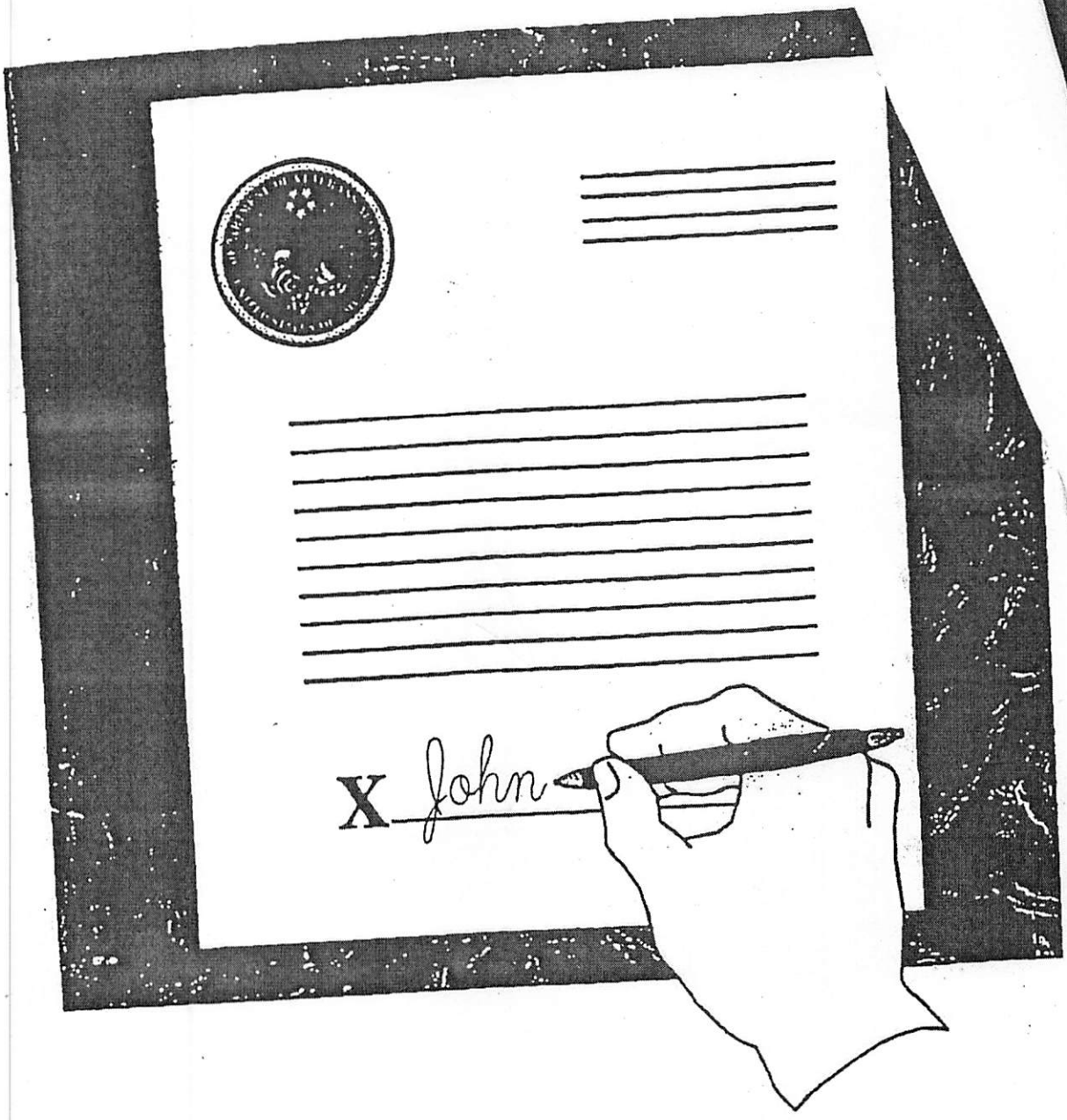

THE VA PARTNERSHIP COUNCIL'S GUIDE TO COLLECTIVE BARGAINING AND JOINT RESOLUTION OF 38 U.S.C. §7422 ISSUES

ATTACHMENT A

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 throughouf 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.

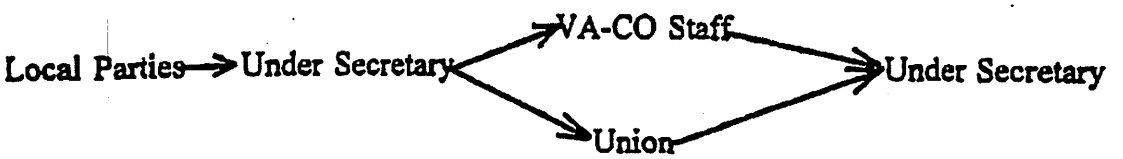
The purpose of labor-management partnership is to get the front line employees directly involved in identifying problems and crafting solutions to better serve the agency's customers and mission. In practice, the solutions that are developed will rarely be appropriate to place in a contract. If a consensus 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.

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