

NATIONAL GRIEVANCE
NG-12/27/2011 (1st Amended)

Date: February 2, 2011

To: Leslie Wiggins, Deputy Assistant Secretary
c/o Edson Morales, LMR Specialist
Office of Labor-Management Relations
Department of Veterans Affairs
810 Vermont Avenue, NW
Washington, D.C. 20420

From: Joseph Mendoza
Staff Attorney
American Federation of Government Employees (AFGE)/National Veterans Affairs Council (herein
“NVAC” or “Union”)

Subject: National Grievance in the matter of the Department of Veterans Affairs (VA) failure to comply with 38 USC Section 7459 et seq., concerning mandated overtime, and therefore failure to comply with the 2011 Master Agreement between the VA and AFGE (MCBA) Article 2 Section 1.

STATEMENT OF CHARGES

Pursuant to the provisions of 38 USC Section 7459 et seq. and MCBA Article 2 Section 1, the NVAC is filing this national grievance against you and all other associated VA officials and/or individuals acting as agents on behalf of the VA for violations as it relates to its failure to comply with 38 USC Section 7459 et seq. and thereby MCBA Article 2 Section 1, by mandating overtime in involuntary, non-emergency situations.

Specifically, on an ongoing and continuous basis, the VA, by and through its representatives and/or agents, has engaged in the following unlawful activity:

1. Mandating nursing staff (NS) to work beyond their scheduled tour of duty, i.e. overtime (herein “OT”), in situations that are not “[e]mergency [c]ircumstances” pursuant to 38 USC Section 7459 subsections (a) and (c).
2. By engaging in such conduct, the VA has violated the following and statutory and MCBA provisions:
 - (1) Title 38 USC Section 7459 subsections (a) and (c);
 - (2) MCBA Article 2 Section 1;
 - (3) Any and all other relevant articles, laws, regulations, customs and past practices not herein specified.

STATEMENT OF THE CASE

I. Background

Multiple VA Medical Centers (VAMCs) have mandated NS to work OT to cover tours of duty (herein “tours”) when the NS scheduled for those tours call in sick or are otherwise unable to work their tours (herein “call-out” or “call-out contingencies”). These call-outs occur frequently at these VAMCs and these VAMCs can reasonably be anticipated. Nonetheless, these VAMCs have been inattentive to and/or failed to reasonably plan for these call-outs. Some of the VAMCs where this has been occurring are listed below:

1. VAMC in Wilmington, VA
2. Charles George VAMC in Asheville, NC
3. VAMC in Clarksburg, WV
4. Tennessee Valley Health Care System – Nashville Campus
5. VAMC in Battle Creek, MI
6. Northern Indiana Health Care System in Marion, IN
7. Veteran Health Care System of the Ozarks in Fayetteville, AR

II. Violations

Title 38 USC Section 7459 (a) states “[e]xcept as provided in subsection (c), the Secretary may not require nursing staff to work more than 40 Hours ... in an administrative work week or more than eight consecutive hours (or 12 hours if such staff is covered under section 7456 or 7456A of this title) [i.e. for nursing staff on 3 day work weeks with an additional 8 hour shift every two weeks].”

Subsection (c) states “... (1) the Secretary may require nursing staff to work hours otherwise prohibited by subsection (a) if ... [1] ... the work is a consequence of an emergency that could not have been reasonably anticipated [and] ...[2] ... the emergency is non-recurring and is not caused by or aggravated by the inattention of the Secretary or lack of reasonable contingency planning by the Secretary [and] ... [3] ... the Secretary has exhausted all good faith, reasonable attempts to obtain voluntary workers [and] ... [4] ... the nurse staff have critical skills and expertise that are required for the work; and ... [5] ... the work involves work for which the standard of care for a patient assignment requires continuity of care through completion of a case, treatment, or procedure.

If all five or these elements are met, then a VAMC can mandate OT consistent with 38 USC Section 7459 (a) and (c) (herein “the Caregiver Act”). However, as described above, multiple VAMCs have failed to reasonably anticipate and plan for call-out contingencies at their facilities, despite the fact that these call-outs happen on a regular and predictable basis. In some VAMCs, the VAMC has gone so far as to schedule mandatory OT weeks in advance. In other VAMCs, the VAMC has scheduled NS, who have repeatedly called-out in the past, on the same tour, thereby knowingly creating a situation where mandatory OT was needed (i.e. “aggravating” the emergency under the Caregiver Act). Other VAMCs have, in the past, created teams of NS to (e.g. SWATs) to, among other things, cover for call-outs, but

have terminated those teams for various reasons without replacing them with other methods of dealing with these often-recurring, reasonably anticipated call-outs, short of mandating OT. Some VAMCs have actually created written Standard Operating Procedures (herein "SOPs") which, on their face, purport to allow these VAMCs to circumvent the law and mandate OT in situations that are not "emergenc[ies]" as defined by the Caregiver Act. And pursuant to these SOPs, these VAMCs have mandated OT when call-outs occur. These are just some examples of violations of the Caregiver Act. Violations of the Caregiver Act by the VA through its many VAMCs is ongoing and continuous and the NVAC reserves its right to amend this National Grievance accordingly as other violations become known to the NVAC.

Because the VA is in violation of the Caregiver Act, it is also in violation of MCBA Article 2 Section 1 which states "[i]n the administration of all matters covered by this Agreement, officials and employees shall be governed by applicable federal statutes." The Caregiver Act is a federal statute that addresses the matter of overtime for nurses. Overtime for NS is also a "matter covered by ... [the] Agreement [i.e. the MCBA]." Thus, violations of the Caregiver Act are also violations of Article 2 Section 1 of the MCBA and are actionable under MCBA Articles 43 and 44, i.e. the grievance and arbitration procedures of the MCBA.

III. Remedy Requested

The Union asks that to remedy the above situation, the VA agrees to the following:

1. To immediately cease and desist mandating NS to work OT in situations that are not "emergencies" under the Caregivers Act.
2. To avoid mandating OT by scheduling sufficient numbers of NS in each and every unit, for each and every tour, at each and every VAMC, by taking into account all recurring, reasonably-anticipated contingencies that may create the need for mandatory OT, including but not limited to call-outs.
3. To avoid mandating OT by otherwise reasonably planning for call-outs or other contingencies that may create the need for mandatory OT.
4. To avoid emergency situations by paying sufficient attention to recurring, reasonably-anticipated contingencies, reasonably planning for these contingencies, and not otherwise aggravating these potential emergency situations.
5. To agree to any and all other remedies appropriate in this matter.

IV. Time Frame and Contact

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 (408) 500-9266.

Sincerely,

Joseph Mendoza, Esq.
AFGE/NVAC Staff Attorney

cc: Alma L. Lee, President, AFGE/NVAC; William Wetmore, Chairperson, Grievance and Arbitration Committee, AFGE/NVAC