



DEPARTMENT OF VETERANS AFFAIRS  
UNDER SECRETARY FOR HEALTH  
WASHINGTON DC 20420

OCT 09 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 management requiring physicians to complete patient discharge instructions using an electronic template and providing patients discharged from their care with those patient discharge instructions. The union allegation, in their amended ULP of July 31, 2002, is that management failed to consult and negotiate in good faith as required by chapter 71 of 5 U.S.C.

Pursuant to delegated authority, I have decided, on the basis of the enclosed paper, that the issue presented is a matter concerning or arising out of professional conduct or competence 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,

A handwritten signature in black ink, appearing to read "Robert H. Roswell".

Robert H. Roswell, M.D.

Enclosure

## Title 38 Decision Paper --- VAMC Sheridan

### FACTS

In late February 2002, VAMC Sheridan management instructed Mental Health Psychiatrists, as well as all other physicians at the Sheridan facility, that all physicians were required to complete patient discharge instructions using an electronic form. The electronic Discharge Instructions form or template had been developed by the head of the facility's Clinical Informatics Committee and had been earlier successfully tested. (Attachment A). All physicians, including those in the Mental Health units, were trained in using the electronic Discharge Instructions form, which allowed physicians to input the same information that had long been required on a paper Discharge Instructions form via an easier, less time-consuming electronic data entry. (Compare Attachments A, H.) The implementation of the electronic Discharge Instructions form was part of a larger policy favoring electronic storage and capture of patient medical data to enhance access to patient data by health care providers and support personnel. (See Attachment G).

On March 11, 2002, the AFGE local filed a ULP alleging that, in training physicians to use the electronic Discharge Instructions form, management had by-passed the union and conducted a formal meeting without providing the union with advance notice and an opportunity to attend. The union further alleged in an amended ULP dated July 31, 2002, that changes in working conditions, including having unit employees complete a progress note entitled "Discharge Patient Instructions," had been implemented without prior notice to or bargaining with the union (Attachment B). The Federal Labor Relations Agency investigated the charge and proposed a settlement, which was rejected by the union. Following this, on July 31, 2002, the union submitted an amended ULP and the FLRA issued a "Complaint and Notice of Hearing" on the matter, with the hearing date scheduled for October 16, 2002 (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). In addition a motion was submitted to stay the proceedings pending a USH determination of applicability of 38 U.S.C. 7422 to the issues raised in the ULP (Attachment F). The request for a stay of the hearing was denied by the FLRA.

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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.

### 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, management and union representatives of the facility and a national AFGE designated representative in a further attempt to resolve the matter. They were unable to resolve the matter; thus, a decision of the USH is required.

### ISSUES

1. Whether a meeting with physicians to provide training regarding a new program for electronic patient discharge instructions is a formal meeting requiring notice and an opportunity for the union to attend.
2. Whether a requirement for physicians to complete patient discharge instructions using an electronic template and to provide patients discharged from their care with those patient discharge instructions constitutes a matter concerning or arising out of professional conduct or competence (direct patient care, clinical competence).
3. Whether a requirement that physicians be responsible for assuring that the VAMC obtains patient signatures on electronic discharge instructions constitutes a matter concerning or arising out of professional conduct or competence (direct patient care, clinical competence).

### DISCUSSION

The Department of Veterans Affairs Labor Relations Improvement Act of 1991 granted collective bargaining rights to Title 38 employees in accordance with

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Title 5 provisions, but specifically excluded from bargaining matters or questions concerning or arising out of professional competence or conduct, peer review and employee compensation as determined by the USH.

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.

Medical records pertaining to patient discharge instructions for the care and future well-being of patients are fundamental to a health care organization. More specifically, discharge instructions go to the heart of the future well-being and care of the veteran patient to include follow up treatment. In this regard, a mock review by the Joint Commission on Accreditation of Health Care Organizations (JCAHO), which sets clinical quality standards for accredited hospitals (including VA), indicated that patient discharge instructions at Sheridan VAMC were not adequate. The decision to implement an electronic discharge instruction form at Sheridan grew out of this JCAHO review and a related peer review recommendation, and also out of an identified clinical need to increase accessibility to patients' medical records by health care providers and support personnel so as to facilitate ongoing patient care. JCAHO standards mandate that physicians complete those portions of patient discharge instructions requiring specific physician decision-making, namely diagnoses, prescriptions, and any requirement for follow-up care; that the treating physician sign the instructions; and that patients' signatures be obtained on the discharge instruction form to verify their receipt of the instructions. VAMC Sheridan management determined that the best and most expeditious way to ensure compliance with these three JCAHO clinical standards was to have physicians themselves obtain patients' signatures when communicating instructions prior to discharge. A Sheridan Medical Center memorandum covering medical records generally and the requirements for discharge instructions specifically, based in part on VA regulations pertaining to medical records, has been in place since October of 2001. (Attachment G).

VA regulations regarding patient records, including discharge instructions, are set forth in VHA Manual M-1, Part I, Chapter 5. These regulations provide that "it is the policy of the Department of Veterans Affairs (VA) to maintain complete, accurate, timely, clinically pertinent, and readily accessible patient records which contain sufficient recorded information to serve as a basis to plan patient care, support diagnoses, and warrant treatment ... [and which] shall provide a basis to evaluate the continuity of care and the patient's condition and treatment." M-1, Part I, Ch. 5, ¶ 5.02. The regulations further provide that electronic computer-

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based patient records may be required to maximize accessibility to vital patient data, M-1, Pt. I, Ch. 5, ¶5.03(5); that "a discharge plan and instructions will be documented for all patients in accordance with JCAHO requirements," M-1, Pt. I, Ch. 5, ¶ 5.10.b; and that "responsibility for the preparation of the discharge summary and for its content [including discharge instructions] rests exclusively with the member of the medical staff having primary care responsibility for the patient," M-1, Pt. I, Ch. 5, ¶ 5.14.b. (Attachment H).

Based on the fundamental clinical nature of medical records, including discharge instructions; the direct relationship between ease of care providers' access to such records and patient care; and the importance of compliance with JCAHO clinical standards, the issues of requiring physicians to complete electronic patient discharge instructions, requiring physicians to obtain patient signatures to confirm receipt of such instructions, and meeting with physicians to discuss and train them in meeting these requirements, are matters of clinical competence relating to direct patient care.

RECOMMENDED DECISION

That the AFGE ULP alleging failure to consult and bargain over requiring physicians to complete electronic patient discharge instructions be deemed a matter exempt from collective bargaining under 38 U.S.C. 7422(b) 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 09 2002

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Date