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STATEMENT BY

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AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO

BEFORE THE

SENATE COMMITTEE ON VETERANS' AFFAIRS,

CONCERNING

PENDING HEALTH-RELATED LEGISLATION

APRIL 22, 2009

Mr. Chairman and Members of the Committee:

The American Federation of Government Employees (AFGE) appreciates the opportunity to testify today on pending health-related legislation. AFGE represents nearly 160,000 employees in the Department of Veterans Affairs (VA), more than two-thirds of whom are Veterans Health Administration (VHA) medical professionals on the front lines treating the physical and mental health needs of our veteran population.

S. 362

Overview

AFGE strongly supports S. 362 to amend the law that provides Title 38 medical professionals with collective bargaining rights: Section 7422 of Title 38 (hereinafter "Section 7422"). Bargaining rights enable labor-management disputes over matters that affect working conditions to be resolved efficiently through grievances, arbitrations and negotiations.

S. 362 is needed to clarify which workplace issues are covered by Section 7422. VA human resource policy interprets Section 7422 to deprive Title 38 employees of the same bargaining rights used every day by other VHA employees covered by Title 5 bargaining rights law.

For example, registered nurses currently have far fewer bargaining rights than licensed practical nurses (LPN) and nursing assistants (NA) working at the same facility; psychiatrists cannot grieve over routine working conditions while social workers and psychologists working at the same mental health clinic can do so.

S. 362 also would give VA registered nurses, doctors and dentists the same bargaining rights as registered nurses, doctors and dentists performing the same type of work at military hospitals and federal prison facilities, who are covered by Title 5 bargaining rights.

Last year, VHA testified before this Committee that enacting this legislation would "jeopardiz[e] the lives of our veterans". We believe that what jeopardizes patient care is arbitrarily preventing certain clinicians from speaking up about working conditions that impact the quality and safety of patient care. What hurts patient care is management's unfettered discretion to ignore laws recently enacted by Congress to improve VHA recruitment and retention of registered nurses and physicians, especially in the face of growing national shortages. (In 2008, VHA ranked RNs and physicians as the top two "mission-critical occupations for recruitment and retention".)
VHA policy did not always single out Title 38 employees for unequal treatment. In fact, in 1996, labor and management entered into an agreement about how to interpret Section 7422 to limit the number of disputes over what matters could be negotiated. They agreed to interpret "direct patient care" narrowly and allow grievances over routine matters such as nurse schedules and pay surveys. During that period, VHA also recognized the importance of affording full collective bargaining rights to all employees. In a 2002 VHA directive, that "applie[d] to all categories of employees in VA", the agency stated that collective bargaining "safeguards the public interest" and "facilitates and encourages the amicable settlement of disputes between employees and their employers involving conditions of employment." A year later, the new administration began singling out Title 38 employees and severely curtailing their bargaining rights.

We agree with VHA that collective bargaining is a valuable safeguard. AFGE urges passage of S. 362 so that access to this safeguard and effective dispute resolution tool does not depend of which personnel system applies, or whether the patients are veterans, active duty personnel or federal prisoners. In addition, this legislative change will ensure the use of consistent personnel policies even when administrations change. (Opponents of this legislation have not expressed objection to the other two bill provisions. Section 2 of the bill would provide Title 38 employees with the right to appeal arbitrator decisions to court and Section 3 would strengthen their right to a hearing transcript following agency personnel hearings.)

Exceptions to Title 38 Bargaining in Current Law

Current VA policy severely limits Title 38 bargaining rights by applying the three exclusions to bargaining in Section 7422 very broadly: direct patient care, peer review, and compensation.

Contrary to Congressional intent, since 2003, VHA has applied an overly broad interpretation of the "direct patient care" exception to prohibit bargaining over a wide range of indirect patient care matters related to routine working conditions such as scheduling and assignments. Congress clearly intended to narrowly define the "direct patient care" exception as limited to medical procedures physicians follow in treating patients. In contrast, Congress cited guidelines for RNs

wishing to trade vacation days as falling outside the exception. (H. Rep. No.101-466 on H.R. 4557,101st Cong., 2d Sess., 29 (1990).)

VHA's interpretation of the compensation exception is also overly broad and contrary to Congressional intent. VHA applies this exception not just to negotiation over the setting of pay scales (which is clearly prohibited already by Title 5 for all federal employees), but also entitlements to "additional pay" such as overtime, weekend pay and retention pay that Congress has specifically enacted to ensure a fair and desirable workplace.

How collective bargaining rights are used in the healthcare workplace

Collective bargaining is an efficient dispute resolution process that requires management and labor to participate in grievance hearings, arbitrations and negotiations over conditions of employment. For example, collective bargaining requires labor and management to participate in grievance hearings about nurse overtime pay is paid according to law, and negotiations over training for new computer systems. Otherwise, management can simply walk away, leaving employees with no recourse to resolve a dispute, even when it involved a matter that could hurt patient care, such as excessive mandatory nurse overtime or assignment of nurses to new hospital units without adequate training.

Contrary to what opponents have contended, collective bargaining cannot be used to:

- Require management to negotiate over disputes related to the agency's mission such as medical procedures or the qualifications of medical professionals;
- Prevent the employer from removing an unfit employee from the workplace;
- Allow employees to "walk off the job" and abandon patients in order to participate in a grievance hearing or negotiation session.

VHA "7422" Policy Wastes Health Care Dollars on Unnecessary Disputes

The ambiguous exceptions in Section 7422 need to be eliminated. They are unnecessary because Title 5 already clearly prevents Title 38 employees from interfering with management's mission. This policy also wastes patient care dollars because it results in many costly, time-consuming and demoralizing labor-management disputes. Opponents point to the number of Undersecretary of Health (USH) decisions published each year. They fail to point out that the actual number of disputes is far greater for two reasons. First, not every USH decision is published. Second, even though the USH has the sole authority to make these determinations, local human resource personnel regularly make unauthorized decisions denying employees their rights to grieve and negotiate. (The fact that VHA has not curbed this widespread, unauthorized practice is also troubling.) Many employees never challenge decisions made at the facility level because they are discouraged by the unlikelihood of success. The USH ruled in favor of management in 100% of the published cases in 2003, 2005, 2006 and 2007, and in all but two cases in 2004.

Employees and their representatives are also discouraged from seeking USH review because of the lengthy process required. Many cases take several years to reach the USH. VHA waited seven years to invoke Section 7422 to block a challenge by Asheville, North Carolina operating room nurses over unfair policies on weekend pay.

Opponents of S. 362 contend that Title 38 employees will use their expanded bargaining rights to interfere with patient care, but they have not, and cannot, point to a single example of attempts to interfere in this matter or in the setting of pay scales. A review of all published USH decisions since 2003 reveals that the vast majority involve routine disputes over matters such assignments, schedules and noncompliance with pay rules, and none relate to medical procedures or pay scales.

Elimination of the exclusions in Section 7422 will not result in employee interference with patient care or setting of pay scales because Title 5 already sets clear limits on the scope of bargaining for all VHA employees, as discussed shortly. Section 7106(a) (which also covers Title 38 employees) clearly states that management rights – the determination of the agency mission, budget and organization – are not subject to bargaining. Similarly, employees cannot interfere with pay rates; Chapters 53 and 71 of Title 5 have always barred all federal employees from bargaining over the setting of pay scales. In contrast, Section 7103(a)(14) of Title 5 makes it clear that federal employees can only bargain over "conditions of employment".

Multiple decisions by the Federal Labor Relations Authority (FLRA) confirm that Title 5, standing alone, would prohibit Title 38 employees from interfering with direct patient care. More specifically, the FLRA has ruled that the union cannot require negotiations on even when services are to be provided to the public for "mission" reasons. It follows that Title 5 prevents a union from forcing negotiations over the substance of patient care.

Collective bargaining increases accountability and improves patient care

Current policy prevents RNs, physicians and other Title 38 employees from challenging workplace policies that lessen the quality and safety of patient care. For example, research on nurse overtime has clearly shown that exhausted nurses are more likely to make medical errors. In 2004, Congress enacted legislation to limit mandatory overtime except in cases of emergency. When local directors invoked the "emergency" exception to cover up for poor staffing policies, AFGE tried to negotiate with VHA for a nationally uniform definition of the term, but VHA refused.

Bargaining rights play a valuable role in agency innovation. A decade ago, VHA implemented two new health care information technology (IT) systems: Computerized Patient Record Systems and Bar Code Medication Administration. These health care IT innovations helped transform the VA into a world-class health care system and national model. When these systems were introduced, labor used its bargaining rights to negotiate over training and IT support to ensure that Title 38 nurses could provide patient care effectively and without interruption during computer breakdowns. Sadly, under current VHA policy, these negotiations would be prohibited as interfering with "direct patient care." Full bargaining rights for VHA doctors and nurses will allow them to once again make valuable contributions as the new administration undertakes major IT changes. .

In contrast, nurses and doctors who work at Department of Defense (DOD) and Bureau of Prison (BOP) healthcare facilities have been able to use their full rights to positively impact patient care. For example, physician assistants (who would fall under Title 38 at the VA) participated in negotiations over all 19 BOP health services program statements currently in effect, including

"Health Services Quality Improvement", "Infectious Disease Management" and "Health Information Management".

In summary, AFGE urges this Committee to support S. 362 to provide all VHA clinicians with the same bargaining rights. This legislation will vastly reduce the number of wasteful, demoralizing labor-management disputes at medical facilities and allow all of VHA's dedicated clinicians to make positive contributions to health care delivery.

S. 252

Overview: AFGE thanks Chairman Akaka for his leadership in introducing legislation again this year to address the needs of front-line VHA nurses for more competitive pay and schedules, increased loan assistance and equal rights for part-time nurses, and we urge passage of these provisions. However, we strongly oppose the provision to expand the Hybrid Title 38 personnel system, and therefore urge the Committee to strike this language from the bill and substitute a provision for further study of this poorly functioning, nascent personnel system. Age's objections to other provisions in this bill are discussed below.

Section 101(a):

This provision would immediately transfer over 11,000 nursing assistants from Title 5 to Hybrid Title 38 status, and allow the Secretary to transfer over 20,000 more Title 5 employees to Hybrid status. Further expansion of this broken system could be disastrous. Therefore, we urge lawmakers to strike Section 101 (a) from the bill and substitute language to request a comprehensive study of the Hybrid Title 38 system to determine if and how can be fixed prior to further expansion.

The Hybrid Title 38 personnel system has failed to meet its top objective: flexible, expedited hiring of healthcare personnel at the facility level. The system is currently plagued by so many delays during the initial boarding process and ongoing hiring and promotion processes that VHA has had to hire additional staff just to deal with current backlogs and problems. For example, it took more than four years for social workers and some psychologists to be "boarded" (transferred to the Hybrid system from Title 5). VHA social workers report that it can take more than six months to hire new social workers. Hiring is so cumbersome and slow that in many cases, it is still faster to hire under Title 5. Proponents of Hybrid expansion contend that the Title 5 hiring process is too slow, but it is worth noting that the VA recently hired 4,000 new Title 5 disability claims processors without delay.

In addition, veterans' employment rights appear to be weaker under Hybrid Title 38 than under Title 5, depriving hundreds of veterans employed by VHA of the ability to enforce their rights through the Merit System Protection Board and Labor Department. Further study is needed to clarify the scope of veterans' preference under different VHA personnel systems prior to placing more employees under the Hybrid system.

Promotion policies are less equitable under the Hybrid system as well, which impacts VHA recruitment and retention. Currently, Hybrid Title 38 employees have little or no recourse if management refuses to allow them to go before professional standards board to be considered for promotion “above the journeyman level”. Even when promotion is recommended, management can refuse to promote. This has greatly impacted social workers and psychologists, among others.

In summary, AFGE urges further study of the Hybrid Title 38 system prior to further expansion, to determine if and how the system can be improved, or whether Title 5 (and possibly new Title 5 streamlined procedures) would better serve VHA’s workforce needs. It will also be worthwhile to examine how VHA recruitment and retention of specific professions is faring under the Hybrid system, for example, mental health providers, licensed practical nurses and pharmacists.

Section 101(b) and (c): AFGE strongly supports these provisions. Part-time VA registered nurses (RN) have “fallen through the cracks” of Title 38 for too long. Under current law, a RN hired on a full-time basis can become a permanent employee after two years. In contrast, RNs who are hired as part-time can never obtain personnel rights and benefits associated with permanent status. It is equally unfair that RNs who worked for years on a full-time basis lose all their rights when they convert to part-time, for example, to start a family or care for elderly relatives. These provisions provide a simple, equitable fix: After the equivalent of two years of work, part-time nurse achieve the same status as their full-time counterparts, and nurses who have already achieved permanent status retain it when they change to a part-time schedule.

Section 101(d)-(f): AFGE takes no position on these provisions

Section 101(g): AFGE opposes this provision to pay $40,000 recruitment and retention bonuses to pharmacist executives. These large bonuses should only be put into law after a showing of clear evidence of a national recruitment and retention problem for all VHA pharmacist positions (including pharmacists and pharmacist techs working directly with patients.) For example, this Committee recently relied on a comprehensive study of recruitment and retention problems for Certified Registered Nurse Anesthetists to support pay adjustments for them. We estimate that this proposed pay increase change would allow a pharmacy executive in Washington State to earn over $173,000 and a pharmacy executive in Salem, Virginia to earn $183,000.

Section 101(h):

We take no position on Section 1(h)(1) on non-foreign COLAs.

We object to Section 1(h)(2) that would allow VHA to set the market pay differently for management physicians and dentists than practitioners providing hands-on care. We see no justification for exempting no practicing physicians and dentists from the same peer-based compensation panel system used by practitioners providing direct care. Congress enacted this elaborate system in 2004 (PL 108-445) specifically to ensure that market pay was set fairly and at a level that was competitive with pay offered by other local health care employers. Exempting management clinicians from this statutory pay process will undermine Congressional intent and increase pay decisions based on favoritism rather than market conditions. We urge the

Committee to strike this provision and instead, conduct oversight of the 2004 law prior to making any further amendments to it.

We strongly object to Section 1(h)(3) that would allow pay reductions based on changes in board certification or reduction of privileges. The board certification provision will disproportionately impact newer physicians and dentists who are required to qualify for renewal of their board certification every ten years (unlike older practitioners whose board certification is permanent.) VHA should create new incentives, not disincentives, to recruit and retain new clinicians. Many VA clinicians have difficulty securing the leave to renew their certification in a timely manner. Therefore, this will also disproportionately impact clinicians in rural hospitals and other facilities that are short-staffed. Similarly, we object to tying pay to privileges as they are completely within management's discretion. Currently, management can provide themselves with full privileges even though they do not see patients, but arbitrarily restrict or deny privileges of hands-on physicians and dentists in retaliation for voicing their concerns through avenues such as union grievances, lawsuits and complaints to the Inspector General.

Sections 101(I) and (n): AFGE supports this provision to adjust the pay caps for Cranes (as already discussed) and Lens (whose modest wages often hit the pay cap when annual federal pay raises are provided).

Sections 101(j) and (l): AFGE opposes these provisions to provide significant increases in base pay and retention bonuses ("special pay") to nurse executives. This represents a 400 percent increase over five years. (In 2004, Congress enacted a $25,000 ceiling on nurse executive retention bonuses.) We estimate that in North Carolina, this would allow some nurse executives to earn almost $240,000, and in Washington State, $243,000. AFGE opposes such a large increase absent sufficient evidence of a national recruitment and retention problem for VHA nurse executive positions.

Section 101(k): AFGE supports this provision to provide additional director training on the RN third party locality pay survey process. This will assure that surveys are conducted properly and will result in VHA pay that is competitive with the private sector. Providing employees and their representatives with survey data about their own pay is also a common-sense fix that will lead to greater accountability.

Sections 101(m): AFGE supports this provision to "fine tune" the rules for overtime and shift differential pay of all VHA nurses to ensure fair and consistent payment of additional pay, and keep VHA competitive with other employers applying similar rules.

Section 102 (a-b): AFGE supports this provision to provide clearer language to limit mandatory overtime for RNs and extend this limit to other nursing positions, as well as protect against retaliation for refusal to work a prohibited schedule. The definition of "emergency" is consistent with state nurse overtime laws that already protect other nurses from excessive mandatory overtime. AFGE notes, however, that under current VHA policy on Title 38 collective bargaining, RNs will not be able to enforce their rights to refuse to work prohibited schedules (but Lens and NAs with Title 5 bargaining rights will be able to seek enforcement through grievances).

Section 102(c): AFGE supports this provision to encourage greater use of alternative work schedules (AWS) by VHA. AWS is valuable nurse recruitment and retention tool as it is widely offered in the private sector. AFGE notes, however, that under current VHA policy on Title 38 collective bargaining, RNs will be unable to enforce their rights to AWS if VHA continues to refuse to offer it (in contrast to LPNs and NAs with full bargaining rights.)

Section 103: AFGE supports these improvements to VHA loan assistance programs including greater access to this assistance by current employees seeking additional training.

Section 104: AFGE generally supports strong standards for physician appointments but notes that most of these proposed requirements are already in practice at VHA. AFGE opposes VISN approval of physician appointments: this will bog down an already slow hiring process and further impede the VA's ability to hire physicians. AFGE calls for further study of the impact of tying performance to board certification prior to implementing this provision; it could have an adverse impact on VHA's ability to recruit physicians without enhancing quality of care. More generally, as already discussed, AFGE urges the Committee to conduct oversight of a broad range of physician issues, including implementation of the base, market and performance pay provisions in the 2004 physician and dentist pay bill, the "24/7" rule and other scheduling matters, panel sizes, continuing medical education reimbursement and board certification.

Section 201: AFGE strongly opposes elimination of this modest annual reporting requirement that holds VHA accountable to Congress for its nurse locality pay policies. We see no benefit, and only problems, with allowing VHA to conduct critical nurse recruitment and retention policies in secrecy, especially given the need for highly effective pay policies during this growing national nursing shortage. More generally, the process of setting front-line nurse locality pay or nurse executive retention bonuses should be far more transparent.

Sections 202-214: AFGE takes no position on these sections.

Section 215: AFGE supports increased access to TBI care but is concerned about the minimal oversight provisions in this section. Therefore, AFGE urges the Committee to conduct regular oversight into all contract care arrangements, including the ongoing Project HERO pilot operating in 4 VISNs, to ensure that veterans' needs are well served by non-VA providers in terms of quality of care, coordination of care, timeliness of care and geographic accessibility. In addition, oversight of all contract care arrangements should include consideration of the impact of diverting patients and patient care dollars on the VA's capacity and budget for providing in-house care, a comparison of the cost and quality of patient care with care provided through increased in-house capacity and providing care through VHA's extensive telehealth system. The long range impact of contract care on the VA's role as a leading researcher and training ground for practitioners across the country should also be evaluated.

Section 216:. AFGE has not taken a position on this section

Section 217: AFGE opposes this provision to pilot a contract dental care program. AFGE supports instead VA-provided outpatient dental care to all enrolled veterans without imposing additional costs on them or their families.

Title III: AFGE takes the same position on Title III of this bill and S. 597. We fully support provisions to improve and expand health care services to women veterans and their families.

Title IV: AFGE has not taken a position on this section.

Title V: AFGE has not taken a position on this section.

Title VI: AFGE has not taken a position on this section.

Title VII: AFGE supports these provisions for VA police officers. AFGE also recommends the additional language providing that in the event that an offense takes place in the presence of the officer while off Department property, he or she may take appropriate action to protect life, and may exercise any authority authorized by an express grant of authority under applicable Federal, State or local law.

S. 821

AFGE supports this legislation to eliminate copayments from veterans who are catastrophically disabled.

S. 801

AFGE supports this legislation to provide assistance to family caregivers.

S. 793

AFGE supports this legislation to increase tuition assistance for individuals training for positions to care for the visually impaired.

S. 772

AFGE has not taken a position on this bill.

S. 734

AFGE supports this bill, including much needed provisions to increase oversight of contract care. As already discussed (see Section 215 of S. 252), AFGE urges the Committee to conduct comprehensive oversight of all contract care arrangements and should coordinate activities under this program with oversight of Project HERO that already operates in four VISNs.

S. 699
AFGE has not taken a position on this bill.

S. 669
AFGE has not taken a position on this bill.

S. 699
AFGE has not taken a position on this bill.

S. 658

AFGE supports this legislation to improve access to health care for rural veterans. In Section 6, AFGE urges greater oversight of contract care consistent with our recommendations in our comments on Section 215 of S. 252 and S. 734.

S. 597

AFGE supports this legislation to improve health care services for women veterans and their families.
S. 543

AFGE has not taken a position on this bill.

S. 509

AFGE supports this bill for construction of new facilities and other improvements at the Walla Walla, WA VAMC.

S. 498

AFGE has not taken a position on this bill.

S. 423

AFGE supports this legislation to authorize advance appropriations for VA health care.

S. 404

AFGE supports this legislation to expand eligibility for emergency medical care.

S. 246

AFGE has not taken a position on this bill.

S. 239

AFGE has not taken a position on this bill.

S. 226
AFGE has not taken a position on this bill.

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