



DEPARTMENT OF VETERANS AFFAIRS  
UNDER SECRETARY FOR HEALTH  
WASHINGTON DC 20420

OCT 09 2008

Roger Johnson  
Director  
VA Medical Center  
VA Connecticut Healthcare System  
950 Campbell Ave.  
West Haven, CT 06516

Karin T. Thompson, APRN, BC  
American Federation of Government Employees  
Local 2138  
950 Campbell Avenue, Bldg. 6, Room 127  
West Haven, CT 06516

Dear Mr. Johnson and Ms. Thompson:

I am responding to the issue raised in your memoranda of May 28, 2008, and June 10, 2008 respectively, concerning the grievance filed by AFGE Local 2138 regarding the reassignment of \_\_\_\_\_ RN from the Homeless Program to the Mental Health Intensive Case Management (MICM) program.

Pursuant to delegated authority, I have determined, on the basis of the enclosed decision paper, that the issue presented is a matter concerning or arising out of professional conduct or competence and is thus exempted from collective bargaining by 38 U.S.C. § 7422(b).

Sincerely yours,

*Michael J. Kussman*

Michael J. Kussman, MD, MS, MACP  
Under Secretary for Health

Enclosure

**Title 38 Decision Paper  
VAMC West Haven, CT**

On May 11, 2007, the American Federation of Government Employees (AFGE and/or union), Local 2138, at the VA Connecticut Healthcare System (VA CT HCS) filed a Step three Grievance on behalf of \_\_\_\_\_, RN alleging that his position as Homeless Veterans Service Coordinator was being abolished. (Attachment A) On May 10, 2007, the union alleged that it received notice from Charles Lee, Labor Relations Specialist, that Mr. \_\_\_\_\_ would be "...the nurse at Newington expanding the [Mental Health Intensive Case Management] MHICM program' and 'the homeless program will be done by a social worker with an addiction therapist.'" (Attachment A, ¶ 3) The union's requested remedy was "that the agency provide notice of any specific changes to allow opportunity to bargain and maintain the status quo concerning \_\_\_\_\_"

By memorandum dated May 18, 2007<sup>1</sup>, Eileen Widger, Nurse Manager, explained to Mr. Lee the need to reassign \_\_\_\_\_ to MHICM. (Attachment B) Ms. Widger explained that "\_\_\_\_\_ nursing skills are needed in the MHICM to provide nursing assessments of clients and to administer medications (including IM [intramuscular medications]) and assess response to these medications. He is also needed to provide health education to these veterans for both their psychiatric illness and any concurrent medical illness they may have. In addition[,] he is needed for intensive case management for these severely chronically ill veterans. His knowledge of community resources will also enhance the program and assist these veterans at maintaining independence in the community." (Attachment B, ¶ 2)

On May 31, 2007, Dr. Paul Mulinski, Associate Chief of Staff, responded to the Step three grievance filed by the union. (Attachment C) Dr. Mulinski explained that while management does have the right to assign RN staff to appropriate areas based on patient care needs, the assignment should be done in a clear and unambiguous manner. Dr. Mulinski further advised the union that he would direct the service to provide a clear notice to the employee regarding the matter.

On June 21, 2007, \_\_\_\_\_ received a memorandum from Ms. Widger informing him that effective July 15, 2007, he would be transferred to the staff nurse role in the MHICM program at the Newington campus. (Attachment D)

On July 2, 2007, the union submitted a demand to bargain related to the "transfer" of \_\_\_\_\_ to the MHICM program. (Attachment E)

On August 23, 2007, \_\_\_\_\_ received a memorandum from Ms. Widger directing him to attend orientation to the MHICM program. (Attachment F)

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<sup>1</sup> Management did not submit a signed copy of this Memorandum.

2.

On August 23, 2007, \_\_\_\_\_ received a memorandum from Ms. Widger directing him to attend orientation to the MHICM program. (Attachment F)

On September 6, 2007, the union submitted a request for assistance to the Federal Services Impasse Panel (FSIP) on the "transfer" of \_\_\_\_\_ (Attachment G) On October 5, 2007, the union withdrew its request for FSIP assistance. (Attachment H)

On October 3, 2007, the union submitted a second third step grievance on behalf of \_\_\_\_\_ (Attachment I) The union alleged that it was not given any information about the movement of \_\_\_\_\_ from the Homeless Program to MHICM and that there was no posting of any Title 38 vacancy opening at the MHICM program in Newington. As a remedy, the union requested that \_\_\_\_\_ be returned to his position as the Homeless Veterans Service Coordinator at the Newington campus; that management post Title 38 vacancy for MHICM-RN at Newington campus; that management provide the union with clear written notice of changes concerning RIFs, reassignments, staffing adjustments, and organizational changes for the Homeless program at Newington and to negotiate over the changes; and, that management provide written public notice of Agency intent to recognize AFGE Local 2138 as the exclusive representative of Title 38 nurses at VA CT HCS and to engage in collective bargaining, as per statutory and contractual obligations.

On December 4, 2007, the Director of the VA CT HCS, Roger Johnson, responded to the third step grievance. (Attachment J) Mr. Johnson explained that one of the reasons for \_\_\_\_\_ reassignment was that his professional skills as an RN for the homeless program were being underutilized because he was not providing medication administration and did little intervention that required the services of an RN. (Attachment J, ¶ 2) In addition, the Director stated that since \_\_\_\_\_ was notified of his assignment to care for MHICM patients on June 21, 2007 with an effective date of July 15, 2007<sup>2</sup>, the grievance was untimely.

The director concluded that..."management has the right to assign Registered Nurses such as \_\_\_\_\_ to appropriate areas based upon patient care needs as was done in this case. I find that the Agency did meet all obligations regarding dealings with the Local regarding \_\_\_\_\_ and his assignment. I find that the assignment of \_\_\_\_\_ was a matter involving direct patient care and clinical competence, and thus nongrievable. I find that the grievance was not filed in a timely manner as required by the contract and thus is nongrievable and nonarbitrable." (*Id.*, ¶ 5)

On December 21, 2007, the union invoked arbitration (Attachment K)

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<sup>2</sup> The effective date was changed to August 1, 2007.

3.

On May 28, 2008, the Director of the VA CT HCS submitted a request to the Under Secretary for Health (USH) for a finding that the union's grievances over the reassignment of [redacted] from the Homeless Program to MHICM is a matter concerning or arising out of professional conduct or competence and is thus exempted from collective bargaining by 38 U.S.C. § 7422(b). (Attachment L) In his memorandum, the Director explained that "[t]he Agency has assigned [redacted] to care for patients who are in need of mental health intensive case management (MHICM). The nurse remains at Newington with the same duty hours with no change in grade or pay. The Agency determined that with the increasing need of care for mental health patients that the RNs abilities were needed with the MHICM program. Outreach for homeless veterans which the RN was assigned previously has been assigned to a social worker and a readjustment councilor." (Attachment L, ¶ 2) The Director further explained that [redacted] position was not abolished, but management "simply changed the types of patients for which the RN provides care. The position was and remains a Nurse 2 in mental health service with the same functional statement." (*Id.*, ¶ 4)

On June 10, 2008 the union submitted an opposition to management's request for a 38 U.S.C. § 7422 decision by the USH. (Attachment M) The union argued that [redacted] position had been abolished from the Homeless Veterans Program and that the 'staffing adjustment' constituted a Reduction-In-Force (RIF). The union further argued that when there is a RIF "those who occupied the abolished position shall compete with other employees in accordance with Civil Service Commission regulations."

On August 19, 2008, Laurie Harkness, Phd., CPRP, Director, VA CT Errera Community Care Center, submitted a memorandum to the USH explaining the need to reassign [redacted] to the MHICM program. (Attachment N) Dr. Harkness explained that [redacted] was moved from a position which did not require nursing skills, to a position that needed a nurse to care for its chronically ill veterans. She specifically stated that "[redacted] reassignment to the MHCIM RANGE was to meet the specific clinical needs of that new program and to enhance services and access to care for veterans with serious mental illnesses in the Newington area."

#### 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 conduct or competence (i.e., direct patient care or clinical competence), peer review or employee compensation within the meaning of 38 U.S.C. § 7422(b).

4.

ISSUE:

Whether a grievance over the reassignment of \_\_\_\_\_, RN is a matter concerning or arising out of professional conduct or competence and is thus exempted from collective bargaining by 38 U.S.C. § 7422(b).

DISCUSSION:

The Department of Veterans Affairs Labor Relations Act of 1991, codified at 38 U.S.C. § 7422, granted collective bargaining rights to Title 38 employees in accordance with Title 5 provisions, but specifically excluded from the collective bargaining process matters or questions concerning or arising out of professional conduct or competence (i.e., direct patient care and clinical competence), peer review or employee compensation as determined by the USH.

Pursuant to 38 U.S.C. 7421(a), the Secretary has prescribed regulations contained in VA Directive/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. The assignment and placement of Title 38 healthcare personnel is fundamental to the patient care mission of all VA health care facilities.

In the union's second third step grievance, it requested the following remedies related to the reassignment of

- that \_\_\_\_\_ be returned to his position as the Homeless Veterans Service Coordinator at the Newington campus;
- that management post Title 38 vacancy for MHICM-RN at Newington campus;
- that management provide the union with clear written notice of changes concerning RIFs, reassignments, staffing adjustments, and organizational changes for the Homeless program at Newington and to negotiate over these changes; and,
- that management provide written public notice of Agency intent to recognize AFGE Local 2138 as the exclusive representative of Title 38 nurses at VA CT HCS and to engage in collective bargaining as per statutory and contractual obligations.

The union's grievance regarding the reassignment of \_\_\_\_\_ and its requested remedy to return \_\_\_\_\_ to his position as the Homeless Veterans Service Coordinator is excluded from the negotiated grievance procedure because the decision made by the Newington VA CT HCS management to assign or reassign \_\_\_\_\_ to the MHICM program was made to deliver vital patient care to veterans and is therefore excluded from the

negotiated grievance procedure. In several prior cases involving reassignments of Title 38 medical professionals, the USH has determined that where such reassignments are based on issues of clinical competence or are necessary to provide direct patient care, they involve professional conduct and competence within the meaning of 38 U.S.C. § 7422. See VA-06-06, VAMC Richmond, VA (October 11, 2006) and VA-06-02, Chillicothe, OH VAMC (September 6, 2006).

The other three requested remedies however, are not matters that concern or arise out of the establishment, determination, or adjustment of employee compensation within the meaning of 38 U.S.C. § 7422(b) and are therefore grievable.<sup>3</sup>

RECOMMENDED DECISION

That the grievance filed by AFGE Local 2138 regarding the reassignment of ~~staff~~ RN concern issues of professional conduct or competence within the meaning of 38 U.S.C. § 7422(b) and are therefore outside the scope of collective bargaining within the meaning of 38 U.S.C. § 7422(b).

APPROVED   X  

DISAPPROVED \_\_\_\_\_

Michael J. Kussman

Michael J. Kussman, MD, MS, MACP  
Under Secretary for Health

10/9/08  
Date

<sup>3</sup> This decision is limited to whether RN assignment concerns issues of professional conduct or competence within the meaning of section 7422. This decision does not address whether the notice and negotiation issues contained in the remedy (i.e., a RIF, reassignment, staffing adjustment, or organization change) would also raise section 7422 issues, if these issues intrude upon an RN's work assignment as it relates to professional conduct and competence.