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DEPARTMENT OF VETERANS AFFAIRS
UNDER SECRETARY FOR HEALTH
WASHINGTON DC 20420

Director(00)
VA Palo Alto Health Care System
3801 Miranda Avenue
Palo Alto, Ca 94304

President
AFGE, Local 2110
3801 Miranda Avenue
P.O. Box V-11
Palo Alto, Ca 94304-0011

Dear Ms. and Mr.

I am responding to the issue raised in your memoranda of May 5, 2005 and June 1, 2005, respectively, concerning the Unfair Labor Practice (ULP) charge filed by the American Federation of Government Employees (AFGE), Local 2110, relating to compressed work schedules for Title 38 employees in the acute psychiatric ward (Unit 2B1) of the VA Palo Alto Health Care System.

Pursuant to delegated authority, I have determined, on the basis of the enclosed decision paper, that the issue presented is a matter concerning or arising out of professional conduct or competence and is thus exempted from collective bargaining by 38 U.S.C. § 7422(b).

Please provide this decision to your Regional Counsel as soon as possible.

Sincerely yours,

Jonathan B. Perlin, MD, PhD, MSHA, FACP
Under Secretary for Health

Enclosure

Title 38 Decision Paper
VA Palo Alto Health Care System
VA - 05-07

FACTS

In early 2001, the VA Palo Alto Health Care System (VAPAHCS) implemented an alternative work schedule (AWS) for the nursing staff in the acute psychiatric ward (Unit 2B1). By 2004, approximately eleven employees assigned to Unit 2B1 were working an AWS consisting of four 10-hour days per week. Five of the employees participating in the AWS were registered nurses (RNs).

On May 12, 2004, Mental Health Nursing Management at the VAPAHCS issued a memorandum documenting a hiring lag and corresponding insufficiency in the Mental Health Nurse staffing levels at the VAPAHCS. *Exhibit A*. The memo identified some of the initiatives already in place to reduce the impact of the hiring lag. Some of these initiatives included the following:

- actively evaluating the Mental Health Nursing programs;
- adjusting the hiring mix;
- allowing nurses and other personnel to work flexible schedules;
- reducing non-productive time;
- having nurse managers cover shifts; and
- sharing staff across the units.

The memo stated that "acute inpatient psychiatry has maintained positive clinical outcomes and [has] improved in patient satisfaction throughout this hiring lag." However, the memo set forth data showing acute care vacancy rates, approved FTEE and numbers of operating beds in each of the facility's Acute Inpatient Mental Health units. While each unit had some vacant nursing positions and a related staffing shortage, the memo noted that

... our most acute inpatient psychiatric unit[,] 2B1[,] is severely impacted by the current hiring lag. 2B1 manages the majority of violent aggressive patients, and unmanageable males that require behavioral restraint. Staffing this unit for safety is critical. If we are not able to fill these positions, our only alternative will be to cap beds or eliminate our ability to accept these high acuity patients. Palo Alto is the referring source for the VISN's most challenging psychiatric patients. In July, 2004 we expect a serious external impact to our inpatient psychiatric program. The mental health inpatient programs in our neighboring counties are reducing inpatient mental health as a result of state budget cuts. This will mean additional inpatient psychiatric workload. The county mental health programs will be actively identifying patients who have Veteran eligibility and transferring their care to the VA.

On September 16, 2004, the Acting Nurse Manager of Unit 2B1 informed the AFGE Local 2110 (Union) that patient care needs required the termination of the AWS and a return to traditional shifts for the nursing staff of Unit 2B1. *Exhibit B*. In this letter, the Acting Nurse Manager stated that she was considering re-establishing traditional tours of duty for the unit "to ensure the greatest number of staff available during periods of high volume patient care activity." The Nurse Manager explained that the unit's ability to meet its mission and to provide optimal care to the Veterans was being affected by the following practices:

- We have staff working both 8 hour and 10 hour tours and consistently more than required staff reporting for duty at 6:00 am;
- The tour overlap from 1:30 pm to 4:00 pm exceeds our staffing requirements on most days;
- There are many critical shortages at other times such as evening shift, night shift and weekends which increase our overtime cost;
- Staff currently have set days off. They will need to be aware that, although we respect their preference for certain days off, it may not be feasible to grant the same days off each week. This weakens our ability for flexible scheduling and fairness to all the staff involved;
- We need to reinforce with staff that weekend rotation is a necessary practice. There are many staff who do not currently work weekends. We must also ensure that staff is rotated to the weekend tours fairly and equitably.

The Acting Nurse Manager further explained the need for terminating the AWS by stating that such schedule has "led to serious staffing gaps leaving the unit inadequately covered."

On September 28, 2004, the Union sent the VAPAHCS Director a demand to bargain on the proposed termination of the AWS for the nursing staff of Unit 2B1. *Exhibit C*. At the same time, the union sent a request for information in order to prepare their proposals and initiate the negotiating process.

On October 4, 2004, the Medical Center Director responded to the union by denying the demand to bargain. *Exhibit D*. However, the Director informed the Union that the Chief Nurse of Mental Health Nursing Service would meet with union officials to discuss how changes in the employees' tours of duty would be implemented. The Director further stated:

I encourage you to meet as quickly as possible. Patient care is the highest priority for each of us and the affected employees. The employees here at the VA Palo Alto Health Care System are very important to me. I am convinced [that] together you can reach an amicable and expedient resolution.

On October 7, 2004, the Union filed an Unfair Labor Practice (ULP) charge (SF-CA-05-0013) with the Federal Labor Relations Authority (FLRA) alleging management violated the statute by denying their demand to bargain on the proposed change to the AWS. *Exhibit E.*

On January 10, 2005, the FLRA sent a letter to the Palo Alto Regional Counsel office informing them that the Union had requested the withdrawal of the ULP charge. *Exhibit F.*

On February 3, 2005, the Chief of Mental Health Nursing Services sent a letter to the Union acknowledging the parties' efforts to discuss "the change in working conditions occurring in the Mental Health Nursing Service" and stating the following:

The changes I have proposed are a matter of 'permissive' bargaining. As such; our attempts to discuss these changes in working conditions are concluded. Compressed Work Schedules must be consistent with patient care and management has no duty to bargain. The right to assign work under 7106(a)(2)(A) of the Statute includes the right to determine when work assignments will be performed and the duration of the work assignments.

If you reconsider your previously stated intent not to engage in bargaining regarding the impact and implementation of these changes in work assignments, please be advised that all such discussion will need to be concluded by February 11, 2005. You are also advised that, effective February 20, 2005, changes to staff schedules, of which you were notified in writing on September 16, 2004, will be implemented.

Exhibit G.

The Union responded to this letter with a February 4, 2005 demand to bargain over the change in nurses' AWS schedules and a related demand that management cease and desist from implementing the change until such bargaining had concluded. *Exhibit H.*

On February 15, 2005, the Union filed a second ULP charge alleging that management failed to negotiate in good faith over the change in AWS. *Exhibit I.* Attached to the ULP charge was a Settlement Agreement proposed by the Union. Management did not agree to settle the matter as proposed by the Union.

On May 2, 2005, the staff attorney from the VA's Regional Counsel in San Francisco, California, sent a letter to the FLRA in response to the Union's ULP charge. *Exhibit J.* The staff attorney explained that "Unit 2B1 manages the majority of violent aggressive inpatients at the Medical Center and that the ward requires intensive nursing attention on a 24 hour/7 days a week basis." Counsel informed the FLRA that the dispute concerned the work schedule of five RNs on the acute psychiatry inpatient ward and that such issue was governed by the direct patient care exclusion of 38 U.S.C. § 7422. The staff attorney requested

that the ULP be held in abeyance until the Under Secretary for Health (USH) issues a determination on the negotiability of the disputed issue.

On May 5, 2005, the Director of the VAPAHCS submitted a memorandum to the USH requesting a determination that the issue raised in the ULP is outside the scope of collective bargaining pursuant to 38 U.S.C. § 7422. *Exhibit K*. The Director stated that such determination was warranted because

...the use of AWS was resulting in, among other things, critical staff shortages, particularly during evening and night shifts and during weekends; and unnecessary expenditures associated with more than required nurses working at other hour, such as early morning and during periods of overlapping shifts (when an AWS nurse's tour-of-duty would overlap with that of someone working a traditional shift.)

On June 1, 2005, the Union sent its rebuttal to the USH, asking that the issue submitted by management be determined not to be excluded from collective bargaining. *Exhibit L*. The Union argued, in part, the following:

I am very aware of the adverse impact that the action taken by Ms. Freeman, without making a good faith effort to bargain, has had on bargaining unit members. Of note, one of our members testified before the FLRA regarding her adverse impact related to the abrupt discontinuation of the AWS and her cancer diagnosis with scheduled chemotherapy treatment. I believe her unique situation has merit and any agency should make an effort to negotiate in good faith and provide reasonable accommodation to work put an agreement that is suitable to all parties involved.

The union further argues that "...management has the right to decide whether to take actions listed in 5 USC 7106(a). However, AFGE Local 2110 is entitled, under succeeding sections 7106 (b),(2) and (3), to negotiate with the agency the procedures management officials of the agency will observe in exercising its authority under 7106; or appropriate arrangements for bargaining unit employees adversely affected by such management action."

PROCEDURAL HISTORY

The Secretary has delegated to the USH the final authority in the VA to decide whether a matter or question concerns or arises out of professional conduct or competence (direct patient care, clinical competence) peer review or employee compensation within the meaning of 38 U.S.C. 7422(b).

ISSUE:

Whether the local Union's ULP regarding the discontinuation of the AWS for title 38 employees at the VA Palo Alto Health Care System's acute psychiatric ward, Unit 2B1, involves issues concerning or arising out of professional conduct or competence within the meaning of 38 U.S.C. § 7422(b).

DISCUSSION:

The Department of Veterans Affairs Labor Relations Act of 1991, 38 U.S.C. § 7422, granted collective bargaining rights to Title 38 employees in accordance with Title 5 provisions, but specifically excluded from the collective bargaining process matters or questions concerning or arising out of professional conduct or competence, peer review, and employee compensation as determined by the USH. Congress' stated intent in enacting this statute was to afford title 38 employees "the same fundamental rights as other Government employees in terms of their employee-management relations while protecting the special professional nature of title 38 employment." 137 Cong Rec S 4537, S4543 (April 17, 1991).

Given the special professional nature of title 38 employment, nurses' and other health care professionals' tours of duty are fundamental to establishing the level of patient care to be provided by the Department of Veterans Affairs. Pursuant to 38 U.S.C. § 7421(a), the Secretary has prescribed regulations contained in VA Directive/Handbook 5011, Part II, Chapter 3 regarding the establishment of workweeks, tours of duty, and work schedules for medical professional employees. These regulations grant facility directors the discretionary authority to institute flexible and compressed work schedules for registered nurses appointed under the authority of 38 U.S.C. § 7401(1) or 7405(a)(1).

Handbook 5011, Part II, Chapter 3, Section 5g(1)(a) provides the following:

Compressed work schedules shall be consistent with patient care requirements. For example, compressed work schedules may be adopted to expand clinic service hours, staff mobile clinics, or otherwise improve service to veterans.

In the instant case, management erroneously argued that the proposed changes in AWS are a matter of "permissive" bargaining. Subsequently, management stated that "[t]he right to assign work under 7106 (a)(2)(A) of the Statute includes the right to determine when work assignments will be performed and the duration of the work assignments."¹ Section 7016(a)(2)(A) does not refer to "permissive" subjects. Management confuses the term "permissive" bargaining with their obligation to negotiate over the procedures and appropriate arrangements associated with the management rights established in 7106 (a). "Permissive" bargaining refers to those issues detailed in 7106 (b)(1), issues that will be negotiated only at the election of the agency. The obligation to negotiate over procedures and appropriate arrangements is established in 7106 (b)(2)(3).

In general, AWS or compressed work schedules for Federal employees are governed by the compressed work schedule statute, 5 U.S.C. § 6120 *et seq.* In policy and practice, VA has applied the authority of the compressed work schedule statute to all of its employees, including Title 38 medical professionals. However, if

¹ See Exhibit G.

participation of Title 38 employees in a proposed or ongoing CWS program adversely impacts on patient care, then the implementation or continuation of such CWS program is non-negotiable under 38 U.S.C. § 7422(b) and not subject to third party review. In such a case, there is a conflict between 38 U.S.C. § 7422 and the CWS statute (i.e. 5 U.S.C. § 6131(c)(2)(A), which provides for the Impasse Panel to rule on the agency's determination that CWS has produced an adverse agency impact). Where, as here, there is such a conflict, 38 U.S.C. § 7425(b) operates to render the Title 5 provision inapplicable.

The Union argues that a change in the CWS for Unit 2B1 would have an adverse impact on the bargaining unit employees, without disclaiming management's argument on the staffing problems afflicting the unit. The union does not specify the adverse impacts they believe the change would have on bargaining unit employees. However, the Union specifically argues that one employee was diagnosed with cancer and that her situation merits an effort to negotiate on this issue and the provision of reasonable accommodations. While we sympathize with the employee's situation and would strongly encourage VAPAHCS management to accommodate her as best it can, her case can and should be considered on an individual basis and need not be determined through collective bargaining with the Union.

The Union also argues that it is entitled to negotiate with the agency the procedures management officials will use in exercising the authority under 5 U.S.C. § 7106 (a) or appropriate arrangements for bargaining unit employees adversely affected by such management action. This argument confuses Title 5 collective bargaining concepts with those applicable to the Title 38 employees involved here. Once an issue has been determined to be non-negotiable, under the provisions of 38 U.S.C. § 7422, there is no "appropriate arrangements" or impact and implementation-style bargaining. Unlike the general title 5 labor statute, 38 U.S.C. § 7422 does not allow for 'appropriate arrangements' or impact and implementation-style bargaining on matters that are substantively excluded from bargaining under 38 USC 7422 (b). *Compare 5 USC § 7106(b)(2), (3) with 38 USC § 7422(b).*²

The issue presented in the instant case is whether the continuation of a CWS for the acute psychiatric ward (Unit 2B1) nurses would adversely affect patient care services. Management has demonstrated that the CWS for Unit 2B1 nurses has caused serious staffing gaps and adversely impacted patient care. The 10 hour CWS has created serious problems by permitting overstaffing during some shifts while leaving the unit inadequately covered during others. Unit 2B1 requires intensive nursing attention on a 24/7 basis and a higher skilled nursing mix because of the complexities of the patient's psychiatric issues. The 10 hour CWS interfered with patient care because it did not properly spread RN coverage throughout the necessary 24/7 period. Moreover, RN vacancies in the facility's other mental health units meant management could not simply float RNs from other units to plug the gaps the CWS caused in Unit 2B1's schedule. As a result, the

² See the USH's decision in VAMC Charleston, South Carolina (May 27, 2005).

union's ULP charge alleging that management failed to bargain in good faith before terminating the CWS for RNs on Unit 2B1 is a matter or question concerning or arising out of professional conduct or competence within the meaning of 38 U.S.C. § 7422(b).

This decision is consistent with prior USH determination in which the USH determined that the elimination of compressed work schedules due to patient care needs was a matter involving professional conduct and competence within the meaning of 38 U.S.C. § 7422 and therefore non-negotiable. See, e.g., VAMC West Palm Beach, (April 19, 2005); VAMC Indianapolis, IN, (February 14, 2004); VAMC Alexandria, LA, (October 16, 2003); and VAMC Biloxi, (October 16, 2003).

RECOMMENDED DECISION:

That the decision made by management at the VAPAHCS to discontinue CWS for Title 38 employees at the acute psychiatric ward (Unit 2B1) involves issues concerning or arising out of professional conduct or competence within the meaning of 38 U.S.C. 7422(b).

APPROVED _____

✓

DISAPPROVED _____



Jonathan B. Perlin, MD, PhD, MSHA, FACP
Under Secretary for Health

10-11-05

Date