DEPARTMENT OF VETERANS AFFAIRS
Veterans Health Administration
Washington DC 20420

In Reply Refer To:

MAY 07 2001

B. W. Story, Ph.D.
VA Medical Center
Hampton, VA 23667

Dear Dr. Story:

I am responding to the issues raised in your January 16, 2001, letter concerning the arbitration and unfair labor practice charge (ULP) filed by the local unit of the American Federation of Government Employees. The issue pertains to management's decision not to implement an arbitrator's decision that the union is allowed to have observers on Nurse Professional Standards Boards (NPSB).

I have decided, on the basis of the enclosed decision paper, that this matter is a matter concerning or arising under peer review 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,

Thomas L. Garthwaite

Thomas L. Garthwaite, M.D.

Enclosure

Title 38 Decision Paper – VAMC Hampton

FACTS

In a memorandum dated May 4, 1999, the Director of the VAMC Hampton notified the President of the American Federation of Government Employees, Local 2328, that the union would not be allowed to appoint a representative as an observer on Nurse Professional Standards Boards (NPSB). On April 27, 1999 and May 17, 1999, AFGE filed grievances alleging that management's denial was in violation of the Master Agreement and contrary to past practice.

The matter was submitted to arbitration on April 4 and 5, 2000. The arbitrator's award, dated July 5, 2000, sustained the grievance and found that management unilaterally changed a past practice and violated the Master Agreement. As a remedy, management was required to return to the status quo by allowing union observers to attend NPSB meetings.

Management filed an exception to the arbitrator's award, which was denied by the Federal Labor Relations Authority (FLRA) as being untimely. Management refused to comply with the award on the basis that the issue involves peer review, which in accordance with 38 U.S.C. 7422(d), must be decided by the Secretary and is not subject to collective bargaining or review by any other agency. AFGE filed an unfair labor practice charge (ULP) over management's refusal to implement the arbitrator's award. The FLRA is investigating the charge. Management maintains that the FLRA has no jurisdiction to review the ULP because the issue involves peer review, which is not subject to collective bargaining.

The Secretary delegated to the Under Secretary for Health the final authority in the VA to decide whether a matter or question concerns or arises out of a matter or question of peer review. 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 labor and management to attempt resolution through involvement of the local and national partnership councils. If the parties are unable to resolve the dispute, the Under Secretary for Health is asked to render a decision.

In a letter dated January 16, 2001, the Director of the VAMC Hampton requested that the Under Secretary for Health decide whether the arbitrator's decision is contrary to 38 U.S.C. 7422. AFGE at the local level declined to participate in a conference call with the national parties in an attempt to resolve the matter. Therefore, the matter is being forwarded to the Under Secretary for a decision.

ISSUE

Whether the issue of extending union rights to attend Professional Standards Boards meetings beyond those specifically provided by VA policies and governing collective bargaining agreements is a matter concerning or arising under peer review, and is thus exempted from collective bargaining by 38 U.S.C. 7422(b).

DISCUSSION

Under 38 U.S.C. 7422(b), a matter that concerns or arises out of peer review is not subject to collective bargaining or to grievance procedures under collective bargaining agreements. Under paragraph (d) of that statute, the Secretary's determination of whether a matter arises under peer review is not subject to review by any other agency. The Secretary has delegated to the Under Secretary for Health the authority to make these determinations.

Pursuant to 38 U.S.C. 7421(a), the Secretary prescribed regulations in MP-5, Part II, Chapter 2, Section B, Paragraph 5 and Chapter 4, that require the establishment of professional standards boards to act on appointments, advancements and probationary reviews of title 38 employees, including nurses. Implementing regulations were promulgated in the VHA Supplement to MP-5, Part II, Sections 2.20, 4.08, and 4.09. The NPSB is one of these boards. NPSBs must be composed solely of nurses who are chosen from the most capable, experienced and responsible personnel. Professional Standards Boards act for the Under Secretary and are important components of management's decision-making processes. Their principal function is to provide professional peer review in such matters as eligibility, suitability, and appropriate grade levels for appointments and advancements of medical professionals.

VHA rules specifically provide that, because summary probationary reviews deal with both professional conduct and competence and peer review, union representatives are not entitled to be present; that only Board members and the individual's personal representative (who may be a union representative) may be present when the individual is being interviewed in such proceedings, and that Board deliberations shall be in closed session. VHA Supplement, MP-5, Part II, Section 4.09(d), (f), and (g). The VA-AFGE Master Agreement, Article 55, nevertheless provides for the union to be present at Disciplinary Appeals Boards and during a probationary employee's testimony before a Professional Standards Board in a termination proceeding, even if not requested by the employee. Extending the union's rights to attend professional standards board meetings beyond those specifically provided for in VA policies and the Master Agreement, as the union seeks in the present case, is clearly a matter that "concerns or arises out of peer review," and thus is not subject to collective bargaining or grievance procedures thereunder.

RECOMMENDED DECISION

The issue of extending union rights to attend Professional Standards Boards meetings beyond those specifically provided by VA policies and governing collective bargaining agreements is a matter concerning or arising under peer review, and is thus exempted from collective bargaining by 38 U.S.C. 7422(b).

APPROVED: ✓ DISAPPROVED: _____

Frances M. Murphy MD 5/7/01

for Under Secretary for Health Date