

Title 38 Decision Paper
VA Ann Arbor Healthcare System, Ann Arbor, Michigan

FACTS

In January 2014, management at the VA Ann Arbor Healthcare System (Medical Center) determined that it was necessary to address registered nurse staffing imbalances in the Medical Center's Patient Care Services (PCS). (Exhibit 1). The Medical Center decided to temporarily rotate some Registered Nurses to different shifts to ensure the appropriate number of nurses were available for each shift. (*Id.*).

On January 10, 2014, the American Federation of Government Employees, Local 2092 (Union), submitted a demand to bargain to Medical Center management, concerning the decision to rotate PCS nurses between the facility's second and third shifts. (Exhibit 2). The Union requested that the Medical Center "cease and desist implementation" of the shift change "until all bargaining obligations are met." (*Id.*).

On January 17, 2014, the Medical Center's Associate Chief Nurse for Patient Care Services (Associate Chief) met with the Union to discuss its concerns. The Associate Chief agreed to outline the process for staff scheduling and to arrange a follow up meeting. (Exhibit 1).

The Associate Chief met with the Union a second time on February 14, 2014. The Associate Chief agreed to write a memo outlining consistent inpatient staff scheduling processes and share it with the Union for their agreement. Upon Union agreement, the memo would be shared with all staff. (Exhibit 3).

On May 28, 2014, the Medical Center released a memorandum (scheduling memorandum) concerning guidelines for scheduling PCS nurses. (Exhibit 1). The scheduling memorandum included provisions drawn from the parties' Master Agreement, Article 21, § 3.¹ Notably, it stated

that "PCS will not allow staff to self-schedule." (Exhibit 4).

On June 9, 2014, the Union submitted a demand to bargain "on the Medical Center RN schedules." (Exhibit 5). The Union contended that the Medical Center issued its scheduling memorandum prior to completing the discussions with the Union concerning the nurse schedules. (*Id.*).

The Union also filed an Unfair Labor Practice charge (ULP) with the Federal Labor Relations Authority (FLRA) on June 9, 2014 claiming that the Medical Center had agreed there would be no changes to RN schedules until the parties completed their talks. The Union further claimed that the Medical Center circulated its scheduling

¹ The scheduling memorandum includes provisions that are similar or identical to Article 21, §§ 3(B), (C), (D), (E), (F), and (J). The final paragraph of the memorandum states, "The Department reserves the right to make the assignments based on other good faith considerations in assuring effective management of the work force." (Emphasis in original). (Exhibit 4).

memorandum “without informing AFGE Local 2092.”² (*Id.*). The first ULP was eventually withdrawn by the Union.

On July 8, 2014, management and the Union met to discuss the Union’s scheduling concerns. (Exhibit 1). Management explained that nurses would be entitled to submit requests for preferred days off, but that the Medical Center reserved the right to schedule RNs based on patient care needs. (*Id.*). Management also stated that schedules of Title 38 employees are excluded from collective bargaining under 38 USC §7422. The Medical Center agreed to “listen to concerns RNs had regarding their schedule,” and the parties decided to schedule a follow up meeting.³ (*Id.*).

On September 2, 2014, the Union filed a second ULP, contending that the Medical Center failed to complete bargaining concerning nurse scheduling before issuing the scheduling memorandum.⁴ (Exhibit 7). The Union explained that it first learned in January 2014 that the Medical Center intended to eliminate the “wish list” or “blanket schedule” that nurses had used for decades. (*Id.*). According to the Union, management intended to place all nurses on set schedules. (*Id.*). Although the parties met “around three times” to discuss the issue after the Union issued a demand to bargain, the Union claimed that, prior to completion of bargaining, the Medical Center “implemented a set schedule for all nursing staff and eliminated the blanket schedule or wish list.” (*Id.*).

The Medical Center responded to the second ULP on October 1, 2014. (Exhibit 8). It contended that the demand to bargain and subsequent discussions with the Union centered on PCS nurse rotations between the second and third shifts and that the wish list was never discussed. (*Id.*). The Medical Center stated that the Union reviewed the staffing guidelines prior to their release and “had played a part in the response before it was posted for employees.” (*Id.*). The Medical Center added that, “[a]t no point were the ‘wish lists’ taken away from the Nurses on the various units nor were the ‘wish lists’ the subject of the scheduling issue that [the Union] demanded to bargain over.” (*Id.*). Under the new scheduling guidelines, Registered Nurses could continue to “submit the days they prefer not to work to their Nurse Manager for consideration.” (*Id.*).

On November 18, 2014, the Medical Center submitted a statement to FLRA, explaining that the matter addressed in the Union’s September 2, 2014, ULP “impacts patient care and, therefore, is excluded from collective bargaining pursuant to 38 U.S.C. § 7422(b).” (Exhibit 9). The Medical Center requested that FLRA hold the matter in abeyance, pending a determination by the Secretary of VA. (*Id.*).

On February 11, 2015, the Office of Labor-Management Relations received the Medical Center’s request for a 38 U.S.C. §7422 determination. The Medical Center provided a copy of its request to the Union and notified the Union that it was entitled to respond with a “position statement and any supporting documentation.”. (Exhibit 10). The Union did not file a response or position statement.

² The ULP was designated as CH-CA-14-0476. It was subsequently withdrawn by the Union. (Exhibit 1).

³ The parties never scheduled a follow up meeting. (Exhibit 1).

⁴ The second ULP was designated CH-CA-14-0617. (Exhibit 1).

TITLE 38 U.S.C. § 7422 AUTHORITY

The Secretary of the Department of Veterans Affairs has the final authority to decide whether a matter or question concerns or arises out of professional conduct or competence, peer review, or employee compensation within the meaning of 38 U.S.C. § 7422(b).

ISSUE

Whether the Union's September 2, 2014, ULP charge claiming that the Medical Center implemented schedule changes for PCS nurses without completing bargaining is a matter or question concerning or arising out of professional conduct or competence within the meaning of 38 U.S.C. § 7422(b).⁵

DISCUSSION

The Department of Veterans Affairs Labor Relations Improvement Act of 1991, codified in part at 38 U.S.C. § 7422, granted limited collective bargaining rights to Title 38 employees and specifically excluded from the collective bargaining process, and the parties' negotiated grievance procedure, matters or questions concerning or arising out of professional conduct or competence, peer review, or employee compensation, as determined by the Secretary.

According to the documents submitted, the Medical Center allowed nurses in the past to "pencil in their desired work schedule on a blank schedule." The nurses referred to their preferred selection as their "wish list." (Exhibit 1). In early 2014, the Medical Center determined that the scheduling process should be primarily controlled by the Nurse Manager, with consideration of requests from nurses for dates and times when they preferred not to be scheduled. (*Id.*). The modification of the nurse scheduling process to emphasize the role of the Nurse Manager rather than an employee-directed scheduling "wish list," resulted in demands to bargain from the Union. (Exhibit 2); (Exhibit 5). In response, management met with the Union and discussed the scheduling changes.⁶ (Exhibit 1). In addition, management created a scheduling memorandum, which borrowed from the parties' Master Agreement, to set out the Medical Center's scheduling guidelines for PCS nursing staff. (Exhibit 4).

In its ULP, the Union argued that the Medical Center's scheduling changes triggered a duty to bargain, and the Medical Center fell short of its duty when it implemented the scheduling change without completing bargaining. (Exhibit 7).

38 U.S.C. § 7422 excludes from collective bargaining any matter that concerns either

⁵ "Professional conduct or competence" is more fully defined as "clinical competence" or "direct patient care." 38 U.S.C. § 7422(c).

⁶ It appears that the initial Union concern, and ensuing discussions, primarily involved the Medical Center's decision to modify PCS nurse rotations between the second and third shifts. (Exhibit 1); (Exhibit 8).

direct patient care or clinical competence. The Medical Center contended that scheduling nurses directly impacts the Medical Center's "ability to provide direct patient care since it is the responsibility of the Medical Center to ensure that appropriate RN Staff is on duty to provide quality care." (Exhibit 1). The Medical Center emphasized that determining a proper schedule "goes far beyond" simply assuring that there are sufficient numbers of nurses assigned to each shift: "While the number of RNs assigned to each shift is important, the experience (from novice to expert), certifications and competence of each RN employee must all be taken into consideration when a schedule is developed in order to ensure that the needs of the [V]eteran are met." (*Id.*). Finally, the Medical Center contended that its authority to control nurse scheduling "goes to the core of professional conduct or competency because the [Medical Center's] ability to provide direct patient care would be severely impacted without the ability to schedule RNs when their services are needed most. Schedules are fundamental in ensuring not only the level but also the quality of patient care provided by the Medical Center." (*Id.*).

The Medical Center's decision to modify its scheduling approach is consistent with established Departmental policy. "In Veterans Health Administration (VHA), the proper care and treatment of patients shall be the primary consideration in scheduling tours of duty under these instructions." VA Handbook 5011, Part II, Chapter 1, ¶ 2(b), (Exhibit 11). Medical Center Directors are authorized to "prescribe any tour of duty to ensure adequate professional care and treatment" to patients. VA Handbook 5011, Part II, Chapter 3, ¶ 2(d), (Exhibit 12).

The Department has addressed Title 38 scheduling issues in previous 38 U.S.C. §7422 decisions. VAMC Indianapolis (May 29, 2013) involved management's assignment of nurses on twelve-hour compressed work schedules to a single eight-hour "off tour" each pay period. (Exhibit 14). The Union argued that, consistent with the parties' Master Agreement, a nurse may only be assigned to work an evening or night "off tour" shift if the nurse's regular twelve-hour tour is a day tour.⁷ (*Id.*). The Secretary concluded that the matter was excluded from collective bargaining by application of 38 U.S.C. § 7422 because "The Agency's authority to control title 38 work schedules goes to the heart of professional conduct or competence because the Agency's ability to provide direct patient care would be severely impacted without the flexibility to assign title 38 personnel to shifts where their services are most needed. The workweeks, tours of duty, and work schedules for title 38 health care professionals – RNs, in particular – are fundamental to ensuring the level and quality of patient care provided by the Agency." (*Id.*).

Consistent with VAMC Indianapolis, collective bargaining is excluded in the present instance.⁸ The Medical Center must have the ability to utilize PCS nurses in the

⁷ The Union based its argument on its reading of Article 21, § 3(E) of the parties' Master Agreement. (Exhibit 14).

⁸ Although collective bargaining is statutorily excluded, management is encouraged to notify the Union prior to making changes in Title 38 employees' working conditions and to engage in a good faith dialogue with the Union concerning the impact of anticipated changes. *See Joint 38 U.S.C. § 7422 Workgroup Recommendations As Revised and Approved by the Secretary of the Department of Veterans Affairs*, §§

manner it determines most appropriate to ensure timely, quality patient care. While continuing to consider nurse input concerning preferred days off, the Medical Center may set or change nurse schedules in PCS without initiating or completing bargaining with the Union.

DECISION

The Union's September 2, 2014, ULP charge claiming that the Medical Center implemented schedule changes for PCS nurses without completing bargaining is a matter or question concerning or arising out of professional conduct or competence within the meaning of 38 U.S.C. § 7422(b).



Robert A. McDonald
Secretary of Veterans Affairs



Date

C(4), (C)(5). (Exhibit 15). Here, management met several times with the Union and incorporated many of the provisions set out in the parties' Master Agreement in the Medical Center's scheduling memorandum. (Exhibit 1); (Exhibit 4).