DEPARTMENT OF VETERANS AFFAIRS
Veterans Health Administration
Washington DC 20420

OCT 25 2002

In Reply Refer To:

Bruce A. Gordon
Acting Director (00)
Connecticut Healthcare System
950 Campbell Avenue
West Haven, CT 06516

Dear Mr. Gordon:

I am responding to the issue you raised in your July 22, 2002, memorandum concerning the local unit of the American Federation of Government Employees. The issue pertains to an unfair labor practice charge filed against management for refusing to bargain over the temporary reassignment of a nurse from Newington to the Windham Clinic two days a week.

I have decided, on the basis of the enclosed decision paper, that the detail of the nurse is a matter or question concerning or arising out of professional conduct or competence under 38 U.S.C. 7422(b), and is thus exempted from collective bargaining and may not be reviewed by any other agency under 38 U.S.C. 7422(d).

Please provide this decision to your Regional Counsel and local union president as soon as possible.

Sincerely yours,

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

Enclosure

Title 38 Decision Paper – VA Connecticut Healthcare System

FACTS

The VA Connecticut Healthcare System operates the Windham Clinic as a community-based outpatient clinic (CBOC). A full-time physician at the clinic retired effective January 31, 2002. On January 22, 2002, management notified the American Federation of Government Employees (AFGE), which represents nurses, that in addition to hiring a part-time physician, a nurse and a nurse practitioner would be assigned to the CBOC three days a week. When the CBOC was able to hire a full-time physician, management decided instead to reassign only one nurse from the VAMC in Newington to the CBOC two days each week. The nurse chosen for the reassignment was selected because of her years of experience in the triage and assessment of ambulatory patients with urgent needs, as well as her demonstrated organizational and management skills in working with coordinating service delivery, all of which were important to providing quality patient care with only a single nurse at the Windham CBOC. Further, the presence of a registered nurse in the CBOC was critical in order to provide basic care to patients.

On March 7, 2002, AFGE filed an unfair labor practice charge (ULP) alleging that management failed to bargain prior to effecting the reassignment. The FLRA issued a Complaint and Notice of Hearing charging the VA with failing or refusing to negotiate in good faith. Management maintains that the FLRA has no jurisdiction to review the ULP because the issue concerning the reassignment involves professional conduct and competence, which in accordance with 38 U.S.C. 7422(d), is not subject to collective bargaining or review by any other agency.

The Secretary delegated to the Under Secretary for Health the final authority in the VA to decide whether disputes arise out of a matter or question of professional conduct or competence. When a dispute is submitted to the Under Secretary for Health for a decision, "The VA Partnership Council's Guide to Collective Bargaining and Joint Resolution of 38 U.S.C. 7422 Issues" sets forth 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 memorandum dated July 22, 2002, the Director of the VA Connecticut Healthcare System requested that the Under Secretary for Health make a determination as to whether reassignment of the nurse was a matter arising out of professional conduct or competence in accordance with 38 U.S.C. 7422. On September 13, 2002, the national and local parties were unable to resolve their dispute during a conference.

ISSUE

Whether the reassignment of a Title 38 nurse from the medical center to a clinic two days a week is a matter or question concerning or arising out of professional conduct or competence under 38 U.S.C. 7422(b), and is thus exempted from collective bargaining and may not be reviewed by any other agency under 38 U.S.C. 7422(d).

DISCUSSION

Under 38 U.S.C. 7422, a matter that concerns or arises out of professional conduct or competence is outside the scope of collective bargaining and is not subject to review by any other agency. The law authorizes the Secretary, or delegatee, to make the determination of any question arising under its provisions. The Secretary has delegated to the Under Secretary for Health the authority to make these determinations.

The Acting Under Secretary for Health decided a case at the VAMC White River Junction on July 6, 1994, where the issue was, for all material purposes, identical to the issue in the instant case. In the White River Junction case the union filed an unfair labor practice charge alleging that management refused to bargain over the reassignment of a nurse. Management maintained that the reassignment was based on staffing restraints. The Acting Under Secretary for Health determined that the matter concerns or arises out of professional conduct or competence.

Pursuant to 38 U.S.C. 7421(a), the Secretary has prescribed regulations, VA Handbook 5005, Part IV, Chapter 3, Sections A and B, to implement assignments, reassignments and details. Section A, paragraph 4(b) provides that, in exercising the authorities covered in the handbook, primary consideration will be given to the efficient and effective accomplishment of the VA mission. VA Connecticut management reassigned a nurse from the VAMC Newington to the Windham CBOC two days a week in order to avoid compromising basic patient care functions such as vaccinations, blood pressure monitoring, answering clinical and administrative phone calls in a timely manner and scheduling new appointments for hundreds of patients. The nurse who was selected for the reassignment had the best skills for the Windham CBOC environment, including years of experience in the triage and assessment of ambulatory patients with urgent needs and demonstrated organizational and management skills in working with and coordinating service delivery. In addition, the urgent care/treatment room where the nurse works at Newington was able to accommodate the loss of one nurse for the two days each week she will spend at the CBOC. Since management's action was directly related to patient care needs, the detail constituted a matter concerning or arising out of professional conduct or competence under section 7422.

RECOMMENDED DECISION

It is recommended that the Under Secretary for Health determine that the reassignment of the nurse to the Windham CBOC two days a week is a matter or question concerning or arising out of professional conduct or competence under 38 U.S.C. 7422(b), and is thus exempted from collective bargaining and may not be reviewed by any other agency under 38 U.S.C. 7422(d).

APPROVED ✓ DISAPPROVED _____

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

OCT 2 5 2002
Date