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FAX COVER SHEET

To: Meghan Serwin Flanz

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Company: Dept. of Veterans Affairs

From: Mark D. Roth

Re: Primer National Grievance

Date: 3/12/08

DOCUMENTS	NUMBER OF PAGES*
Primer National Grievance And Attachment	6

COMMENTS:
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#131481

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO

John Gage
National President

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Andrea E. Brooks
National Vice President for
Women and Fair Practices

7m/7422 Primer/246346

March 12, 2008

By Facsimile and Messenger
Meghan Serwin Flanz
Associate Deputy Assistant Secretary
for Labor-Management Relations
Department of Veterans Affairs
1575 I Street, NW – Suite 250
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National Grievance

This is a National Grievance filed by the American Federation of Government Employees (AFGE) in accordance with Article 42, Section 11 of the Master Agreement between the Department of Veterans Affairs (VA) and AFGE signed March 21, 1997 (hereinafter, "Master Agreement"). This National Grievance is filed against VA and any and all other associated VA officials regarding violations of the Master Agreement Article 42, Section 2C, *Note 1*, and any other relevant governing laws and regulations, Master Agreement provisions and past practice. (See Attachment).

Initially, AFGE notes that Article 42, Section C1-C3 reads as follows:

> Under Title 38 Section 7422, the following exclusions also apply:
> 1. Any matter or question concerning or arising out of professional conduct or competence such as direct patient care or clinical competence,
> 2. Any matter or question concerning or arising out of peer review, and/or
> 3. Any matter or question concerning or arising out of the establishment, determination, or adjustment of employee compensation under this Title.

More importantly, and pertinent to the issue at hand, AFGE points out that pursuant to *Note 1* under the above cited section:

> Any questions concerning the extent of the exclusions in Paragraphs C1-C3 will be resolved in accordance with the VA Partnership Council's *Guide To Collective Bargaining and Joint Resolution of 38 USC Section 7422 Issues* (hereinafter, Primer) which provides that these exclusions will be applied narrowly and only to those matters clearly and unequivocally involving direct hands-on patient care or clinical competence. (See Attachment).

AFGE contends that in recent Midterm negotiations regarding defining the term "emergency" for Title 38 employees, AFGE's negotiating team attempted to apply the provisions of the Primer; however, VA refused to apply it to the issues before them. AFGE maintains that the Primer is an enforceable document agreed to jointly by VA and AFGE in 1995. This contention is further established by the parties incorporation of
Note 1 under Article 42 of the Master Agreement cited above. Further, under the Primer, disputes about the applicability of Section 7422(b) exclusions are submitted to the VA National Partnership Council.

Additionally, AFGE maintains that the Primer does two things. First, it establishes a "procedure" by which AFGE and the VA could "resolve" disputes over the applicability of the 38 USC 7422(b) exclusions to labor-management disputes. Second, the Primer seeks to define which items are excluded from the bargaining table under the 38 U.S.C. 7422(b) exclusions and which items are subjects of mandatory bargaining for the VA notwithstanding the exclusions.

In this vein, AFGE contends that since the Primer is currently incorporated in Article 42 of the Master Agreement, it is enforceable and VA must adhere to it in resolving Title 38, Section 7422 disputes before the Under Secretary of Health makes a ruling. AFGE maintains that VA's refusal to abide by the provisions of the Primer is a direct violation of Article 42, Section 2C, *Note 1* of the Master Agreement.

In light of the above, it is AFGE's position that VA management officials should immediately cease and desist from violating Article 42, Section 2C, *Note 1*, and any other relevant governing laws and regulations, Master Agreement provisions and past practice relating to the Primer. Further, it is AFGE's position that VA management officials should immediately adhere to the provisions of the Primer as agreed to by the parties and as set forth in the Master Agreement Article 42, Section 2C, *Note 1* and any other relevant governing laws and regulations, Master Agreement provisions and past practice.

This is a National Grievance and the time frame for resolution of this matter is not waived until the matter is resolved or settled. If you have any questions regarding this National Grievance, please feel free to contact me at 202-639-6415.

Sincerely,

Mark D. Roth
General Counsel

cc: John Gage, President, AFGE
J. David Cox, National Secretary-Treasurer, AFGE
Jane Nygaard, National Vice President, AFGE
Alma Lee, President, AFGE-NVAC
Jacqueline Sims, Assistant General Counsel, AFGE-NVAC
William Wetmore, Chairman, Grievance and Arbitration Committee, AFGE-NVAC

SPECIAL ISSUES IN LABOR RELATIONS WITH TITLE 38 MEDICAL PROFESSIONALS

Labor-management relations with Title 38 health care professionals present unique issues not involved in standard Title 5 labor matters. These issues may arise in:

- *negotiations* between VHA facilities and labor unions representing title 38 employees;
- *grievances* filed by or on behalf of title 38 employees under negotiated grievance procedures;
- *disciplinary actions* (other than major adverse actions) in which a title 38 employee's appeal rights depend upon whether the misconduct was a matter of professional conduct or competence;
- *ULPs* brought by health care professionals' unions; or
- *litigation* before FLRA, FSIP, arbitrators, or courts.

Regional Counsel attorneys and other field personnel whose responsibilities include labor relations with title 38 employees should familiarize themselves with these issues so as to effectively assist VHA facilities in dealing with these specialized problems.

OVERVIEW OF THE LAW

Prior to the 1990s, Title 38 health care workers had no right to engage in collective bargaining at all. In 1991, Congress granted non-hybrid title 38 employees -- physicians, dentist, podiatrists, optometrists, registered nurses, physician assistants, and expanded-duty dental assistants – limited collective bargaining rights, but specifically excluded collective bargaining over certain issues: namely, ***matters arising out of (1) professional conduct or competence (meaning direct patient care and clinical competence); (2) peer review; and (3) compensation***. These exemptions are often referred to as "7422 matters," a reference to the statute – 38 U.S.C. § 7422 – that provides the the specific exclusions.

Under section 7422, issues involving direct patient care, clinical competence, peer review, and compensation for health care workers are not subject to negotiation with labor unions, nor can such matters be grieved under negotiated grievance procedures. In addition, arbitrators and third parties such as the FLRA have no jurisdiction to review matters falling within one of the 7422 exemptions. The statute gives the Secretary of Veterans Affairs the sole authority to determine whether an issue falls within the statutory exemptions. The Secretary has delegated that authority to the Under Secretary for Health (USH). If the USH finds a matter to be non-negotiable under section 7422, then the issue is *absolutely* outside the scope of collective bargaining – there is no bargaining over impact and implementation and no jurisdiction to involve arbitrators, FLRA, or FSIP in resolving the dispute. However, proposals for procedures that are peripheral to an exempted issue may not be subject to the

exemptions; the particulars of a given proposal determine whether it falls inside or outside the 7422 exemptions.

Specific examples of issues that have been found to fall within the 7422 exemptions can be found on VA's Office of Labor Management Relations (LMR) website, which posts prior USH decisions. Go to www.va.gov/lmr, click on "Title 38 § 7422" on the menu at the left of the screen, then scroll down to find the prior decisions toward the bottom of the main webpage. In addition, OHRM's website has an internet-based course for HRM specialists that gives general information on 7422 issues. Go to http://vaww.ees.aac.va.gov/t38/default_two.htm and click on *Section VI: Labor Management Relations* on the menu on the left.

THE 38 U.S.C. §7422 PROCEDURE

The 7422 exemptions are not self-effectuating. Only when the USH has determined, in writing, an issue to be non-negotiable or non-grievable do the exemptions and prohibition against external administrative review attach. For this reason, the procedure for obtaining an USH determination must be initiated as soon as a potential 7422 issue arises, and VA should not assert a 7422 exemption before FLRA, FSIP, or another external authority unless and until the USH has actually determined the matter to be exempt. FLRA, FSIP, and arbitrators should, however, be notified that a 7422 decision request has been forwarded to the USH, and such authorities should be asked to suspend proceedings pending the USH's decision in the case.

The first step in the 7422 decision process should be a consultation with Regional Counsel and/or with a GC attorney in PSG III who specializes in labor relations law and/or a member of the Central Office LMR group staff. These specialists' names and contact information are listed below. In consultation with the local Regional Counsel attorney handling the matter, GC and LMR specialists will help the facility frame the issue and determine whether it is, in fact, appropriate for USH review. If a union has merely made a proposal or threatened action but has not yet filed a negotiability appeal or ULP claim, then the issue may not yet be ripe for decision by the USH. On the other hand, the determination process must not be put off, as FLRA and other external agencies generally require a finalized, signed USH decision to terminate a case under section 7422. It may be helpful to review the prior 7422 decisions posted on LMR's website (www.va.gov/lmr) to see whether the USH has determined similar or analogous issues to be 7422-exempt in the past.

If, after consultation with PSG III and LMR and reviewing prior USH decisions, the issue seems to require a decision by the USH, the Director of the affected VHA facility should send a written request to the USH for a 7422 determination. (Please see the attached sample request, discussed more fully below.) At a minimum, the request must provide:

- the underlying facts giving rise to the 7422 issue, including copies of any pertinent documents;

- the procedural posture of the case necessitating the USH's decision (e.g. grievance, ULP, or negotiability appeal filing), including copies of any pertinent documents;
- citations to any pertinent VA regulations;
- If there is a prior USH decision on point, a reference to that decision.

A sample of a completed request is attached for your reference. Please note the parenthetical bold language is merely for identification of the above-mentioned requirements and should not be contained in the final request.

The request for a decision must be signed by the facility director and submitted to the USH through LMR. In addition, the request should state what efforts have been taken to resolve the issue informally with the union in the spirit of collaboration. A copy should be provided to the local union. They should be advised that they are free to submit their views on the issue(s) to the USH through LMR. To avoid unnecessary delays, the request should be sent via Federal Express or other overnight courier (using the correspondence code LMR). Once the request is received in VACO, LMR and PSG III specialists will work together to prepare a decision paper for the USH. That paper will be reviewed for GC concurrence and then submitted to the USH for his consideration. This process can take as little as two weeks or as long as eight weeks to complete, depending upon the complexity of the issues involved.

Once the USH decides that an issue is subject to one of the 7422 exemptions, that decision divests the FLRA, FSIP, or arbitrator of jurisdiction to resolve the matter. At this point the third party authority (FLRA, FSIP, etc.) should be provided with a copy of the decision paper and reminded of the case law precluding third-party jurisdiction over matters deemed exempt by the Under Secretary (e.g., *VAMC Asheville and AFGE Local 446*, 57 FLRA No. 137 (2002) (ULP case); *Dep't of Veterans Affairs, Veterans Affairs Med. Ctr., Wash., D.C.*, 53 FLRA 822 (1997) (ULP case); *Wis. Fed'n of Nurses & Health Prof'ls, Veterans Admin. Staff Nurses Council, Local 5032*, 47 FLRA 910, 913-14 (1993) (negotiability case). If an issue has been briefed for the Under Secretary but no decision has yet been rendered, management should request that proceedings before the FLRA, FSIP, etc. be stayed pending the issuance of the Under Secretary's decision.

Notification to the National Union