DEPARTMENT OF VETERANS AFFAIRS
DEPUTY ASSISTANT SECRETARY FOR
HUMAN RESOURCES MANAGEMENT AND LABOR RELATIONS
WASHINGTON DC 20420

April 14, 2008

Mark D. Roth
General Counsel
American Federation of Government Employees
80 F. Street, N.W.
Washington, DC 20001

Dear Mr. Roth:

This is in response to your March 12, 2008, grievance alleging violations of Article 42, Section 2C, *Note 1,* of the VA/AFGE Master Agreement. Note 1 provides as follows:

> Note 1: Any questions concerning the extent of the exclusions in Paragraph C1-C3 [38 U.S.C. § 7422 exclusions] will be resolved in accordance with the *VA Partnership Council's Guide to Collective Bargaining and Joint Resolution of 38 USC Section 7422 Issues*, 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.

The statute referenced in Note 1, 38 U.S.C. § 7422, excludes certain subjects (professional conduct or competence, peer review, and the establishment, determination or adjustment of Title 38 employee compensation) from collective bargaining and from the negotiated grievance procedure. The statute also provides, in subsection (d), that "an issue of whether a matter or question concerns or arises out of [one of the excluded subjects] . . . shall be decided by the [VA] Secretary and is not itself subject to collective bargaining and may not be reviewed by any other agency." The VA Secretary has delegated the authority provided in 38 U.S.C. § 7422(d) to the Under Secretary for Health (USH).

The *VA Partnership Council's Guide to Collective Bargaining and Joint Resolution of 38 USC Section 7422 Issues* ("Primer"), referred to in Note 1, was a guidance document developed and agreed to by the National Partnership Council (NPC) in or around 1995.[1] The Primer established a pre-decisional notification and resolution process by which the NPC could weigh in on 38 U.S.C. § 7422 issues before the USH issued a negotiability or grievability decision under 38 U.S.C. § 7422(d). More specifically, the Primer required that 38 U.S.C. § 7422 negotiability or grievability disputes arising at a local Veterans Health Administration ("VHA") facility would first be referred to the facility-level labor-management partnership council, which would "make every reasonable effort" to resolve the dispute. If local resolution efforts failed, the local parties would send a written request for resolution to the USH, who would forward copies of the request to all of the national labor unions represented on the NPC and would afford those unions 30 days to

[1] Attached for your reference is a copy of the rescinded Primer. The document attached to the grievance is a draft of management's proposed new guidance that Ron Cowles sent to all the NPC partners prior to the issuance of the September 2003 guidance, with what appears to be AFGE's comments on the proposed new guidance.

submit their analyses and recommendations on the subject dispute to the USH. Only after both the local and national Partnership Councils had weighed in could the USH issue a negotiability or grievability determination under the authority afforded by 38 U.S.C. § 7422(d).

In 2003, the then-Management Co-Chair of the NPC, Ron Cowles, notified the NPC of VA management's desire to expedite the process by which 38 U.S.C. § 7422 issues were referred to the USH for decision so that union input would be solicited and considered at the level at which the issue arose, but local issues would not be routed through the NPC for national-level union consideration. The NPC -- including the then-Labor Co-Chair, J. David Cox, and the three (3) other AFGE-NVAC members of the NPC -- discussed management's proposed revised guidance document on several occasions, both via email and in a specially scheduled NPC conference call. Following the NPC's discussions, Mr. Cowles incorporated several comments raised by the NPC's labor partners into the revised guidance document and transmitted the revised document to all the NPC members via electronic mail on September 2, 2003. During that same month, the Office of Labor Management Relations (LMR) deleted the Primer from its website and posted the September 2003 guidance document in its place. In addition, VA management issued revisions to VA Handbook 5023, Labor-Management Relations, on June 16, 2004 to eliminate the reference to the Primer and to add a reference to the 2003 guidance document that was posted on the LMR website.

Between September 2003 and the date of your grievance, the USH issued 38 U.S.C. § 7422(d) negotiability or grievability determinations on no fewer than forty (40) AFGE grievances or proposals, including two (2) raised by AFGE-NVAC at the national level.[2] In all forty (40) cases, the expedited process set forth in the September 2003 guidance document was used. In none of those forty (40) cases were copies of the local parties' requests for 38 U.S.C. § 7422(d) determinations routed to the NPC, as had been the case under the Primer.

On September 12, 2007, the AFGE-NVAC Labor-Management Relations (LMR) Committee raised a concern about the "ripeness" requirement of the revised 38 U.S.C. § 7422 process during the LMR Committee's questioning of the undersigned. That discussion centered on an August 24, 2007 letter sent by the VA Office of Labor-Management Relations to local labor and management at the VA Iliana Health Care System, stating that the USH would not process the local parties' request for a 38 U.S.C. § 7422(d) determination on a bargaining proposal submitted by the union because there was no grievance or litigation matter pending in that case. The AFGE-NVAC LMR members stated during the September 12, 2007 meeting that they felt the "ripeness" standard imposed by the September 2003 guidance document discouraged informal resolution of 38 U.S.C. § 7422 issues. At no time during this discussion, however, did any of the AFGE-NVAC representatives express a belief that the Primer was still in effect.

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[2] These issues included a national grievance filed by AFGE-NVAC on May 16, 2006, over VHA's implementation of the Department of Veterans Affairs Personnel Enhancement Act of 2004, which the USH found to be non-grievable on March 2, 2007, and two bargaining proposals submitted by AFGE-NVAC's national Title 38 mid-term bargaining committee relating to proposed revisions to VA Handbook 5011, Hours of Work and Leave, which proposals the USH determined to be non-negotiable on October 2, 2007.

On January 8, 2008, at the start of the NPC meeting in San Antonio, TX, AFGE-NVAC President and NPC Labor Co-Chair Alma Lee asked the undersigned how it was that the Primer came to be rescinded. The undersigned explained that she was not part of the NPC at the time, but that she believed VA management had proposed a more expedited process; that such proposal had been discussed with the NPC; and that new guidance had been issued in 2003 to replace the Primer.

As this history reflects, AFGE-NVAC was notified of management's intent to revise the 38 U.S.C. § 7422 decision process in mid-2003; was afforded the opportunity to comment on the proposed new process at that time; and was notified that the new process would take effect, replacing the Primer, in September 2003. AFGE-NVAC was aware that September 2003 guidance was in place when the LMR website and VA Handbook 5023 were revised to show the 2003 guidance; when the USH used the 2003 process to decide no fewer than forty (40) 38 U.S.C. § 7422(d) issues, including two raised by AFGE-NVAC at the national level, over a nearly five-year period; when the "ripeness" requirement under the 2003 guidance was discussed at the September 12, 2007 AFGE-NVAC LMR Committee meeting; and when Alma Lee questioned the rescission of the Primer at the January 8, 2008 NPC meeting. The March 12, 2008 grievance – filed five and a half years after the Primer was rescinded and significantly more than 30 days after each of the other events enumerated herein – is thus untimely under Article 42, Section 11.A. of the VA-AFGE Master Agreement.

In the grievance you allege that "in recent Midterm negotiations regarding defining the term 'emergency' for Title 38 employees,[3] AFGE's negotiating team attempted to apply the provisions of the Primer; however, VA refused to apply it to the issue before them." This is patently untrue. The AFGE-NVAC negotiating team never mentioned the Primer, orally or in writing, to any of the VA management officials involved in those negotiations. Moreover, the position paper that AFGE-NVAC submitted to the USH in that matter was submitted in accordance with the September 2003 guidance process and made no reference to the Primer. Nor did AFGE-NVAC mention the Primer, demand adherence to the Primer process, or to comport itself in accordance with the Primer when the USH considered the grievability of AFGE-NVAC's May 16, 2006 national grievance relating to the Department of Veterans Affairs Personnel Enhancement Act of 2004.[4]

Your grievance is also untenable from a substantive perspective. As noted above, 38 U.S.C. § 7422(d) reserves to the Secretary of Veterans Affairs the authority to determine whether a particular topic or issue falls within one of the 38 U.S.C. § 7422(b) collective bargaining exclusions, and specifies that such authority is not itself subject to collective bargaining. The Secretary's authority, which has been delegated to the USH, constitutes a management deliberative process that is not subject to collective bargaining. The Primer cannot properly be characterized as a binding collective bargaining agreement when the document's subject matter is clearly not subject to negotiation.

Moreover, as noted above, the Primer was a developed and implemented under the authority of President Clinton's revoked Executive Order 12871. As stated in Secretary Principi's December 11, 2001, *Memorandum to Members of VA's National Partnership*

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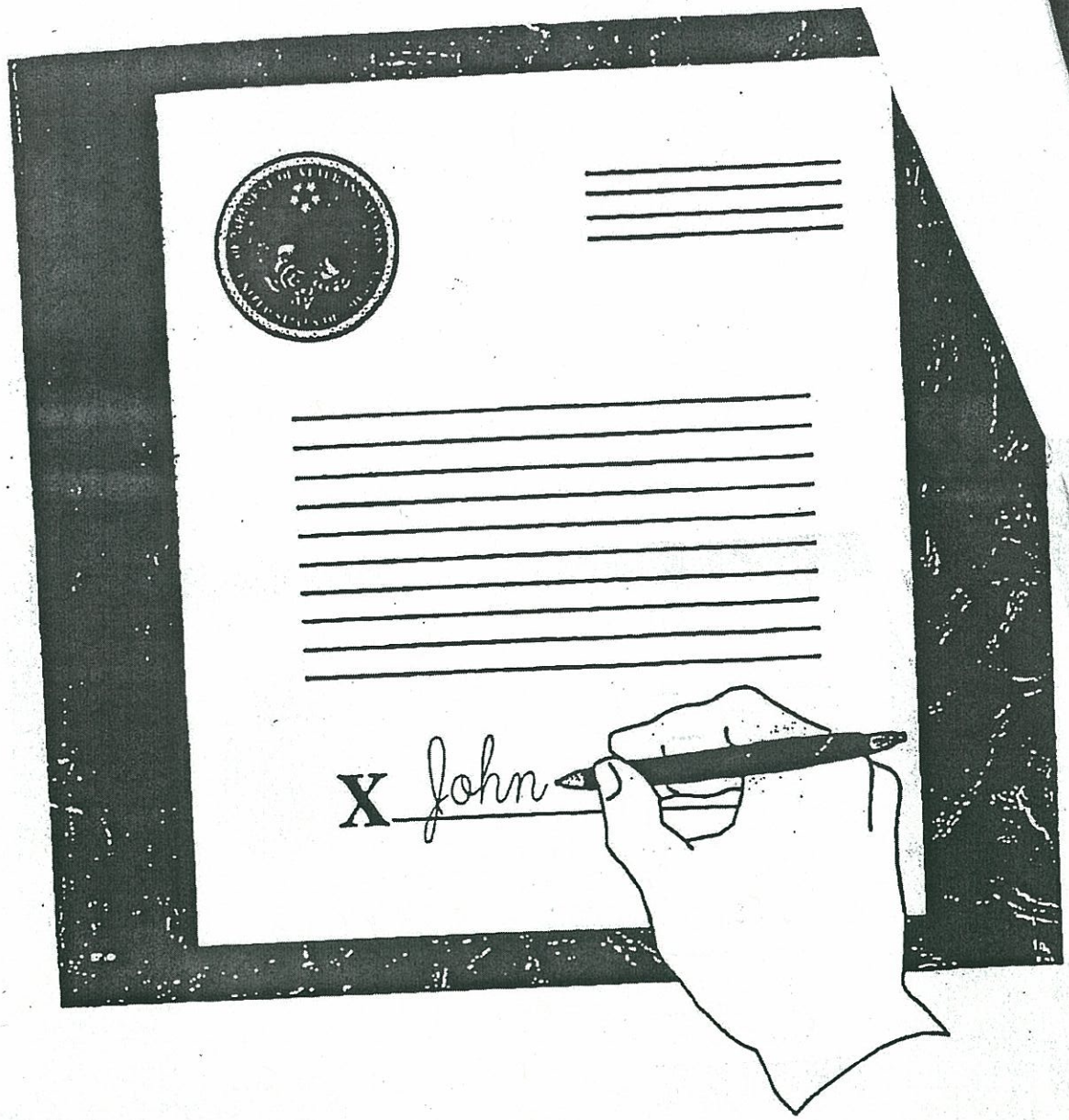
[3] Two of the proposals offered by AFGE in these negotiations were the subject of the October 2, 2007, 38 U.S.C. § 7422(d) determination referred to in Footnote 1 above.
[4] See Footnote 1 above.

Council, documents that were used to implement partnership, such as the Primer, were rescinded in whole or in part, to comply with President Bush's Executive Order 13203. While FLRA has found some partnership-era agreements to constitute past practices that cannot be unilaterally rescinded, see, e.g., *U. S. Department of Labor, Mine Safety and Health Administration and AFGE, National Council of Field Labor Locals*, 61 FLRA 232, 61 FLRA No. 42 (2005), such analysis cannot be applied to the Primer, which, as noted above, was rescinded in 2003 with no objection from AFGE-NVAC until 2008.

For the above stated reasons, the grievance is denied.

Sincerely yours,

Meghan Flanz
Deputy Assistant Secretary
For Labor-Management Relations



THE VA PARTNERSHIP COUNCIL'S GUIDE TO COLLECTIVE BARGAINING AND JOINT RESOLUTION OF 38 U.S.C. §7422 ISSUES

INTRODUCTION

In Executive Order 12871, President Clinton directed all federal agencies to allow their employees to contribute to the fullest extent possible in determining how the agency can best serve its customers. To do this, the President directed all agencies to develop partnership relations with their employees' unions. Additionally, the President ordered most agencies to bargain with the unions representing their employees on, among other things, the methods, means, and technology of performing work and the numbers, types, and grades of employees assigned to various work units or shifts.

This handbook explains how the President's order will be complied with as it applies to Title 38 employees, in light of 38 U.S.C. §7422(b). That section bars bargaining over the following particular subjects:

> (1) any matter or question concerning or arising out of professional conduct or competence, i.e., direct patient care or clinical competence;
>
> (2) any matter or question concerning or arising out of peer review; and
>
> (3) any matter or question concerning or arising out of the establishment, determination, or adjustment of employee compensation under this title.

The Title 38 restrictions on the scope of bargaining reflect a congressional determination that the listed subjects cannot be appropriately dealt with in the negotiation system that had developed under the federal sector labor relations law. The restrictions do not reflect a hostility to employee involvement in ways that avoid the problems of the old labor relations system.

Union-agency relations under the old system, not just in VA but throughout the federal government, were adversarial, litigious, dilatory, distracting, and non-credible. The unions and management in VA are now committed to creating a new system, as envisioned by President Clinton's October 1993 executive order. It is worth comparing the two systems:

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OLD	NEW
Adversarial: The union's goal was to get as much as possible, and management's goal was to give as little as possible. The legitimate interests of the parties were not always considered.	We will use interest-based problem solving in order to meet the legitimate objectives of all concerned. We recognize that the employees have a deep stake in the quality and efficiency of the work performed by the agency.
Dilatory: In contract bargaining, management was motivated to delay. In bargaining over the impact and implementation of management decisions, the union was motivated to delay.	We share a sense of urgency in addressing the problems of the agency which, if not soon cured, threaten the jobs of all of us.
Litigious: Disagreements were framed in legal terms, and negotiations were delayed while the FLRA and courts considered the legal issues.	Management will have no incentive to avoid dealing except to the minimum absolutely required by the law. Thus, there will be no need to litigate what that minimum is. Besides, the unions gain nothing from discussions which cannot yield results until after years of litigation.
Distracting: Contract negotiations concentrated on matters which were of marginal importance to the employees and the agency.	We are going to concentrate on issues of the utmost importance to the employees and the agency.
Noncredible: Impasses were resolved by individuals whom neither management nor the union believed understand the needs of the agency or the employees.	We will avoid delegating decision-making power to any outsider. If we seek advice or training from the outside, it will be from people that both sides trust.

TITLE 38 ISSUES WITHIN THE LOCAL PARTNERSHIP

As long as the law remains as it is, there cannot be written contracts which control patient care, clinical competence, peer review, etc. Ambiguous contracts cannot be construed to control these matters. On the other hand, the law certainly allows management to try to reach consensus with the unions on these subjects, to make commitments based on that consensus, and to keep those commitments. That is how the unions and the agency are going to try to deal with Title 38 issues.

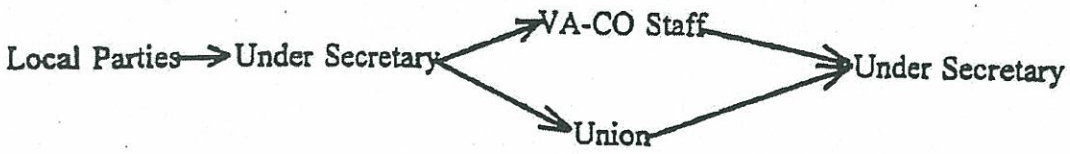
The purpose of labor-management partnership is to get the front line employees directly involved in identifying problems and crafting solutions to better serve the agency's customers and mission. In practice, the solutions that are developed will rarely be appropriate to place in a contract. If a consensus is reached on the proper mix of staff in an intensive care unit ("ICU"), management will simply make the change. It would, however, contradict the purpose of government reinvention to say that that particular mix must stay in effect for some arbitrary period of time. The local partnership will be continuously monitoring the quality of service provided by that ICU. If either party sees a problem, the partnership will revisit the staffing issue.

DECISION-MAKING UNDER 38 U.S.C. §7422 IN THE CONTEXT OF PARTNERSHIP

The union members of the VA Partnership Council recognize that a decision as to whether a matter falls within the "professional conduct or competence" exception of 38 U.S.C. §7422(b) rests with the Under Secretary. VA recognizes, however, consistent with the spirit and letter of Executive Order 12871, labor organizations representing VA's medical professionals are to play a role in how decisions affecting those employees are made.

The final voice within the department as to the scope of bargaining belongs to the Under Secretary. Nevertheless, all such decisions should be made with the pre-decisional involvement of VA's union partners. The VA Partnership Council has crafted two mechanisms ensuring the pre-decisional involvement of VA's union partners: one for issues arising at a particular facility and one for addressing national level issues.

Local level issues: The members of the VA Partnership Council have jointly decided upon the structure for decision-making under 38 U.S.C. §7422 for matters arising at the local level. That structure is envisioned as:



When issues concerning the application of §7422 arise at the local level, management and the union will make every reasonable effort to resolve the dispute within the local partnership council. If that fails, the matter should be forwarded to the VA Central Office ("VACO"), for further attempts at mutually satisfactory resolution and, if necessary, decision by the Under Secretary.

The request for action should be addressed to the Under Secretary. It may be initiated by the local parties jointly, by the local partnership, or either of the local parties separately. The Under Secretary will not decide the matter until the national unions have had an opportunity to address it through the process described below.

Upon receipt of the request, the Under Secretary will forward copies to the unions represented on the National VA Partnership Council. Within 30 days of their receipt of the documents, the unions -- jointly or separately -- may submit their analyses and recommendations to the Under Secretary.

It is presumed that the Under Secretary will also seek the advice of VACO staff, including the office of labor management relations and the office of general counsel. Any such advice must be provided within the same deadlines as apply to the unions.

Although in the interest of speed and of avoiding unnecessary bureaucratization, there is no requirement that every issue forwarded by the local parties be formally considered by the National VA Partnership Council, it is expected that in some cases national level attempts will be made to resolve the issue by consensus.

If national consensus is reached, it is expected that the local parties will proceed in accordance with it, without any need for a formal decision by the Under Secretary. Otherwise -- if there is no national consensus within the deadline for national party submissions to the Under Secretary, or if one of the local parties refuses to abide by the consensus -- the Under Secretary will be advised of the need to issue a decision. Decisions of the Under Secretary will be stored in a database or some other form that may be accessed by both union and agency parties.

National level issues: For those issues/matters arising at the national level, requests for a decision as to the negotiability of a matter under 38 U.S.C. §7422 may be submitted to the VA Partnership Council. The members (unions and agency) of the council will make a good faith effort to find a solution to the underlying dispute which will avoid the necessity of a decision on the legal issue. If that fails, the council will attempt to reach a consensus on the legal issue, and urge the parties to dispose of the case based on that consensus. The Under Secretary will be informed of any consensus advice of the council. If there is not consensus, the Under Secretary will be provided the views of the various council members.

TITLE 38 ISSUES WITHIN THE FRAMEWORK OF NEGOTIATIONS AND ARBITRATION

During the transition from the old to the new system, there are sure to be mistakes and disagreements. These will be treated as opportunities for the parties to learn, rather than grounds for winning or losing appeals.

With respect to the Title 38 issues, disputes are going to arise in at least the following three situations:

* contract negotiations
* contract enforcement
* disciplinary actions

Contract negotiations: Collective bargaining over peer review matters, professional conduct or competence, i.e., direct patient care and/or clinical competence, is precluded by the law governing Title 38 employees. Thus, there are not going to be contract provisions defining the proper care for particular types of patients, or that bar the agency from using peer review procedures established by law. Nevertheless, the parties will attempt to craft solutions in partnership to address problems in these areas.

In the past, the disputes concerned proposals which management believed, if agreed to, might at some time during the life of the contract interfere with the agency's management rights and responsibilities, such as patient care. Quality patient care is recognized as an interest of both sides which must be protected or enhanced by any contract. Both parties will seek to develop contract provisions, not involving the excluded matters, which respect the patient care interest while also achieving the interest underlying the original proposal.

Contract enforcement: What if management believes that it cannot comply with an existing contract clause which is contrary to the restrictions of §7422.

Management's first resort should be to the local partnership council. If maintaining the current schedule is truly important to the employees, then the union would be obliged to propose viable alternative means of providing the necessary quality of care. If, within the partnership, the parties agree to the change, it would be implemented. If the parties cannot agree after utilizing the process outlined previously in pages 3-4 of this document, the union may seek review as provided by law.

Disciplinary actions: Title 38 requires that appeals of major disciplinary actions involving patient care or clinical competence issues be decided by peer review boards rather than by arbitrators or the Merit Systems Protection Board ("MSPB"). Many cases will clearly fall within one system or the other. For some cases, however, the parties may have difficulty determining which forum to use. When the matter does not clearly involve direct patient care or clinical competence, one factor that is helpful to consider is whether the application of professional judgment is required in order to decide the merits of the case. However, if the parties are in disagreement over whether a matter arises out of or involves a question of professional conduct or competence, Title 38 provides that the Disciplinary Appeals Board has exclusive jurisdiction to decide that issue.

EXAMPLES OF THE TITLE 38 EXCLUSION OF SUBJECTS FOR BARGAINING

Outside the partnership, management retains unilateral responsibility to make decisions with respect to employees' professional conduct and clinical competence as these relate to patient care. Matters relating to professional conduct and competence are not subject to collective bargaining or negotiated grievance procedures. However, the definition of professional conduct and competence has often been the subject of dispute between labor and management. **The Secretary has decided that VA will apply the exception to bargaining based on professional conduct or competence "narrowly to matters clearly and unequivocally involving direct hand-on patient care or clinical competence."** Therefore, labor and management parties must be mindful of the fact that many matters affecting the working conditions of Title 38 employees affect patient care only indirectly and therefore should be subject to bargaining.

No contract or arbitration should attempt to define the care which is given to patients. Nor should a contract or arbitration define the professional qualifications for positions or whether particular employees meet those qualifications.

To be sure, it is the responsibility of both parties to avoid agreements which will make it impossible to provide proper levels of patient care. Similarly, both parties must be aware of, and consciously take account of, the costs associated with the employee benefits. For example, scheduling shifts substantially in advance, so that employees can plan family and civic activities, may make it more expensive to meet patient care standards under certain

circumstances. That does not relieve management of either the responsibility to assure proper patient care or to bargain over employee working conditions.

Collective bargaining and arbitration should not attempt to control the scope of peer review or the outcome of particular cases.

Under Title 38, pay scales are set by the agency, outside of collective bargaining and arbitration. Left within the scope of bargaining and arbitration are such matters as: procedures for collecting and analyzing data used in determining scales, alleged failures to pay in accordance with the applicable scale, rules for earning overtime and for earning and using compensatory time, and alternative work schedules.

This primer and its contents were developed by the members of the Title 38 Subgroup of the VA National Partnership Council. VA representatives on the subgroup were designated by the VA members of the Partnership Council; Union representatives on the subgroup were designated by the Union members of the Partnership Council. The substance and wording of the primer are the products of the consensus of the members of the subgroup. By consensus, the VA National Partnership Council adopted the primer.

The members of the Title 38 Subgroup who worked on this primer were:

Walt Glockler
Vice-President, AFGE VA Council & Co-chair, VA National Partnership Council

Audley Hendricks
Assistant General Counsel, VA

Dr. Tom Horvath
Director, Mental Health & Behavior Sciences Service

Phillip Kete
Staff Counsel, NFFE

Alma Lee
President, AFGE National VA Council

Alexia McCaskill
Staff Counsel, AFGE

Ronald Norby
Director, Field Support and Clinical Integration Nursing Program

Lorraine Payton
President, NFFE VA Counsel

Susanne Pooler
National Vice President, NAGE

Jack Price
Staff Director Management Support Office

Mark Roth
General Counsel, AFGE

Barbara Sapin
Labor Counsel, ANA

Steve Schwartz
Director of Professional Council SEIU, AFL-CIO, CLC

Dan Sobrio
Director, Labor-Management Relations Services