Title 38 Decision Paper --- Staffing Adjustments

FACTS

During negotiations for a new master national contract covering both Title 5 and Title 38 employees, the National Association of Government Employees (NAGE) union submitted the proposal shown in Attachment A, outlining criteria for VA to follow in conducting a Reduction in Force (RIF). As stated, the proposal does not distinguish between Title 5 and Title 38 employees, but would require the VA to apply Title 5 rules and regulations when accomplishing staff adjustments (equivalent to RIFs) for Title 38 medical professionals.

VA management had previously informed the NAGE union that the proposal was non-negotiable to the extent that it attempted to bring Title 38 employees under the criteria of the Title 5 RIF rules, as the Under Secretary for Health (USH) has the exclusive authority consistent with 38 USC section 7421 to establish regulations for accomplishing staff adjustments of VA's medical personnel. The policy and criteria so established are outlined in VA Handbook 5005, Part 4, at Chapter 3, Section C Paragraph 3, and Appendices B and C. The union argues that their proposal simply means that Title 38 employees are to be treated the same as Title 5 employees pursuant to the decision of the U.S. Court of Appeals for the Federal Circuit in James v. Von Zemenszky, 284 F.3d 1310, 2002 U.S. App. LEXIS 5371 (April 1, 2002), holding that Title 5 RIF statutes and regulations apply to Title 38 medical professionals. The parties were unable to resolve the matter in negotiations, so NAGE brought the issue to the Federal Services Impasses Panel (FSIP) for decision. The VA management team has declared the NAGE proposal non negotiable and is now referring the issue to the USH for a determination that the matter is outside the scope of collective bargaining pursuant to Title 38, section 7422.

PROCEDURAL HISTORY

Under 38 USC 7422, any matter affecting employees hired pursuant to Title 38 concerning or arising out of professional conduct or competence relating to direct patient care is outside the scope of collective bargaining and is not subject to review by any other agency. 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 conduct or competence.

ISSUE

Whether the proposal of the NAGE union set forth in Attachment A, which applies Title 5 Reduction in Force criteria to staffing adjustments of Title 38 employees as well as RIFs of Title 5 personnel, is subject to collective bargaining with employees appointed under Title 38.

DISCUSSION

The Department of Veterans Affairs Labor Relations Improvement Act of 1991, codified at 38 USC § 7422, granted collective bargaining rights to Title 38 employees in accordance with Title 5 provisions, but specifically excluded from bargaining matters or questions concerning or arising out of professional conduct or competence (direct patient care), as determined by the USH.

These specific exclusions were an acknowledgement that because of the decisions constantly occurring in a health care facility, certain matters, primarily clinical in nature, must remain within the full authority of the clinical professional to control.

The placement of health care personnel such as physicians and nurses is fundamental to direct patient care. As such, the flexibility to control assignments and the criteria for retention, reassignment or separation in the event of a staffing adjustment must remain with the clinical management staff. It is critical to patient care that medical center clinical management have full authority and flexibility to make the decisions pertaining to the professional competence of employees who will be assigned patient care responsibilities.

The NAGE proposal, if applied to Title 38 medical professionals, would require VA managers to apply the specific criteria of Title 5 rules and regulations to Title 38 personnel when conducting a staff adjustment. The USH has promulgated VA's own clinical competency-based policy and regulations pertaining to accomplishing Staff Adjustments of Title 38

health care personnel, outlined in VA Handbook 5005, Part 4, at Chapter 3, Section C Paragraph 3, and Appendices B and C. (Attachment B). Unlike Title 5 RIF rules, which limit consideration to employees' veterans' preference, seniority and, to a lesser extent, official performance ratings, VA's Title 38 staff-adjustment procedures allow local VAMC management to consider doctors' and nurses' personal professional qualifications in determining which employees to separate during an adjustment. This consideration is critical to staffing a health care system, in which staff members' particular competencies dictate a facility's ability to provide quality care. The union's proposal would interfere with and restrict the important clinical determinations made by VA management pursuant to VA Handbook 5005 as to the specific clinical skills and abilities required by the medical professionals retained in a staffing adjustment to ensure appropriate levels of patient care. As such, the proposal clearly has the potential to produce a negative impact on patient care.

The union's assertion that the Federal Circuit's decision in James v. Von Zemenszky renders the proposal negotiable is misplaced. Von Zemenszky was not a labor relations case, but rather an appeal from a decision of the Merit Systems Protection Board; several decisions of the Federal Labor Relations Authority run directly contrary to the Von Zemenszky ruling. Moreover, the Von Zemenszky decision incorrectly interpreted the statutory provisions underlying the separate Title 38 personnel system, 38 USC §§ 7421 and 7425, and contravened expressed Congressional intent by applying general Title 5 statutory and regulatory rules to Title 38 personnel, notwithstanding expressly contrary provisions in Title 38 and in authorized VA regulations. For these reasons, the Von Zemenszky ruling has no bearing on the negotiability of the union's proposal.

Based on the fundamental clinical nature of decisions regarding placing health care personnel at a time when staffing adjustments may be necessary, the issue of the criteria to be used in making the assignments is a matter of clinical competence relating to direct patient care.

RECOMMENDED DECISION

That the NAGE proposal (Attachment A) to apply specific Title 5 Reduction in Force criteria to staffing adjustments for Title 38 employees be deemed a matter exempt from collective bargaining under Title 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

NOV 0 6 2002
Date

NAGE Proposal
September 25, 2002

Article 35
Reduction in Force

Section 1. - RIFs will be conducted in accordance with applicable law, regulation and policy. A RIF exists when an agency releases an employee from his/her competitive level by separation, demotion, furlough for more that 30 days, or reassignment requiring displacement; when lack of work or funds, reorganization, reclassification due to change in duties, or the need to make a place for a person exercising re-employment or restoration rights requires the Agency to release the employee.

Section 2 - Prior to initiating a RIF or Transfer of Function involving unit employees at a field facility, management at the facility will notify the Local President in writing. Such notification will be provided at he earliest opportunity after a determination is made to conduct a RIF or a Transfer of Function, and will include specific information concerning the action to be taken. The Local will be provided with the opportunity to bargain concerning the impact and implementation of these actions.

Section 3 - Each competing employee selected for release from a competitive level under this part is entitled to a written notice at least 60 full days before the effective date of release. When a general notice is supplemented by a specific notice, an agency may not release an employee from his or her competitive level until at least 10 days after the employee's receipt of the specific notice.

Section 4 - In the event a reduction-in-force is implemented, the employee(s) affected and his/her designated Union representative may review the appropriate retention registers if requested.

Section 5 - RIF actions resulting in separation or reduction in grade or pay are appealable to MSPB. Other RIF actions are grievable pursuant to the Grievance Procedure Article of this Agreement.

Section 6 - The Impact and Implementation of a reduction in force is subject to local bargaining.

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