Department of Veterans Affairs

Memorandum

Date: JUN 1 5 1992

From: Chief Medical Director

Subj: Title 38 Negotiability Decision

To: Deputy Assistant Secretary for Personnel and Labor Relations (05)

1. I am responding to the attached demand to bargain submitted by the American Federation of Government Employees.

2. Under 38 USC Section 7422, any matter affecting health care personnel in positions described in 38 USC 7421 (b) and concerning or arising out of professional conduct or competence, including direct patient care and clinical competence, is nonnegotiable. The law authorizes the Secretary, or delegatee, to determine the negotiability of any question arising under its provisions. The Secretary has delegated to my office the authority to make any such determinations, which are not subject to administrative review under the law.

3. Acting pursuant to this authority, I have determined that the recruitment and placement of health care personnel described in 38 USC 7421 (b) is fundamental to establishing the level of patient care to be provided by the Department of Veterans Affairs. Determining staffing requirements concerns overall competency of the staff at each facility and their ability to perform without compromising patient care, given the staff available. Consequently, I believe any matter relating to the recruitment and placement of such health care personnel at any VA facility is related to the professional competence or conduct of those employees. Accordingly, in answer to the union's demand to bargain, MP-5, Part II, Chapter 11, as it concerns such employees, is nonnegotiable.

Phil T. Farar

for James W. Holsinger Jr., M.D.

Attachment

*U.S. GPO: 1991-282-804/27336

TITLE 38 NEGOTIABILITY
Decision Paper

FACTS

The American Federation of Government Employees (AFGE) is the recognized, exclusive bargaining agent for approximately 17,500 Title 38 employees. VA has an Interim Memorandum of Agreement with AFGE covering Title 38 employees. This agreement requires VA to notify the AFGE VA Council of proposed changes to conditions of employment that effect Title 38 employees and give the Council the opportunity to bargain prior to implementing the change.

VA published the regulation, Change 2 to MP-5, Part II, Chapter 11, Recruitment and Placement on January 24, 1992, without giving AFGE the opportunity to bargain. The only changes to this regulation concern delegating authority to direct transfers and the deletion of a sentence which states that employees would be entitled to a disciplinary board hearing if the reason for a transfer is inaptitude, inefficiency, or misconduct.

On February 24, 1992, Larney J. Werth, 3rd Executive National Vice-President, AFGE National VA Council submitted a demand to bargain on the change to MP-5, Part II, Chapter 11. On February 26, 1992, Mr. Werth filed an Unfair Labor Practice Charge (ULP) with the Federal Labor Relations Authority (FLRA), charging VA with refusal to consult or negotiate in good faith with AFGE as required by the Labor Relations Statute.

On April 29, 1992, Daniel Sobrio, Director, Labor-Management Relations Service, submitted a response to the FLRA on the ULP requesting that they delay processing the charge until a decision is rendered by the Chief Medical Director.

ISSUE

Since AFGE has submitted a demand to bargain and has filed a ULP with the FLRA it is necessary for a decision to be made by the Chief Medical Director regarding whether the Chapter is negotiable.

DISCUSSION

Under Public Law 102-40, the Department of Veterans Affairs Labor Relations Improvement Act of 1991 (the Act), persons in positions described in 38 USC 7421 (b), have the right to engage in collective bargaining pursuant to the Federal Labor Management Relations Statute, except as to any matter or question concerning or arising out of (1) professional conduct or competence, (2) peer review, or (3) the establishment, determination, or adjustment of employee compensation. 38 U.S.C. sec. 7422. The Act also authorizes the Secretary of Veterans Affairs, or designee, to decide any issue of whether a matter or question concerns or arises from any of these issues. The Chief Medical Director has been delegated authority to decide these matters. That decision may not be reviewed by any other agency and is not subject to collective bargaining.

The VA is responsible for the delivery and direction of the conduct of professional duties and services by such employees. The recruitment and placement of health care personnel is fundamental to establishing the level of patient care to be provided by the VA. Determining staffing requirements concerns the overall competency of the staff at each facility and their ability to perform without compromising patient care, given the staff available.

RECOMMENDATION

We recommend that the Chief Medical Director determine that MP-5, Part II, Chapter 11, Recruitment and Placement as it relates to Section 7421 (b) employees applies to a matter or question concerning or arising out of professional conduct or competence. Therefore, it is not subject to collective bargaining under Section 7422 of Public Law 102-40.

Approved/~~Disapproved.~~ for Robert T. Farrar 6-15-92

James W. Holsinger Jr., M.D. Date
Chief Medical Director