



DEPARTMENT OF VETERANS AFFAIRS
UNDER SECRETARY FOR HEALTH
WASHINGTON DC 20420
JUN 14 2016

Mr. Robert McDivitt
Director
VA Ann Arbor Healthcare System
2215 Fuller Road
Ann Arbor, MI 48105

Dear Mr. McDivitt:

I am responding to the request for a 38 U.S.C. § 7422 decision from the Director of the VA Ann Arbor Healthcare System regarding AFGE Local 2092's unfair labor practice charge concerning mandatory Basic Knowledge Assessment Test for ICU nurses.

I have determined that the issue presented addresses matters or questions that concern or arise out of professional conduct or competence and are thus exempted from collective bargaining by 38 U.S.C. § 7422(b). Please review the enclosed Decision Paper for a more complete explanation of my decision.

Sincerely,

A handwritten signature in black ink that reads "David J. Shulkin, M.D." with a stylized flourish at the end.

David J. Shulkin, M.D.

Enclosures



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Mr. Ozzie L. James, Jr.
President AFGE Local 2092
VA Ann Arbor Healthcare System
2215 Fuller Road
Ann Arbor, MI 48105

Dear Mr. James:

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David J. Shulkin, M.D.

Enclosures

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

FACTS

In 2012, the VA Ann Arbor Healthcare System (Medical Center) began requiring registered nurses (nurses) assigned to the facility's Surgical Intensive Care Unit (SICU) to take the Basic Knowledge Assessment Test (BKAT). The BKAT provides an assessment of RN proficiency, as well as identifying areas that need improvement. (Exhibit 1).

On September 19, 2014, the Medical Center realigned the Medical Intensive Care Unit (MICU) and the SICU to form one unit, the Intensive Care Unit (ICU). (Exhibit 2). This realignment became permanent on February 8, 2015. (Exhibit 6). Following the realignment, the Medical Center began requiring the BKAT for those nurses who previously had been part of the MICU and who had not taken the BKAT. (Exhibit 1).

On December 1, 2014, the American Federation of Government Employees, Local 2092 (Union) demanded that the Medical Center cease and desist the mandatory BKAT testing for its ICU nurses. (Exhibit 3).

On December 5, 2014, the Medical Center's management met with the Union to discuss the BKAT. (Exhibit 1). During the meeting, the Union questioned the necessity of the BKAT and requested that the Medical Center stop administering the test to ICU nurses. In response, the Medical Center verbally informed the Union that it intended to seek a 38 U.S.C. § 7422 determination from the Secretary. (Exhibit 1).

On December 8, 2014, the Union again demanded that the Medical Center cease and desist, and bargain over, mandatory BKAT testing for its ICU nurses. On December 8, 2014, the Medical Center's Associate Director for Patient Care Services sent a letter to the Union reiterating the Medical Center's intention to seek a determination that the BKAT is excluded from collective bargaining under 38 U.S.C. § 7422(b)(1) as it directly involves professional competency. The Medical Center also explained that it would continue the BKAT to "ensure all Registered Nurses are competent to provide safe patient care to our Veterans." (Exhibit 4).

On December 15, 2014, the Union filed an Unfair Labor Practice charge (ULP) with the Federal Labor Relations Authority (FLRA). The ULP charged the Medical Center with refusing to bargain over the BKAT testing. (Exhibit 5).

On February 13, 2015, by and through its Regional Counsel, the Medical Center responded to the Union's ULP. In its response, the Medical Center stated that it believed the matter was "an issue that directly involves professional competence, and is therefore, excluded from collective bargaining pursuant to 38 U.S.C. § 7422(b)." The Medical Center also reiterated its intention to submit a request for a 7422 determination to the VA Secretary. (Exhibit 7).

On March 13, 2015, the FLRA agreed to hold the ULP in abeyance once it received a copy of the Medical Center's request for a 38 U.S.C. § 7422 determination. (Exhibit 1).

The Medical Center filed its request for a 38 U.S.C. § 7422 determination on April 10, 2015.¹ (Exhibit 1). The Union did not file a response to the Medical Center's request for determination.

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 ULP charge, claiming that the Medical Center refused to bargain a requirement that registered nurses take the Basic Knowledge Assessment Test, involves a matter or question 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 Improvement Act of 1991, codified in part at 38 U.S.C. § 7422, granted collective bargaining rights to Title 38 employees but 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 (direct patient care or clinical competence), peer review, or employee compensation, as determined by the Secretary.

In its ULP, the Union alleges that the Medical Center refused to bargain over the testing of its registered nurses within the ICU. (Exhibit 5). However, 38 U.S.C. § 7422 precludes from collective bargaining any matter that concerns a registered nurse's professional conduct or competence. "Professional conduct or competence" is more fully defined as "direct patient care" or "clinical competence." 38 U.S.C. § 7422(c).

In its request for a 38 U.S.C. § 7422 determination, the Medical Center explained that the American Association of Critical-Care Nurses "supports the use of the BKAT as a knowledge validation tool for critical care nurses."² According to the Medical Center, the

¹ The Medical Center's request is dated March 20, 2015. (Exhibit 1).

² In addition, the Medical Center stated: "On-going research studies, publications and the use of BKATs has become accepted as one standard for measuring basic knowledge in critical care nursing." (Exhibit 1).

BKAT allows the facility to both assess the proficiency of its nurses and to identify areas that require additional focus and training. (Exhibit 5). Once a BKAT is completed and reviewed at the facility, a nurse is assigned specific "learning modules" to address any deficiencies noted in the assessment. In the Medical Center's view, its "authority to assess the competency of RNs goes to the core of professional conduct or competency." (Exhibit 5). I agree.

Assessing the skills and competencies of a facility's critical care nurses furthers the Medical Center's ability to fulfill its primary mission of providing quality patient care to Veterans. Ongoing nurse assessments, like the BKAT, are important to ensuring safe and appropriate patient care at VA facilities. The Medical Center's decision to require the BKAT for all its ICU nurses is a matter that concerns direct care of patients and determination of a nurse's clinical competence, both matters excluded from collective bargaining by 38 U.S.C. § 7422.

CONCLUSION

The Medical Center demonstrated that its decision to require the registered nurses within the ICU to take the BKAT is directly tied to providing quality patient care and assessing the competence of its ICU nurses. As a result, the testing requirement is a matter concerning professional conduct or competence and is excluded from bargaining by 38 U.S.C. § 7422.

DECISION

The Unfair Labor Practice charge claiming that the Medical Center refused to bargain a requirement that ICU nurses take the Basic Knowledge Assessment Test involves a matter or question concerning or arising out of professional conduct or competence within the meaning of 38 U.S.C. § 7422(b) and is thus excluded from collective bargaining.



David J. Shulkin, M.D.
Under Secretary for Health

6/14/16
Date