DEPARTMENT OF VETERANS AFFAIRS
UNDER SECRETARY FOR HEALTH
WASHINGTON DC 20420

OCT 0 9 2002

Ms. Maureen Humphrys
Medical Center Director
VA Medical Center
1898 West Fort Road
Sheridan, Wyoming 82801

Dear Ms. Humphrys:

I am responding to the issue raised in your letter of August 14, 2002, concerning an unfair labor practice charge (ULP) filed by the local unit of the American Federation of Government Employees (AFGE) union. The issue pertains to an increase in the acuity level of patients received at the Sheridan VAMC in a High Intensity Psychiatric Unit. The union allegation in their amended ULP of June 28, 2001, is that management has failed to negotiate appropriate arrangements and procedures for title 38 employees concerning the "mission change."

Pursuant to delegated authority, I have decided on the basis of the enclosed decision paper, that the issue presented, as it applies to all employees appointed under 38 U.S.C. is a matter concerning or arising out of professional competence (direct patient care) and 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,

Robert H. Roswell, M.D.

Enclosure

Title 38 Decision Paper --- VAMC Sheridan

OVERVIEW

This matter involves a perceived "mission change" at the High Intensity Psychiatric Unit (Unit 8) at VAMC Sheridan that resulted in an increase in the number or percentage of admissions of severely mentally ill patients. The issue presented is whether such a change in acuity level requires collective bargaining with the title 38 medical professionals who treat patients on the impacted ward.

FACTS

VAMC Sheridan's High Intensity Psychiatric Unit (Unit 8) is, and has always been, a referral center for VISN 19 for the more severely ill psychiatric patients who require a controlled or restrictive environment, for patients requiring specialized therapy for chronic psychiatric conditions, substance abuse or post-traumatic stress, and for geropsychiatric patients presenting behavior management problems.

In June 2001, VISN 19 Mental Health Leadership met to discuss many matters relevant to all mental health facilities within the VISN and, more particularly, the role of the various VISN 19 hospitals, including Sheridan VAMC, in accepting difficult-to-place patients. Consistent with VA policy and regulations, it is the goal of VISN 19 Mental Health Leadership to make sure that acute and extended psychiatric care is equally available to veterans throughout the Network, regardless of location. Sheridan's role in providing such care was discussed in the June 2001 leadership meeting.

In late July of 2001, the AFGE local filed several requests to negotiate the "change in mission of unit 8." The union based its requests on a perceived increase in the numbers of behavorially difficult patients admitted to unit 8, and stated that it was concerned "over the negative impact on BUE [bargaining unit employees] and personnel policy and working conditions which this Mission Change on Unit 8 entails." Management responded that there had been no mission change, and that in any case the mission of unit 8 was not subject to negotiation with title 38 medical professionals.

It should be noted that 10 of the 16.8 full-time-equivalent positions in Unit 8 are title 38 positions; accordingly, any negotiation in this matter would predominantly involve title 38 employees. In essence, negotiation over the perceived mission change on Unit 8 would involve collective bargaining with medical professionals over the patients, or patient mix, they are required to treat.

On July 23, 2001, the union filed a ULP alleging that management had refused to negotiate appropriate arrangements and procedures concerning the mission change in unit 8. (Attachment A.) However, the union offered no specific proposals for appropriate arrangements or procedures. Nor did the union specify whether the "BUE" over whom it was concerned were title 5 employees, who might arguably have the right to negotiate

was concerned were title 5 employees, who might arguably have the right to negotiate over appropriate arrangements, or title 38 medical professionals, who by law have no such right in areas exempted from bargaining under 38 USC 7422.

On July 26, 2002 the FLRA issued a complaint and notice of hearing scheduled for October 16, 2002 based on the alleged charge. (Attachment B) On August 28, 2002, VA requested a stay of the hearing, which was denied by the FLRA. (Attachment C).

On August 14, 2002, the Sheridan VAMC Director submitted a letter requesting a determination by the Under Secretary for Health (USH) that the issue constitutes a matter of professional conduct or competence directly relating to patient care and is therefore outside the scope of collective bargaining pursuant to 38 U.S.C. 7422. (Attachment D)

On August 26, 2002, the VA Regional Counsel office at Cheyenne responded to the Complaint and Notice of Hearing. (Attachment E).

Under 38 USC 7422, any matter affecting employees hired pursuant to Title 38 concerning or arising out of professional conduct relating to direct patient care is outside the scope of collective bargaining and is not subject to review by any other agency. While the Sheridan VAMC Director's request for a 38 USC 7422 determination by the USH may include issues beyond the purview of section 7422 – namely, the negotiability of a "mission change" as between the VAMC and any impacted title 5 employees – only issues directly involving title 38 medical personnel are treated herein.

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 competence or conduct. When labor and management disagree over such matters or questions, "The VA Partnership Council's Guide to Collective Bargaining and Joint Resolution of 38 U.S. C. 7422 Issues" provides a procedure for attempting resolution. If the parties are unable to resolve the dispute, the USH is asked to render a decision.

In accordance with the Guide, a conference call was held on September 19, 2002 with a VACO labor relations specialist, union and management representatives of the facility and a National AFGE designated representative in a further attempt to resolve the matter.

ISSUE

Whether a change in acuity level in a VA Psychiatric unit, such that the unit admits a greater number or percentage of behaviorally challenged or otherwise difficult patients, gives rise to a collective bargaining obligation to the Title 38 medical professionals who are assigned to treat such patients.

of professional competence or conduct, peer review and employee compensation as determined by the Under Secretary for Health.

These specific exclusions were an acknowledgement that because of the nature of life and death decisions constantly occurring in a health care facility, certain matters, primarily clinical in nature, could not be left to the give and take of normal collective bargaining. Certain health care matters must remain within the full authority of the clinical professional to control and administer.

Decisions regarding admission of psychiatric patients presenting differing levels of behavioral management problems for treatment by title 38 staff are clinical in nature and go straight to the heart of the provision of patient care. In addition, such decisions are governed by VA regulations. By regulation, VA medical facilities are obliged to treat veteran patients, including psychiatric patients, at the facility to which they apply for treatment or at the nearest VAMC facility that can provide appropriate care. 38 C.F.R. §§ 17.46, 17.49. A more specific regulation, VHA Directive 99-030 *("Authority for Mental Health Program Changes")*, provides that the Under Secretary for Health has sole decision-making authority over changes in mission, staffing, or bed levels for VA mental health programs.

Based on the fundamental clinical nature of decisions regarding admission and treatment of severely ill psychiatric patients at particular VAMC facilities, the issue of changing acuity levels at a given psychiatric facility is a matter of clinical competence relating to direct patient care. The right of VAMC management to determine which Title 38 medical professionals should care for which veteran patients, irrespective of such patients' behavior management problems or other medical challenges, is not subject to collective bargaining.

RECOMMENDED DECISION

That the AFGE ULP alleging failure to consult and bargain over an alleged mission change resulting in a change in acuity level at Sheridan VAMC's High Intensity Psychiatric Unit be deemed a matter exempt from collective bargaining under 38 U.S.C. 7422b as a matter that concerns or arises out of professional competence (direct patient care or clinical competence).

APPROVED ✓ DISAPPROVED _____

Robert H. Roswell, M.D.
Under Secretary for Health

OCT 0 9 2002
Date