

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C. 20424-0001

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| DEPARTMENT OF VETERANS AFFAIRS VETERANS AFFAIRS MEDICAL CENTER TULSA OUTPATIENT CLINIC TULSA, OKLAHOMA Respondent | Case No. DA-CA-90322 |
| and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 2250 Charging Party | |

NOTICE OF TRANSMITTAL OF DECISION

The above-entitled case having been heard before the undersigned Administrative Law Judge pursuant to the Statute and the Rules and Regulations of the Authority, the undersigned herein serves his Decision, a copy of which is attached hereto, on all parties to the proceeding on this date and this case is hereby transferred to the Federal Labor Relations Authority pursuant to 5 C.F.R. § 2423.34(b).

PLEASE BE ADVISED that the filing of exceptions to the attached Decision is governed by 5 C.F.R. §§ 2423.40-2423.41, 2429.12, 2429.21-2429.22, 2429.24-2429.25, and 2429.27.

Any such exceptions must be filed on or before **DECEMBER 11, 2000**, and addressed to:

Federal Labor Relations Authority
Office of Case Control
607 14th Street, NW, 4th Floor
Washington, DC 20424-0001

GARVIN LEE OLIVER
Administrative Law Judge

Dated: November 9, 2000
Washington, DC

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C. 20424-0001

MEMORANDUM

DATE: November 9, 2000

TO: The Federal Labor Relations Authority

FROM: GARVIN LEE OLIVER
Administrative Law Judge

SUBJECT: DEPARTMENT OF VETERANS AFFAIRS
VETERANS AFFAIRS MEDICAL CENTER
TULSA OUTPATIENT CLINIC
TULSA, OKLAHOMA

Respondent

and

Case No. DA-CA-90322

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 2250

Charging Party

Pursuant to section 2423.34(b) of the Rules and Regulations, 5 C.F.R. § 2423.34(b), I am hereby transferring the above case to the Authority. Enclosed are copies of my Decision, the service sheet, and the transmittal form sent to the parties. Also enclosed are the motions, exhibits, and correspondence filed by the parties.

Enclosures

FEDERAL LABOR RELATIONS AUTHORITY

Office of Administrative Law Judges

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WASHINGTON, D.C.

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| DEPARTMENT OF VETERANS AFFAIRS VETERANS AFFAIRS MEDICAL CENTER TULSA OUTPATIENT CLINIC TULSA, OKLAHOMA Respondent | Case No. DA-CA-90322 |
| and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 2250 Charging Party | |

Clifton L. Rowe
Counsel for the Respondent

Mary A. Larson
Counsel for the General Counsel, FLRA

Before: GARVIN LEE OLIVER
Administrative Law Judge

DECISION

Statement of the Case

The unfair labor practice complaint alleges that Respondent violated section 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (the Statute), 5 U.S.C. §§ 7116(a)(1) and (5), by reassigning Anthony C. Gagliano, a bargaining unit employee, from Behavioral Medicine to Primary Care without providing the Charging Party (the Union) with notice and an opportunity to negotiate to the extent required by the Statute.

The Respondent contends that the reassignment was nonnegotiable as Gagliano is a Title 38 physician. Respondent claims that Gagliano's reassignment concerns

professional conduct and competency based on the Under Secretary's determinations under 38 U.S.C. § 7422 in other cases. Therefore, according to the Respondent, the matter is excluded from the Authority's jurisdiction.

Subsequent to the filing of the complaint and the answer, Counsel for the Respondent moved to dismiss or for summary judgment. Counsel for the General Counsel filed a response to the motion and a cross-motion for summary judgment.

Considering all the pleadings and exhibits, it appears that there are no genuine issues of material fact and that the General Counsel is entitled to summary judgment as a matter of law. Accordingly, I make the following findings of fact, conclusions of law, and recommendations.

Findings of Fact

The American Federation of Government Employees (AFGE) is the exclusive representative of a unit of employees appropriate for collective bargaining at the Respondent. The Union, AFGE, Local 2250, is an agent of AFGE for representing unit employees at Respondent's Tulsa Outpatient Clinic, Tulsa, Oklahoma.

Anthony C. Gagliano is an employee under 5 U.S.C. § 7103(a)(2) and a member of the bargaining unit. During all relevant times he was employed under 38 U.S.C. Chapter 74 as a permanent part-time physician. Dr. Gagliano was assigned as a staff psychiatrist in the Behavioral Medicine Service for some twenty-four years.

In January 1999, the Chief of Staff determined that, based upon a study of Dr. Gagliano's patient load, he would be better utilized performing duties as a psychiatrist in the Primary Care Service, also at the Tulsa Outpatient Clinic (Resp. Exh. A, E).

On or about January 29, 1999 Gagliano was notified that, due to his low workload, he would be reassigned for better utilization of his services from Behavioral Medicine to Primary Care effective February 8, 1999.

Upon learning of the reassignment, the Union contacted the Respondent and requested to negotiate the appropriate

arrangements and procedures of the reassignment. The Respondent failed to respond to the Union's request to bargain.

On or about February 8, 1999 Gagliano was reassigned from Behavioral Medicine to Primary Care. Dr. Gagliano has since retired from the Department of Veterans Affairs.

Discussion and Conclusions

A. The Duty to Bargain Under the Statute

Before implementing a change in conditions of employment affecting bargaining unit employees, an agency is required to provide the exclusive representative with notice of, and an opportunity to bargain over, those aspects of the change that are within the duty to bargain. See *Federal Bureau of Prisons, Federal Correctional Institution, Bastrop, Texas*, 55 FLRA 848, 852 (1999) (*FCI, Bastrop*); *U.S. Army Corps of Engineers, Memphis District, Memphis, Tennessee*, 53 FLRA 79, 81 (1997). Absent a waiver of bargaining rights, the mutual obligation to bargain must be satisfied before changes in conditions of employment are implemented. *Id.*; *National Weather Service Employees Organization and U.S. Department of Commerce, National Oceanic and Atmospheric Administration, National Weather Service*, 37 FLRA 392, 395 (1990).

The nature of the change in conditions of employment that management proposes to make dictates the extent of its duty to bargain. If the change is substantively negotiable, a union may bargain over the actual decision whether the change should be made. See, e.g., *Department of the Navy, Puget Sound Naval Shipyard, Bremerton, Washington*, 35 FLRA 153, 155 (1990). If the decision to change a condition of employment constitutes the exercise of a management right under section 7106 of the Statute, the substance of the decision to make the change is not negotiable, but the agency is nonetheless obligated to bargain over the impact and implementation of that decision if the resulting change will have more than a *de minimis* effect on conditions of employment. See *Department of Health and Human Services, Social Security Administration*, 24 FLRA 403, 407-08 (1986). In such circumstances, an agency which fails to provide adequate prior notice of the change to the affected

employees' exclusive representative or rejects the union's timely request for negotiations pursuant to section 7106(b) (2) and (3) of the Statute will be found to have violated section 7116(a) (1) and (5) of the Statute. See *FCI, Bastrop*, 55 FLRA at 852, and cases cited.

B. 38 U.S.C. § 7422

38 U.S.C. § 7422 provides, in pertinent part:

(a) Except as otherwise specifically provided in this title, the authority of the Secretary to prescribe regulations under section 7421 of this title is subject to the right of Federal employees to engage in collective bargaining with respect to conditions of employment

(b) Such collective bargaining (and any grievance procedures provided under a collective bargaining agreement) . . . may not cover, or have any applicability to, any matter or question concerning or arising out of (1) professional conduct or competence, (2) peer review, or (3) the establishment, determination, or adjustment of employee compensation under this title.

(c) For purposes of this section, the term "professional conduct or competence" means any of the following:

- (1) Direct patient care.
- (2) Clinical competence.

(d) An issue of whether a matter or question concerns or arises out of (1) professional conduct or competence, (2) peer review, or (3) the establishment, determination, or adjustment of employee compensation . . . shall be decided by the Secretary and is not itself subject to collective bargaining and may not be reviewed by any other agency.

38 U.S.C. § 7421, referenced in 38 U.S.C. § 7422, provides, in pertinent part:

(a) Notwithstanding any law, Executive order, or regulation, the Secretary shall prescribe by

regulation the hours and conditions of employment and leaves of absence of employees appointed under any provision of this chapter in positions in the Veterans Health Administration listed in subsection (b).

(b) Subsection (a) refers to the following positions:

(1) Physicians. . . .

There is no dispute that this case involves "collective bargaining" within the meaning of 38 U.S.C. § 7422, that Dr. Gagliano is a physician within the meaning of 38 U.S.C. § 7421(b)(1), that the reassignment of Dr. Gagliano involved the right of the Respondent to assign work pursuant to section 7106(a)(2)(B) of the Statute, and that the Union asserted the right to bargain pursuant to section 7106(b)(2) and (3) of the Statute concerning the appropriate arrangements and procedures of the reassignment.

The Respondent does not argue that the reasonably foreseeable impact of such reassignment was *de minimis*. As noted, it only contends that the reassignment was outside the scope of collective bargaining under 38 U.S.C. § 7422 as Gagliano is a Title 38 physician and his reassignment concerns professional conduct and competency. Therefore, according to the Respondent, the matter is excluded from the Authority's jurisdiction.

There is no assertion by the Respondent that it has exercised its authority under section 7421 to prescribe a regulation overriding the right of a labor organization to negotiate over the appropriate arrangements and procedures of a physician's reassignment, thus divesting the Authority of jurisdiction. *Cf. Department of Veterans Affairs, Veterans Affairs Medical Center, Washington, DC*, 53 FLRA 822 (1997) (VA); *Department of Veterans Affairs, Veterans Affairs Medical Center, Hampton, Virginia*, 51 FLRA 1741 (1996). Nor has the Secretary made a determination pursuant to 38 U.S.C. § 7422(d), that the issue raised in this case is a matter concerning or arising out of professional conduct or competence, which would also not be reviewable by the

Authority.¹ VA, 53 FLRA at 831; *Wisconsin Federation of Nurses and Health Professionals, Veterans Administration Staff Nurses Council, Local 5032 and U.S. Department of Veterans Affairs, Clement J. Zablocki Medical Center, Milwaukee, Wisconsin*, 47 FLRA 910, 913 (1993); *Veterans Administration, Long Beach, California*, 48 FLRA 970, 975 (1993).

The Respondent relies on previous specific determinations made pursuant to 38 U.S.C. § 7422(d) to argue generally that reassignments of health care professionals, such as that of Dr. Gagliano, fall within the meaning of professional conduct or competence as they directly affect patient care and, therefore, are nonnegotiable and nongrievable. The Respondent has furnished such a July 10, 1992 determination concerning the reassignment of a registered nurse at the Fayetteville, North Carolina facility, a July 20, 1992 determination concerning a nurse reassignment and performance evaluation at the Hampton, Virginia facility, and a July 7, 1994 determination concerning a nurse reassignment at the White River Junction, Vermont facility (Resp. Exh. B, C & D). These determinations pursuant to 38 U.S.C. § 7422(d) were made in light of specific facts and circumstances at a particular facility.

As noted, no such determination has been made in this case. In the absence of such a specific determination, pursuant to 38 U.S.C. § 7422(d), or a regulation addressing

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1/ Following a prehearing conference in this matter in November 1999, the scheduled hearing was indefinitely postponed and a decision on the Respondent's motion to dismiss or for summary judgement was held in abeyance while the Respondent sought the position of the Secretary, or his designee, "concerning whether 38 U.S.C. § 7422 precludes the Charging Party (Union) from receiving notice of the reassignment of Anthony C. Gagliano from Behavioral Medicine to Primary Care and the opportunity to negotiate, pursuant to 5 U.S.C. § 7106(b)(2) and (3), concerning procedures which management officials will observe and appropriate arrangements for adversely affected employees." The Respondent promptly requested the determination from the Acting Under Secretary, but was advised that the matter had been referred to the National Partnership Council for review and recommendation prior to being submitted to the Acting Under Secretary for decision. Status reports requested and submitted during the following year indicated that the National Partnership Council had not yet made its recommendation. Nearly a year later, on October 5, 2000, the Chief Administrative Law Judge ordered that the case would no longer be held in abeyance "[i]nasmuch as the Respondent has not furnished a definitive position on 38 U.S.C. § 7422, as requested in November 1999[.]"

the matter, pursuant to 38 U.S.C. §§ 7421(a) and 7422(a), the Union had a right to engage in collective bargaining and the Authority has jurisdiction to resolve the alleged unfair labor practice.

Based on the admitted material facts, including Respondent's acknowledgment that it failed to bargain in response to the Union's request, it is concluded that Respondent violated section 7116(a)(1) and (5) of the Statute, as alleged, by reassigning Anthony C. Gagliano, a bargaining unit employee, from Behavioral Medicine to Primary Care without providing the Union with notice and an opportunity to negotiate pursuant to section 7106(b)(2) and (3) of the Statute concerning the appropriate arrangements and procedures of the reassignment.

Based on the above findings and conclusions, it is recommended that the Authority deny the Respondent's Motion to Dismiss or in the alternative for Summary Judgment, grant the General Counsel's Cross-Motion for Summary Judgment, and issue the following Order:

ORDER

Pursuant to section 2423.41(c) of the Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute, it is hereby ordered that the Department of Veterans Affairs, Tulsa Outpatient Clinic, Tulsa, Oklahoma, shall:

1. Cease and desist from:

(a) Reassigning bargaining unit employees without providing the American Federation of Government Employees, Local 2250, the agent of the exclusive representative of bargaining unit employees, with notice and an opportunity to negotiate to the extent required by the Statute.

(b) In any like or related manner, interfering with, restraining, or coercing its employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Federal Service Labor-Management Relations Statute:

(a) Upon request, negotiate with the American Federation of Government Employees, Local 2250, concerning the impact and implementation of the reassignment of Dr. Anthony C. Gagliano on or about February 8, 1999.

(b) Post at its facilities in Tulsa, Oklahoma, where bargaining unit employees represented by the American Federation of Government Employees, Local 2250 are located, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Medical Center Director, and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced, or covered by any other material.

(c) Pursuant to section 2423.41(e) of the Authority's Rules and Regulations, notify the Regional Director, Dallas Regional Office, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

Issued, Washington, DC, November 9, 2000.

GARVIN LEE OLIVER
Administrative Law Judge

NOTICE TO ALL EMPLOYEES

POSTED BY ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

The Federal Labor Relations Authority has found that the Department of Veterans Affairs, Tulsa Outpatient Clinic, Tulsa, Oklahoma, violated the Federal Service Labor-Management Relations Statute, and has ordered us to post and abide by this Notice.

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT reassign bargaining unit employees represented by the American Federation of Government Employees, Local 2250, the agent of the exclusive representative of unit employees, without providing the Union with notice and an opportunity to negotiate to the extent required by the Statute.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce our employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

WE WILL, upon request, negotiate with the American Federation of Government Employees, Local 2250, concerning the impact and implementation of the reassignment of Dr. Anthony C. Gagliano on or about February 8, 1999.

(Activity)

Date:

By:

(Signature)

(Title)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate

directly with the Regional Director, Dallas Regional Office,
Federal Labor Relations Authority, whose address is: 525
Griffin Street, Suite 926, Dallas, TX 75202 and whose
telephone number is: (214)767-4996.

CERTIFICATE OF SERVICE

I hereby certify that copies of the **DECISION** issued by GARVIN LEE OLIVER, Administrative Law Judge, in Case No. DA-CA-90322, were sent to the following parties:

CERTIFIED MAIL AND RETURN RECEIPT

CERTIFIED NOS:

William Kirsner, Esquire
Federal Labor Relations Authority
525 Griffin Street, Suite 926
Dallas, TX 75202

P168-060-232

Clifton Rowe, LRS
VAMC, Human Resources
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REGULAR MAIL:

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Washington, DC 20001

CATHERINE L. TURNER, LEGAL TECHNICIAN

DATED: NOVEMBER 9, 2000
WASHINGTON, DC