



DEPARTMENT OF VETERANS AFFAIRS
Under Secretary for Health
Washington DC 20420

October 31, 2017

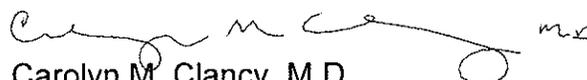
Ms. Colleen Evans
Executive Vice President, AFGE Local 2028
VA Pittsburgh Healthcare System
University Drive
Pittsburgh, PA 15240

Dear Ms. Evans:

I am responding to a request for a 38 U.S.C. § 7422 decision regarding the VA Pittsburgh Healthcare System's temporary schedule change for nurses in its Behavioral Health Department (Medical Center) and whether that change is a matter or question concerning or arising out of professional conduct or competence, as defined by 38 U.S.C. § 7422(c), and thus, excluded from collective bargaining and review by any other agency pursuant to 38 U.S.C. § 7422(d).

I have determined that the Medical Center's decision to temporarily change the schedules of nurses in the Behavioral Health Department was to address a staffing shortage, and consequently is a matter or question concerning or arising out of professional conduct or competence, as defined by 38 U.S.C. § 7422(c). Please review the enclosed Decision Paper for a more complete explanation of my decision.

Sincerely,


Carolyn M. Clancy, M.D.
Executive in Charge

Enclosures



DEPARTMENT OF VETERANS AFFAIRS
Under Secretary for Health
Washington DC 20420

October 31, 2017

Ms. Karin McGraw
Director
VA Pittsburg Healthcare System
University Drive
Pittsburgh, PA 15240

Dear Ms. McGraw:

I am responding to a request for a 38 U.S.C. § 7422 decision regarding the VA Pittsburgh Healthcare System's temporary schedule change for nurses in its Behavioral Health Department (Medical Center) and whether that change is a matter or question concerning or arising out of professional conduct or competence, as defined by 38 U.S.C. § 7422(c), and thus, excluded from collective bargaining and review by any other agency pursuant to 38 U.S.C. § 7422(d).

I have determined that the Medical Center's decision to temporarily change the schedules of nurses in the Behavioral Health Department was to address a staffing shortage, and consequently is a matter or question concerning or arising out of professional conduct or competence, as defined by 38 U.S.C. § 7422(c). Please review the enclosed Decision Paper for a more complete explanation of my decision.

Sincerely,

A handwritten signature in black ink, appearing to read "Carolyn M. Clancy", with a small "ms" written to the right of the signature.

Carolyn M. Clancy, M.D.
Executive in Charge

Enclosures

**Title 38 Decision Paper
Department of Veterans Affairs (VA)
VA Pittsburgh Healthcare System, Pittsburgh, Pennsylvania**

FACTS

The Behavioral Health Department (Behavioral Health) at the VA Pittsburgh Healthcare System (Medical Center) is ordinarily staffed with over 18 registered nurses (nurses). Exhibit 1. As of June 4, 2015, Behavioral Health was short three full-time nurses, all of whom were on extended leave for various reasons. Id. At the time, a majority of the full-time nurses in Behavioral Health were working a schedule which consisted of six 12-hour tours and one 8-hour tour per pay period. Id. The absence of three nurses "created a gap in the patient coverage and began to compromise the level and degree of patient care at" the Medical Center. Id.

The Nurse Manager approached the Behavioral Health nurses and asked if they would be willing to temporarily change to a different schedule. Id. The schedule she proposed consisted of two 12-hour tours and two 8-hour tours per week. Id. The Nurse Manager explained that the proposed schedule would allow the Medical Center to "adequately staff the work week and meet patient care needs." Id. The Nurse Manager received no complaints about the temporary change and she implemented the new schedule. Id.

On June 12, 2015, the American Federation of Government Employees, Local 2028 (Union), submitted a demand to bargain concerning the change in nurse schedules. Exhibit 2. The Union requested that the Medical Center "cease and desist with any and all changes in bargaining unit employees working schedules until all bargaining obligations are met." Id.

On June 22, 2015, the Nurse Manager emailed the nursing staff, thanking them for agreeing to work the new schedule "to cover the unit during our staffing crisis." Exhibit 3.

On June 26, 2015, the Union filed an Unfair Labor Practice charge (ULP) with the Federal Labor Relations Authority. The ULP alleged that the Medical Center failed to bargain in good faith with the Union concerning the change in nurses' schedules in Behavioral Health. Exhibit 4.

On June 28, 2015, the nurses began working the new schedule. Exhibit 1.

On August 2, the staffing shortage was resolved with the return of several nurses and the Behavioral Health nurses were moved back to their previous schedules. Id.

On August 31, 2015, the Medical Center filed a request for a 38 U.S.C. § 7422 determination.¹ Id. The Union did not file a response to the Medical Center's request for determination.

¹ The Medical Center's request for determination is dated August 4, 2015. Exhibit 1.

AUTHORITY

The Secretary of Veterans Affairs has final authority to determine whether a matter or question concerns or arises out of professional conduct or competence (i.e., direct patient care or clinical competence), peer review, or employee compensation within the meaning of 38 U.S.C. § 7422(b). On August 23, 2015, the Secretary delegated his authority to the Under Secretary for Health. Exhibit 5.

ISSUE

Whether the Medical Center's decision to modify the shifts and tours of duty of its Behavioral Health nurses is a matter or question concerning or arising out of professional conduct or competence, as defined by 38 U.S.C. § 7422(c), and thus, excluded from collective bargaining and review by any other agency pursuant to 38 U.S.C. § 7422(d).

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 matters or questions concerning or arising out of professional conduct or competence (i.e., direct patient care or clinical competence), peer review, or employee compensation, as determined by the Secretary.

After determining that patient care would be compromised at the Medical Center's Behavioral Health Department if nurses continued on their existing schedule, the Nurse Manager decided to temporarily modify nursing schedules. Exhibit 1. Rather than working three 12-hour tours each week (and an 8-hour tour every other week), the nurses were required to work two 12-hour tours and two 8-hour tours each week. Id. According to the Medical Center, the schedule change for Title 38 nurses lasted a little over 4 weeks, from June 28, 2015 to August 2, 2015, after which nurses were returned to their previous schedules. Id.

The Medical Center explained that the changes were necessary in order to meet minimum staffing requirements at the facility's behavioral health unit and behavioral health clinic. Id. Had the Medical Center been prevented from initiating the new temporary schedule, patient health and safety would have been compromised. Id. The temporary schedules provided the flexibility Medical Center management needed to ensure that nurse coverage on both day and night shifts was adequate to provide appropriate care of Veterans. Id.

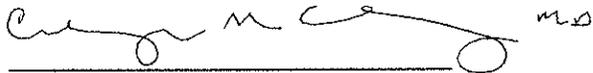
Changes in the schedules of Title 38 professionals to accommodate patient care needs have been determined to be excluded from collective bargaining by 38 U.S.C. § 7422. In VAMC Ann Arbor, the Secretary determined that a medical center's decision to

temporarily rotate some nurses to different shifts to address “nurse staffing imbalances” in Patient Care Services was excluded from collective bargaining by 38 U.S.C. § 7422. Exhibit 7, VAMC Ann Arbor (August 5, 2015). In VAMC Indianapolis, management assigned nurses on 12-hour compressed work schedules to a single 8-hour “off tour” each pay period to provide safe, quality patient care on the evening shift.” Exhibit 6, VAMC Indianapolis (May 29, 2013). The Secretary determined, in VAMC Indianapolis, that the facility’s nurse scheduling was a matter that concerned professional conduct or competence and, as a result, was excluded from collective bargaining under 38 U.S.C. § 7422(b). Id. The Secretary explained that VA’s “authority to control [T]itle 38 work schedules goes to the heart of professional conduct or competence because [VA’s] ability to provide direct patient care would be severely impacted without the flexibility to assign [T]itle 38 personnel to shifts where their services are most needed. The workweeks, tours of duty, and work schedules for [T]itle 38 professionals – RNs [registered nurses], in particular – are fundamental to ensuring the level and quality of patient care provided by” VA. Id.

In similar fashion, I find that the Medical Center’s decision to modify the shifts and tours of duty of its Behavioral Health nurses to address a temporary staffing shortage is a matter or question concerning or arising out of direct patient care, and is excluded from collective bargaining. A medical facility must have the flexibility to quickly adapt to changing circumstances and to ensure that its nursing staff is properly deployed at all times to provide appropriate, high-quality care to Veterans.

DECISION

The Medical Center’s decision to modify the shifts and tours of duty of its Behavioral Health nurses due to a staffing shortage to ensure appropriate patient care and safety is a matter or question concerning or arising out of professional conduct or competence, as defined by 38 U.S.C. § 7422(c), and thus, excluded from collective bargaining and review by any other agency pursuant to 38 U.S.C. § 7422(d).



Carolyn M. Clancy, M.D.
Executive in Charge
Office of the Under Secretary for Health

10/31/17
Date