November of 2002, American Federation of Government Employees (AFGE) Local 1738 filed an Unfair Labor Practice Charge (ULP) with the Federal Labor Relations Authority (FLRA). The ULP was in response to VAMC Salisbury management's termination of two Memoranda of Understanding (MOUs) concerning the reassignment of registered nurses. More specifically, the ULP alleged that management had improperly repudiated two MOUs signed in 1995 and 2002 and a related provision in the parties' 1980 local supplemental collective bargaining agreement termed the "wish book" (collectively, the "nurse reassignment agreements").¹

The nurse reassignment agreements differed slightly from one to the next, but each mandated certain seniority-based criteria for nurse reassignments. The "wish book" (Exhibits B.1. and B.2.) required that registered nurses in the bargaining unit be permitted to submit written requests for reassignment to other units, and that management fill vacancies by selecting the nurse who had submitted the first request for reassignment to the unit in which the vacancy occurred. The 1995 MOU (Exhibit C) redefined the "wish book's" seniority-based criteria to require that management select the nurse with the longest tenure within the unit, the service line, or the medical center, in that order. Nurses seeking reassignment to specialty units would be selected based on seniority so long as they met certain "criteria standards [and] experience requirements" – essentially, minimum experience and certification standards that the parties agreed upon for Salisbury VAMC's five specialized

¹ For ease of reference, the pertinent provisions of the 1980 local supplemental and the 1995 and 2002 MOUs, as well as pertinent provisions of the VA-AFGE Master Agreement, are set forth and explained in Exhibit A. Copies of the local supplement, 1995 MOU, 2002 MOU, and applicable provisions of the Master Agreement are attached as Exhibits B, C, D and E, respectively.

nursing units. The 2002 MOU (Exhibit D) was similar to the 1995 MOU but updated the list of Salisbury's specialty units.

In terminating the agreements, management asserted that the seniority-based criteria were non-negotiable under 38 U.S.C. § 7422 because they effectively prohibited management from selecting nurses to fill vacancies based on the clinical competencies of the candidates. The union disputed this assertion and alleged that management's repudiation of the agreements constituted an unfair labor practice.²

In February 2003, Local 1738 submitted a request to the Under Secretary for Health (USH) for a determination that the issues raised in the ULP were not subject to the clinical conduct and competence exclusion of 38 U.S.C. § 7422(b). (Exhibit G)

In March 2003, the then-Director of VAMC Salisbury submitted to the USH management's own request for a determination under 38 U.S.C. § 7422(b) that the issues raised by the ULP involved professional conduct and competence and were thus outside the scope of collective bargaining. (Exhibit H)

On August 25, 2003, the Deputy Under Secretary for Health for Operations and Management responded to both the Salisbury VAMC Director and the local union president. In her response, the Deputy Under Secretary stated that the locally negotiated MOUs and "wish list" were inconsistent with certain provisions of Article 56 of the VA-AFGE Master Agreement and, as such, were unenforceable. Accordingly, the negotiability dispute over the provisions of the documents was moot and no determination under 38 U.S.C. § 7422 was warranted. (Exhibit I)

On June 11, 2004, the Union submitted a third step local grievance alleging violation of Articles 1, sections 4 & 10, and Article 12, section 5 of the 1980 local supplemental agreement as well as Article 12, section 6 & 10 and Article 43, section 1 of the Master VA-AFGE Agreement. (Exhibit J)

In the June 11 grievance, the union asserted that the letter of August 25, 2003 from the Deputy Under Secretary was incorrect, in that Article 56 of the Master Agreement concerns the manner in which vacancies are posted, while the local parties' MOUs and "wish list" procedure dealt only with shift changes and relocation/reassignments of existing VA employees. The grievance thus challenged management's repudiation of the MOUs and wish list, and further demanded that management (a) abide by the "wish list" procedure as laid out in the 1980 local supplemental agreement and/or renegotiate procedures to replace the repudiated MOUs; (b) make whole any employee negatively affected by management's actions; (c) provide a written letter of apology to RNs at VAMC Salisbury and associated clinics "for the violation of their rights;" and (d) provide the local union with a "written

² The parties' correspondence regarding the termination of the MOUs is attached as Exhibit F.

letter of assurance that these violations of the negotiated agreements not occur again." (Exhibit J, page 4.)

On July 6, 2004, the Salisbury Director responded to the union that the grievance was untimely. The Director also reiterated the Deputy Under Secretary's statement that the local agreements were inconsistent with the Master Agreement, and further stated that the subject provisions concerned clinical competency determinations, (Exhibit K)

On July 7, 2004, the union invoked binding arbitration (Exhibit L).

On August 3, 2004, the Director submitted a request to the USH for a determination that the issues raised by the June 11 grievance involve professional competence or conduct within the meaning of 38 U.S.C. § 7422(b) and, as such, are outside the scope of collective bargaining or negotiated grievance procedures. (Exhibit M)

The union responded to the Director's request to the USH on August 9, 2004 (Exhibit N). In this response the union alleged that management has refused to meet with the union and to discuss and bargain new nurse reassignment procedures as appropriate per the August 23, 2003 letter from the Deputy Under Secretary. In addition, the union alleges that management did not respond to the grievance in a timely manner as required by the Master Agreement.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 June 11, 2004 grievance over management's repudiation of the 1995 and 2002 MOUs; failure to abide by the 1980 "wish book" procedure; and refusal to negotiate new seniority-based nurse reassignment procedures involves

³ The timeliness of management's response to the grievance is not a subject for the Under Secretary for Health to determine under 38 U.S.C. § 7422. As such, that topic is not considered in this decision paper. However, to the extent that the Union is raising the timeliness issue in an effort to prevail on its grievance by default under Article 42, Section 9 of the parties' Master Agreement, it must be noted that the Master Agreement provides for such an outcome only where "the remedy requested by the grievant is legal and reasonable under the circumstances of the grievance." As is explained below, the Union's requested remedy in this matter -- that Salisbury VAMC management abide by the "wish book" procedure -- is barred by 38 U.S.C. § 7422(b). As a result, the requested remedy is not legal or reasonable under the circumstances of the grievance, and the Union is not entitled to a default resolution under the terms of the Master Agreement.

issues of professional conduct or competence within the meaning of 38 U.S.C. § 7422(b).

DISCUSSION

The issues raised by the subject grievance are essentially three-fold:

1. Do the "wish-book" procedure and/or the 1995 and 2002 seniority-based MOUs -- requiring that management select for RN reassignments the senior-most (or first requesting) internal RN who meets certain experience and certification requirements -- involve issues of professional conduct or competence under 38 U.S.C. § 7422?
2. If the "wish-book" and/or MOUs are non-negotiable under 38 U.S.C. § 7422, is management required to bargain new provisions relating to nurse reassignments?
3. If management is required to bargain new provisions relating to nurse reassignments, what limitations does 38 U.S.C. § 7422 place on the parties in conducting those negotiations?

Each of these questions must be answered in turn. First, however, several critical terms must be defined.

- *Clinical competence* is the term used in 38 U.S.C. § 7422(c), along with "direct patient care," to define the "professional conduct or competence" exclusion from collective bargaining set forth in 38 U.S.C. § 7422(b). The legislative history of the statute indicates that that the "professional conduct or competence" exclusion was intended to carve out of collective bargaining and negotiated grievance procedures "those matters that involve the manner in which health care is provided." 143 Cong. Rec. S4537 at S4544 (Comments of Senator Cranston on S. 675, Title II). *Clinical competence* is a medical term of art, defined by Webster's Dictionary Online as "The capability to perform acceptably those duties directly related to patient care." *Clinical competence* is a relative term, in the sense that practitioners strive to improve their competence through continuing education and training, and employers assess the relative competence of various applicants when filling vacant positions. While any competent provider can theoretically provide competent health care, a more competent provider -- one with more specialized experience, for example -- may be able to provide better care than one who is only minimally competent.
- *Qualifications* is a term used in 38 U.S.C. § 7403(a)(1) to refer to the minimum standards for appointment to VHA positions that the Secretary is empowered to prescribe by regulation. More specifically, the VA *nurse qualification standard*, set forth in VA Handbook 5005, Part II, Appendix G6, is the regulation prescribed by the Secretary pursuant to 38 U.S.C. § 7403(a)(1)

to set out the specific educational, certification, and other requirements that must be met or exceeded to qualify for appointment to a registered nurse position within VHA. A nurse who meets the *VA nurse qualification standard* is assumed to be clinically competent, but only as a threshold measure; that is, a nurse may be qualified for employment as a VA nurse but not be clinically competent to provide the specialized care required in a particular unit.

- *Competencies* is a term used within the Veterans Health Administration to refer to the written assessment of each employee's professional capabilities required by the Joint Commission on the Accreditation of Healthcare Organizations (JCAHO). This assessment, like the *VA nurse qualification standard*, is objective, documenting that the employee has met minimum standards of capability rather than measuring one employee's relative competence against another's.
- *Criteria standards [and] experience requirements* is the term used by VAMC Salisbury and AFGE Local 1738 in the 1995 and 2002 MOUs relating to Reassignment of Registered Nurses to describe the parties' bargained-for listing of experience and certification requirements applicable to nursing positions in VAMC Salisbury's specialty units. These agreed-upon requirements seem to reflect the parties' agreed-upon measure of the minimum qualifications required to provide specialized nursing care. Under the terms of the MOUs, the senior-most internal candidate meeting the applicable *criteria standards [and] experience requirements* was required to be selected for any vacant position.
- *Vacancy* and *Vacancy Announcement* are terms used in the VA-AFGE Master Agreement to describe open positions and the information that management must make available to employees interested in applying for such positions. Nursing vacancies are governed by Article 56 of the Master Agreement, which provides that "[a]ll Title 38 bargaining unit positions will be announced facility-wide" and that "[a]ll employees will have a fair and equitable opportunity to compete for selection for a posted vacancy." The local parties used the same terms in their MOUs on reassignment of nurses, providing that nurses in the bargaining unit "will be considered for [reassignment from one unit or area to another] when a vacancy does exist" and that "[v]acancy announcements will be posted and distributed with selection made on the basis of seniority by: a. intra-service line (intra-unit first, then intra-service line 2nd); and] b. station-wide." Thus while management may elect to fill a vacancy by reassigning an internal candidate or by appointing an applicant from outside the agency, in either case the spot being filled is a *vacancy*.

With the essential terms thus defined, the issues raised by the grievance can be resolved.

The 1980 "wish book" procedure and subsequent MOUs were intended to – and did -- limit management's assessment of the relative clinical competence of reassignment candidates to threshold qualifications. While the "wish book" qualifications assessment was undefined, the MOUs set forth a bargained-for listing of specific qualifications criteria. All three arrangements, however, restricted management's right to select the most competent candidate for a nursing position. In fact, in the view of the union, no clinical competence assessment beyond minimum qualifications is necessary: "The nurses subject to these MOUs and Local Agreement are all expected to meet threshold levels of competency and, once those threshold competencies are met (as evidenced by their very hiring), what nurse is selected for what vacant position is a fungible selection not tied to any particular specialized skills or grade of any particular nurse." (Exhibit G at page 2, first paragraph.)

By their terms, then, these negotiated provisions would require the selection, for example, of a nurse with ten years' service at VAMC Salisbury but only one year of specialized operating room (OR) experience over a nurse with ten years' specialized OR experience but only one year working at VA. Similarly, the subject provisions would preclude management's selection of a less-senior nurse for a particular unit or shift to ensure an appropriate balance of experience levels on all units and all shifts. As a result, these provisions involve professional conduct or competence within the meaning of 38 U.S.C. § 7422 because requiring that management select the senior-most nurse for each vacancy -- rather than place nurses according to their relative levels of clinical competence -- has the potential to significantly impact the manner in which patient care is delivered. Although management properly exercised the termination provision in the MOUs when their potential to impact patient care became evident, it is troubling that the parties did not recognize that potential far earlier.

Significantly, the MOUs and "wish book" provision are silent as to whether, and how, management might assess the relative clinical competence of an internal candidate seeking reassignment and a qualified external candidate applying for the same vacant position. The Deputy Under Secretary for Health for Operations and Management addressed this issue when, in her August 25, 2003 correspondence, she stated that the parties' local arrangements were inconsistent with the requirements in Article 56 of the Master Agreement that all title 38 vacancies be announced and that all employees be given a fair and equitable opportunity to compete for selection for a posted vacancy. The union objected to this conclusion in its June 11, 2004 grievance, stating that "AFGE Local 1738 is taking issue with how Shift Change and Relocation/Reassignments are awarded and filled, not how vacancies are posted." (Exhibit J, p. 3) However, as the MOUs and "wish book" procedure expressly acknowledge, a vacancy is required before a reassignment can be made.

To the extent that the "wish book" and MOUs were intended to prohibit management from announcing any vacancy in which a qualified bargaining unit nurse had expressed interest, the local agreements contravened not only the Master Agreement but also general Federal labor relations law. Under the Federal Labor-Management Relations Statute – which applies to title 38 medical professionals under 38 U.S.C. § 7422(a), subject only to the bargaining exclusions in 7422(b) – a proposal that would require management to consider internal candidates for reassignment before issuing vacancy announcements or initiating external recruitment is non-negotiable as interfering with the rights reserved to management by 5 U.S.C. § 7106(a)(2)(C). See, e.g., Dept. of Treasury, BATF v. FLRA, 857 F.2d 819, 822 (D.C. Cir. 1988); AFGE Local 2429 and Dept. of Air Force, 38 FLRA 1469, 1472 (1991); Fort Knox Teachers Association and Fort Knox Dependents Schools, 19 FLRA 878 (1985); see also Dept. of Agriculture, Food and Nutrition Service and NTEU, 35 FLRA 1154 (1990) (ruling non-negotiable a proposal to use seniority as a tie-breaking factor in selecting from among qualified applicants and restricting management's right to select through competitive procedures). As a result, if the subject agreements were intended to preclude external recruitment for vacancies requested by a minimally qualified internal candidate, they are non-negotiable even absent the professional conduct or competence exclusion in 38 U.S.C. § 7422(b).

This is not to say that management must disregard seniority within a unit or a service line or a medical center when making selections for reassignments; appropriate respect for service and tenure are critical for employee morale and retention. Nor would 38 U.S.C. § 7422(b) preclude the negotiation of a provision requiring management to consider seniority when making reassignment decisions. If the union wishes to propose nurse reassignment procedures that recognize seniority but do not restrict management's right to assess the relative clinical competence of all candidates, external as well as internal, nothing in 38 U.S.C. § 7422 would preclude bargaining over such proposals.

Future negotiations between these parties may provide for seniority to be a consideration in making nurse assignments. However, management's right to determine both the qualifications and the relative competence of competing candidates must be preserved. In addition, the parties should bear in mind that under 5 U.S.C. § 7106 and the case law authorities cited above, a seniority-based assignment/reassignment proposal is non-negotiable to the extent that it would have the effect of delaying or prohibiting external recruitment. The parties would need to carefully craft any future-negotiated provision to allow management to recruit externally at the same time that it is considering any internal candidates.

In several prior cases involving seniority provisions and nurse reassignments, the USH has determined that such provisions involve professional conduct or competence within the meaning of 38 U.S.C. § 7422. These cases include Erie, PA VAMC (July 1, 2002) and Buffalo, NY VAMC (August 16, 1994).

RECOMMENDED DECISION

That the June 11, 2004 grievance over management's repudiation of the 1995 and 2002 MOUs; failure to abide by the 1980 "wish book" procedure; and refusal to negotiate new seniority-based nurse reassignment procedures involves issues of professional conduct or competence within the meaning of 38 U.S.C. § 7422(b).

APPROVED ✓

DISAPPROVED _____

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

9-14-04
Date