



DEPARTMENT OF VETERANS AFFAIRS
UNDER SECRETARY FOR HEALTH
WASHINGTON DC 20420

MAY 27 2005

Director
Ralph H. Johnson VA Medical Center
109 Bee Street
Charleston, South Carolina 29401-5799

President, AFGE Local 523
Ralph H. Johnson VA Medical Center
109 Bee Street
Charleston, South Carolina 29401-5799

Dear Mr. _____ and Dr. _____

I am responding to the issues raised in your memoranda of February 22, 2005 and March 2, 2005 respectively, concerning the union's Unfair Labor Practice Charge (ULP) and a related Memorandum of Understanding (MOU) relating to the assignment of Primary Care physicians to cover the Urgent Care unit at the Ralph H. Johnson VA Medical Center in Charleston, South Carolina.

Pursuant to delegated authority, I have determined, on the basis of the enclosed decision paper, that the issues presented by both the ULP and the MOU concern or arise out of professional conduct and competence, and are thus exempted from collective bargaining under 38 USC § 7422(b).

Please provide a copy of the decision paper to your Regional Counsel as soon as possible.

Sincerely yours,

A handwritten signature in cursive script, appearing to read "Jonathan Perlin", is written over a horizontal line.

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

Enclosure

Title 38 Decision Paper
VAMC Charleston
VA – 05 – 06

FACTS:

The Veterans Affairs Medical Center (VAMC) in Charleston, South Carolina, has had a long-standing practice of assigning Primary Care physicians to the Urgent Care Unit to assist in patient care coverage. The Primary Care physicians' temporary assignments to the Urgent Care Unit occur approximately once a month for each provider, and may include scheduled "late stay" coverage from 4:00 to 6:00 p.m.

In or about 2004, VAMC management also began assigning physician assistants from Primary Care to cover Urgent Care to ensure adequate coverage.

On May 12, 2004 the Primary Care Service Line issued a routine schedule for medical provider coverage of the Urgent Care unit. *Attachment A.*

On June 9, 2004, AFGE Local 523 demanded to bargain "over the proposed change in work assignment and schedules for Primary Care providers (MD's and PA's) to cover Urgent Care." *Attachment B.*

In response to the union's demand, the Charleston facility's labor relations specialist and human resources chief scheduled a meeting with the president and vice-president of the union to discuss their concerns. During the meeting, the union officials indicated that Primary Care providers objected to providing coverage in Urgent Care, as it reduced their administrative time and interfered with the time they needed to see Primary Care patients. The union officials stated that if Primary Care providers were going to provide coverage in Urgent Care, Primary Care panel sizes needed to be reduced. They also expressed dissatisfaction with management's decision to add physician assistants to the coverage mix. The union officials further expressed interest in resolving the "late stay" coverage issue, meaning that the Primary Care providers disliked working longer than eight-hour days. *Attachment C, pages 1-2.*

Management informed the union that they believed the issues raised concerned matters of professional conduct and competence (i.e., direct patient care) and were therefore outside the scope of bargaining pursuant to 38 U.S.C. § 7422 (b). Management further informed the union that even though they believed their issues were non-negotiable, they would discuss their concerns with top facility management to determine if there was room for further discussion or change. *Attachment C, pages 2-3.*

On June 30, 2004, management sent a formal response to the union's June 9th demand to bargain, informing the union that "...Urgent Care coverage [by Primary Care] physician assignment rotation, with PA's now included, for direct patient care has been a long standing practice that is appropriate and planned to continue, at least for the present time." *Attachment D.*

On November 1, 2004, the AFGE local union filed an Unfair Labor Practice Charge (ULP) with the Federal Labor Relations Authority (FLRA), alleging that the medical center had violated the labor relations statute by refusing to negotiate over the Primary Care providers' hours of work in the Urgent Care area. *Attachment E.*

On November 3, 2004, the union submitted a formal bargaining proposal to management that requested a reduction in "the panel size of each primary care physician required by management to work in urgent care outside of their primary panel responsibility." *Attachment F.* The union's proposal specifically requested that each Primary Care provider who was required to cover Urgent Care have his or her Primary Care panel reduced by a minimum of ten percent from 100% panel size.

On November 18, 2004, management responded to the ULP charge, asking the FLRA to stay the proceedings while the parties tried to reach a local resolution of the issues, or until the Under Secretary for Health (USH) rendered a determination of whether the disputed issues were outside the scope of bargaining pursuant to 38 U.S.C. § 7422. *Attachment G.*

On January 28, 2005, the union sent a letter to the Director of Primary Care, alleging "an unfair and inequitable practice regarding assignment of work for primary care physicians" as follows:

"Primary care physicians have been regularly scheduled for mandatory overtime work in urgent care after completing their regular tours of duty in primary care since 1995. On or about June 2004, two new halftime primary care physicians were hired to replace one full-time primary care physician. Prior to January 2005 these two physicians have not been assigned extra duty in urgent care creating an additional burden of work for their colleagues. During January 2005, they were assigned urgent care duty which has been worked for them by a contract physician supplied by primary care administration. Per the Master Agreement, article 16, section 1, the union requests similar contract coverage for all primary care physicians assigned to work in urgent care."

Attachment H.

On February 16, 2005, facility management entered into a Memorandum of Understanding (MOU) with the local union that purported to set certain limits on the patient care assignments of Primary Care physicians in the bargaining unit. The MOU provided, among other limitations, the following:

10. PCSL will use the VA's directive on panel sizes as a guide and consider Continuity Clinic resident supervision in calculation of panel sizes for Attending volunteers. Historically, the standard is a 1/10 reduction for ½ day of resident supervision.

Attachment I.

In a memorandum dated February 22, 2005¹, the Director of the VAMC requested a determination from the USH that the issues raised in the ULP relating to the assignment of Primary Care physicians and physician assistants to the Urgent Care Unit are outside the scope of collective bargaining pursuant to 38 U.S.C. § 7422. *Attachment J.*

On March 2, 2005, the union sent a letter to the USH to counter the arguments raised in management's February 22, 2005 §7422 decision request. *Attachment K.* In its letter, the union reiterated its allegation of an "unfair and inequitable practice regarding assignment of work for primary care physicians," and further alleged that management was in violation of the February 16, 2005 MOU with respect to panel sizes in Primary Care. More specifically, the union argued as follows:

Management agreed a reduction in panel size for work in urgent care outside of the assigned primary care panel per VA Directive 2004-27 and 2004-031 would be appropriate. This has not occurred and panels remain well above recommended maximum size at this time (enclosed). While assigned to urgent care duty the primary care work load continues to grow from telephone calls and computer alerts which must be satisfied by the clinician at a later time with no additional time made available to accomplish this work.

Attachment K, paragraph 4.

The union further stated that management had failed to correct the "late stay" coverage issue, whereby physicians are asked to work in Urgent Care after completing a full 8-hour tour of duty in Primary Care. As a "remedy," the union requested that "management ... hire professional employees to fully and adequately staff operating hours of the urgent care center while allowing primary care physicians to focus on taking care of their panels during a normal tour of

¹Although the facility's decision request is dated February 22, 2005, it was sent through the Network Director and not received in VA Central office until March 30, 2005.

duty without being detailed to extra work and extra hours outside of their patient panel." *Attachment K, paragraph 8.*

PROCEDURAL HISTORY:

The Secretary has delegated to the USH the 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).

ISSUES:

1. Whether the union's ULP alleging failure to bargain over the hours of work of Primary Care physicians assigned to cover Urgent Care involves issues of professional conduct or competence (direct patient care) within the meaning of 38 U.S.C. §7422(b).
2. Whether the parties' February 16, 2005 MOU relating to the participation of Primary Care physicians in the Continuity Clinic, and purporting to limit patient-care duties and panel sizes for those Primary Care providers who do supervise residents in the Continuity Clinic, involves issues of professional conduct or competence (direct patient care) within the meaning of 38 U.S.C. §7422(b).

DISCUSSION:

The Department of Veterans Affairs Labor Relations Act of 1991, codified at 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 (i.e., direct patient care and clinical competence), peer review or employees compensation determined by the USH.

38 U.S.C. § 7421(a) authorizes the Secretary of Veterans Affairs to prescribe by regulation "the hours of work, conditions of employment and leaves of absence" of title 38 medical professionals, including physicians and physician assistants. The Secretary has exercised this authority by prescribing regulations contained in VA Directives and Handbooks 5005, 5007 and 5011 relating to staffing, pay and scheduling of title 38 health care providers. Among these regulations are the following:

Handbook 5005, Part IV, Chapter 3, Section A, paragraph 4(b), relating to assignments for title 38 health care professionals, provides that in exercising the authorities covered in the handbook, primary consideration will be given to the efficient and effective accomplishment of the VA mission. The assignment and

placement of Title 38 health care personnel is fundamental to the patient care mission of all VA health care facilities.

Handbook 5007, Part V, Ch. 2, paragraph 2.a., relating to overtime pay for physicians, dentists, podiatrists, chiropractors and optometrists, provides that “[f]ull-time employees covered by this paragraph are employed on the basis of availability for duty 24 hours a day, 7 days a week. No extra amount in addition to the regular per annum rate shall be payable to these employees for duty on a legal holiday, Saturday or Sunday, at night, on overtime, or for on-call duty. In addition, part-time and intermittent physicians, dentists, podiatrists, chiropractors, and optometrists may not receive extra pay for duty performed on a legal holiday, on a Saturday or Sunday, at night, for overtime, or for on-call duty.”

Handbook 5011, Part II, Ch. 3, para. 2.a, relating to hours of work for full-time physicians, dentists, podiatrists, chiropractors and optometrists, provides that such providers “shall be continuously subject to call unless officially excused by proper authority. This requirement as to availability exists 24 hours per day, 7 days per week.” In addition, paragraph 2.d. of the that same chapter provides that “[b]ecause of the continuous nature of the services rendered at hospitals, the facility Director, or designee (in no case less than a chief of service), has the authority to prescribe any tour of duty to ensure adequate professional care and treatment to the patient, consistent with these provisions.”

Read together, these regulations clearly provide that full-time physicians will be assigned such duties as patient care needs require; that they are not eligible for overtime pay; and that they are employed on the basis of their availability to perform service twenty-four hours per day, seven days per week.

The ULP

The ULP alleges that Charleston VAMC management failed to bargain over hours of work in Urgent Care. The parties’ submissions and supporting documentation indicate that the union issued its demand to bargain after management issued a routine schedule for Urgent Care coverage by Primary Care physicians. That schedule was part of a long-standing practice whereby management assigned Primary Care physicians to cover the facility’s Urgent Care service so as to ensure adequate coverage for Urgent Care patients. Because the Urgent Care service’s hours extend beyond those of the Primary Care service, the hours during which Primary Care physicians were assigned to cover Urgent Care sometimes extended beyond the end of the normal Primary Care tour of duty.

The underlying management determination that Primary Care physicians should cover Urgent Care involves issues of professional conduct or competence, including direct patient care, and is therefore non-negotiable and non-grievable under 38 U.S.C. § 7422(b). The union's proposals with respect to that determination – that the affected providers' Primary Care panels be reduced in size; that they not be required to provide "late stay" Urgent Care coverage after working an 8-hour shift in Primary Care; and that management use contract providers to cover Urgent Care instead of the Primary Care providers in the bargaining unit – likewise involve issues of direct patient care, in that they would restrict management's right to assign patient care duties to the affected providers and to determine which personnel will care for patients in the Urgent Care unit. Unlike the general title 5 labor statute, 38 USC 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). Accordingly, the union's proposals are non-negotiable, and the ULP for failure to bargain is barred by 38 USC § 7422.

This decision is consistent with several prior decisions in which the USH has determined that assignments and reassignments of Title 38 health care personnel fall within the meaning of 38 U.S.C. § 7422(b) and are thus outside the scope of collective bargaining.² It is also consistent with prior decisions of both the USH³ and the Federal Labor Relations Authority⁴ to the effect that management determinations as to the quantity, quality, timeliness and priority of work are substantively non-negotiable.

The MOU

The parties' February 16, 2005 MOU purports to set a number of limitations on the patient care assignments of Primary Care physicians. Most of those limitations are not discussed in the parties' respective submissions and, for that reason, will not be discussed here.⁵ However, the union has invoked paragraph 10 of the MOU in its allegation that Charleston management failed to make agreed-upon reductions in panel size for the Primary Care physicians. Paragraph 10, by its terms, provides that the Primary Care Service Line "will use the VA's directive on panel sizes as a guide and consider Continuity Clinic

² See, e.g., VA Maryland Health Care System, VA 03-02, February 4, 2003; and VA Medical Center, Poplar Bluff, VA 03-01, February 12, 2003.

³ VA Medical Center, Wilmington, DE, December 4, 2001 (panel sizes involve direct patient care within the meaning of 38 USC 7422).

⁴ See, e.g., NTEU, 3 FLRA 769, 775 (1980), *aff'd sub nom Nat'l Treasury Employees Union v. FLRA*, 691 F.2d 553 (D.C. Cir. 1982); AFGE Local 1687 and VA Medical Center, Mountain Home, TN, 52 FLRA 521 (1996).

⁵ It must be noted, however, that to the extent that the agreed-upon limitations may adversely impact patient care in either Primary Care or the Continuity Clinic, they are non-negotiable under 38 USC § 7422 and may be void on that basis. The parties are urged to revisit the MOU to ensure that all of its provisions are legally valid.

resident supervision in calculation of panel sizes for Attending volunteers. Historically, the standard is a 1/10 reduction for ½ day of resident supervision.”⁶ In its March 2, 2005 response to management’s request for a 38 USC 7422 determination, the union alleges that management violated this provision by failing to reduce panel sizes for Primary Care physicians who are required to cover Urgent Care.⁷ To the extent that paragraph 10 of the MOU is intended to mandate a reduction in panel size, it is non-negotiable under 38 USC § 7422(b).

The union further alleges that “regularly scheduling physicians for additional work in urgent care after completing a full tour of duty in primary care [is an] abusive, inequitable and unfair labor practice.”⁸ As a “remedy,” the union proposes that Charleston management “hire professional employees to fully and adequately staff the operating hours of the urgent care center while allowing primary care physicians to focus on taking care of their panels during a normal tour of duty without being detailed to extra work and extra hours outside of their patient panel.” It must be noted that the Primary Care physicians represented by this union are full-time providers who are legally ineligible for overtime compensation⁹ but who do receive extra scarce specialty pay by virtue of their full-time status.¹⁰ Thus while these providers would of course prefer to work only in their area of primary assignment and only during their scheduled tour hours, patient care needs take precedence over that preference, and compensation for the extra duty is factored into their special pay.

⁶ VHA Directive 2004-031 provides, as its title suggests, “Guidance on Primary Care Panel Size” rather than numerical mandates, setting forth a number of variables for local management to consider when assigning patients to primary care providers. As such, the union errs in suggesting that resident supervision, standing alone, mandates a reduction in panel size under the Directive.

⁷ See Attachment K, paragraph 4 (“Management agreed a reduction in panel size for work in urgent care outside of the assigned primary care panel per VA Directive 2004-27 and 2004-031 would be appropriate. This has not occurred and panels remain well above recommended maximum size at this time”).

⁸ Attachment K, paragraph 5.

⁹ See VA Handbook 5007, Part V, Chapter 2, paragraph 2.a.

¹⁰ 38 USC 7433(b)(1); VA Handbook 5007, Part IX, paragraph 5.a.

RECOMMENDED DECISION:

1. The October 27, 2004 ULP over refusal to bargain over hours of work in Urgent Care for Primary Care physicians involves an issue of professional conduct or competence (direct patient care) within the meaning of 38 U.S.C. §7422(b) and is therefore outside the scope of collective bargaining.

APPROVED ✓

DISAPPROVED _____

2. The parties' February 16, 2005 MOU relating to the participation of Primary Care physicians in the Continuity Clinic, and purporting to limit patient-care duties and panel sizes for those Primary Care providers who do supervise residents in the Continuity Clinic, involves issues of professional conduct or competence (direct patient care) within the meaning of 38 U.S.C. §7422(b).

APPROVED ✓

DISAPPROVED _____

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

5-27-05
Date