



DEPARTMENT OF VETERANS AFFAIRS
UNDER SECRETARY FOR HEALTH
WASHINGTON DC 20420

JAN 05 2005

Director(00)
VA Gulf Coast Health Care System
480 Veterans Avenue
Biloxi, MS 39531

Dear Ms.

I am responding to the issue raised in your memorandum of October 5, 2004, concerning an Unfair Labor Practice (ULP) charge and related grievance filed by the American Federation of Government Employees (AFGE), Local 1045, relating to the reassignment of registered nurses.

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,

A handwritten signature in black ink, which appears to read "Jonathan B. Perlin".

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

Enclosure

VA GCVHCS management responded to the third step grievance on July 15, 2004, 2004, informing the employee that management "must retain the right to make assignments based on the needs of patient care..." rather than an arbitrary system such as seniority." *Exhibit F.*

On July 22, 2004, the union invoked arbitration on the subject grievance. *Exhibit G.*

On August 6, 2004, management notified the union that "the selection of an arbitrator must be held in abeyance pending a determination by the Undersecretary [sic] for Health concerning the applicability of 38 USC Section 7422 to this issue. It is the assertion of the management of this facility that such decisions fall under the jurisdiction of the aforementioned reference and are therefore NOT subject to the provisions of collective bargaining." *Exhibit H.* The grievance was therefore held in abeyance pending a determination by the USH.

On August 19, 2004, management responded to the ULP charge, stating that the restructuring of unit 62G2 and the reassignment of the four RNs were excluded from collective bargaining by 38 USC § 7422. *Exhibit I.*

On September 28, 2004, the FLRA issued a Complaint and Notice of Hearing in the matter, scheduling the matter for pre-hearing conference on January 18, 2005, and for hearing for January 25, 2005. *Exhibit J.*¹

On October 5, 2004, the Director of the VA GCVHCS submitted a memorandum to the USH requesting a determination that the issues raised in the ULP are outside the scope of collective bargaining pursuant to 38 USC § 7422. *Exhibit K.* In explaining the reassignment of the referenced nurses, the Director stated:

Unit 62G2 was a Mental Health acute care unit that was responsible for the care of Mental Health patients of all ages with a wide variety of diagnoses and presenting complaints. The average length of stay on the unit prior to reorganization was 15 days. All the registered nurses assigned at that time to 62G2 were considered skilled in Mental Health and geriatrics nursing. During the year previous to the decision to restructure the unit, there had been three administrative boards of investigation resulting from incidents related to patient care. Those ABI's called into question the judgment of several patient care providers on unit 62G2, and caused management to determine that several RN's appeared to have lost contact with the nurturing, compassionate and therapeutic nature of their nursing practice. When reviewing the staff on the unit in order to determine the most appropriate RN's to be reassigned, it was determined that those RN's involved in the incidents resulting in the ABI's would be most appropriate for the reassignment. Although the reassignment of these individuals was not disciplinary in nature and not intended to deal with any misconduct on the

¹ It should be noted that the Complaint lists the four Registered Nurses involved in the reassignment, while the ULP charge itself just concerned a single Registered Nurse. Two of the four Nurses involved in the reassignment have since resigned from employment with the VA GCVHCS.

part of the employees, it was felt that these particular individuals needed to have a change in assignment in order to refocus their nursing practice toward the patient and regain a more compassionate approach to patient care. Also taken into consideration is the fact that there is a strong need for skilled mental health RN's on all units, including geriatric units, throughout the VA GCVHCS.

On October 18, 2004, the VA's Regional Counsel answered the ULP complaint, asserting again that the matter is directly related to patient care and is therefore outside the scope of collective bargaining under the provisions of 38 USC § 7422. *Exhibit L.*

On November 10, 2004, the VA's Deputy Under Secretary for Health for Operations and Management requested additional information from Management at the VA GCVHCS relating to the specific clinical bases for the reassignments. *Exhibit M.* On November 23, 2004, the Director of VA GCVHCS provided the requested information, providing more detailed support for its assertion that the restructuring and reassignments were undertaken with the clinical goal of improving the therapeutic environment for the patients. *Exhibit N.*

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 USC §7422(b).

ISSUES:

1. Whether the issues raised by the union's grievance over the reassignment of Lori Ishee, RN, concern or arise out of professional conduct or competence within the meaning of 38 USC § 7422(b).
2. Whether the issues raised by the ULP complaint relating to the reassignment of four RNs from 62G2 to other units at the VA GCVHCS concern or arise out of professional conduct or competence within the meaning of 38 USC § 7422(b).

DISCUSSION:

The Department of Veterans Affairs Labor relations Act of 1991, 38 USC § 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 (i.e., direct patient care and clinical competence), peer review or employee compensation as determined by the USH.

Pursuant to 38 USC § 7421(a), the Secretary has proscribed regulations (contained in VA Directive/Handbook 5005, Part IV, Chapter 3, Sections A and B) to implement assignments, reassignments and details of Title 38 medical professionals, including RNs. Section A, paragraph 4(b) of Handbook 5005, Part IV, Chapter 3 provides

that when Title 38 assignments and reassignments are made pursuant to the authorities covered in the handbook, "primary consideration will be given to the efficient and effective accomplishment of the VA mission." The first consideration in assigning and reassigning Title 38 personnel at VA health care facilities such as the VA GCVHCS is patient care.

In the instant case, management determined that unit 62G2 should be restructured to improve the unit's patient care milieu. As part of that restructuring, management determined that nurses _____ and _____ should be reassigned to other units to maximize the quality of patient care delivered throughout the facility. More specifically, management determined that these particular nurses needed to have a change in assignment in order to refocus their nursing practice toward the patient and regain a more compassionate approach to patient care. Additionally, management reassigned these nurses to units where they were specifically needed and where they were more qualified based on their previous experience. The Director's November 23, 2004 memorandum to the Deputy Under Secretary for Health for Operations and Management provides the following specific justification for the reassignment of each nurse:

:

Mr. _____ was reassigned from unit 62G2 to unit 1-3. Unit 1-3 is an acute med/surgery unit which had six vacancies at the time of the restructuring of unit 62G2. It was decided that Mr. _____ would be most appropriately assigned to assist on this unit because of his strengths noted by the Nurse Manager on that unit.

:

Ms. _____ was reassigned to unit 41G2, a Dementia unit. That unit had two vacancies at the time of unit 62G2's restructuring. Management determined that they needed a nurse with a strong mental health background for that unit and decided that Ms. _____ was the most qualified. Ms. _____ had been a psychiatric nurse for the VA since 1997.

and _____ :

Mr. Sumrall and Ms. Ishee were reassigned to the VA GCVHCS's Nursing Home facility, unit 2-2. This unit had no RN vacancies at the time of unit 62G2's restructuring but had four LPN vacancies. The LPN vacancies placed an unacceptable burden on the existing unit 2-2 RN staff. It was determined that placing Mr. Sumrall and Ms. _____ on this unit would be most helpful to the existing staff and would ensure proper nursing care was provided to the residents.

See Exhibit N. These patient-care based reassignments involve issues concerning or arising out of professional conduct or competence and are therefore outside the scope of bargaining pursuant to 38 USC § 7422.

In several prior cases involving reassignments of Title 38 medical professionals, the USH has determined that where such reassignments are based on issues of clinical competence or are necessary to provide uncompromised patient care, they involve professional conduct and competence within the meaning of 38 U.S.C. § 7422. Two such determinations include: Poplar Bluff, MO, VAMC (February 12, 2003) and VA Black Hills, SD, Health Care System (May 11, 2004).

RECOMMENDED DECISION(S):

1. That the issues raised by the union's grievance over the reassignment of Lori Ishee, RN, concern or arise out of professional conduct or competence within the meaning of 38 USC § 7422(b).

APPROVED _____ ✓

DISAPPROVED _____

2. That the issues raised by the ULP complaint relating to the reassignment of four RNs from 62G2 to other units at the VA GCVHCS concern or arise out of professional conduct or competence within the meaning of 38 USC § 7422(b).

APPROVED _____ ✓

DISAPPROVED _____


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

1-5-05
Date