



DEPARTMENT OF VETERANS AFFAIRS
UNDER SECRETARY FOR HEALTH
WASHINGTON DC 20420

JUL _ 9 2008

Mr. William D. Montague
Director (00)
Louis Stokes Cleveland VAMC
10701 East Boulevard
Cleveland, OH 44106

Ms. Malinda Morrow
President, AFGE, Local 31
10701 East Boulevard
Cleveland, OH 44106

Dear Mr. Montague and Ms. Marrow:

I am responding to the issues raised in your memoranda of April 8, 2008 and April 18, 2008, respectively, concerning the demand to bargain and request for assistance from the Federal Service Impasses Panel (FSIP) filed by the American Federation of Government Employees (AFGE), Local 31, relating to Compressed Work Schedules for the Short Stay Unit at the Cleveland, Ohio, VA Medical Center.

Pursuant to delegated authority, I have determined, on the basis of the enclosed decision paper, that the issues presented by the demand to bargain and request for assistance from the FSIP as well as a related Unfair Labor Practice (ULP) charge concern or arise out of professional conduct or competence and are 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 that reads "Michael J. Kussman".

Michael J. Kussman, MD, MS, MACP
Under Secretary for Health

Enclosure

Title 38 Decision Paper
VA Medical Center, Cleveland, OH
VA – 08-0

FACTS

On March 4, 2008, the Associate Chief Nurse at the Cleveland, VA Medical Center (VAMC) notified the President of the American Federation of Government Employees (AFGE or union), Local 31 that there would be a change in the nursing shifts on the Short Stay Unit (SSU) at the Wade Park Campus. (Attachment A) Specifically, the Associate Chief Nurse informed the union that the compressed work schedule (CWS) for registered nurses (RNs) in the SSU would be eliminated, changing the work schedule from ten (10) to eight (8) hour tours. *Id.* at ¶ 1.

On March 5, 2008, Jennifer M. Stober, SSU/Pre-Op Clinic Manager, notified all SSU staff of the change in tours. (Attachment B) Ms. Stober provided the following explanation for the decision to eliminate the CWS:

“I currently do not have enough staff to adequately take care of patients for the 5 days the SSU is open. The compressed tour leaves us short one employee each day and the problem is compounded when we have a sick call, an employee is out injured, classes are scheduled and or an employee is on annual leave. The unit is not functioning with a consistent staff with compressed tours.”

“...With this [new] schedule, we will have every staff member here each day throughout the week and will be able to safely care for patients with this schedule.”

Id. at ¶¶ 2 and 3

Ms. Stober’s notice to staff indicated that the new schedule would be implemented the week of March 23, 2008. *Id.* at ¶ 3

On March 5, 2008, VAMC management provided the union with a second notice of the change in CWS. (Attachment C)

On March 7, 2008, the union submitted a demand to bargain over the elimination of the 10-hour tours at the SSU. (Attachment D) A meeting between the union and management was scheduled for March 13, 2008, to start negotiations on the change in CWS. (Attachment E)

On March 10, 2008, the union submitted a request to the Federal Services Impasses Panel (FSIP) to consider an impasse in the parties’ negotiations over the termination of 10-hour tours for staff on the SSU. (Attachment F)

On March 11, 2008, management at the VAMC provided the union with a list of all of the employees who would be affected by the change in the CWS with their current tours of duty. (Attachment G)

On March 13, 2008, Maria Schloendorn, Labor Relations Specialist at the VAMC, responded to the union's demand to bargain. (Attachment H) Ms. Schloendorn explained that the change in the RNs' work schedules was not negotiable because it is "governed by the direct patient care exclusion of 38 U.S.C. § 7422." *Id.* ¶ 2. Ms. Schloendorn's letter further clarified that the FSIP had agreed to hold the case in abeyance until the Under Secretary for Health (USH) could make a determination on the negotiability of the issue. *Id.* ¶ 3.

On March 25, 2008, Ms. Schloendorn submitted a letter to the union in reference to a meeting held on March 13, 2008 between the parties. (Attachment I) Ms. Schloendorn stated that the union had claimed that the tours of duty are covered by the AFGE Master Agreement, VA Handbook 5011/12, Part II and 5 CFR Part 610. *Id.* ¶ 2. During the March 13 meeting, management requested that the union share its constituents' concerns so appropriate arrangements could be made to ameliorate any possible adverse effects caused by the elimination of the CWS. *Id.* ¶ 3. The union allegedly informed management that the employees' concerns centered on continuity of patient care. Management further stated that the union had claimed the following:

You explained that the nurses believe that the existing CWS would better ensure consistency of clinicians, thereby allowing the same nurse who admits the patient to be on duty when the surgery is completed and the patient is discharged. Further, you stated that the nurses were concerned about the staffing shortage; patient care, and the fact that they are required to work overtime. Ironically, these are management's reasons for discontinuing the CWS.

Id. ¶ 4

In her March 25 letter, Ms. Schloendorn further informed the union that the change in work tours would be implemented on Monday, April 14, 2008. *Id.* ¶ 5

By memorandum dated April 8, 2008, the Director of the VAMC requested that the USH determine that the union's demand to bargain and request for FSIP assistance involve issues concerning or arising out of professional conduct or competence (i.e. direct patient care and clinical competence) under 38 U.S.C. § 7422. (Attachment J) In the April 8 memorandum, the Director provided the following explanation for the need to eliminate the CWS:

The SSU is an out-patient surgical floor comprised of eighteen (18) beds. The unit also has a pre-operative testing unit. The SSU and Pre-Operative Clinic have a combined authorized FTEE of 15: Twelve (12) RN's, one (1) LPN, and two (2) Health Technicians. Currently, it is operating with 10 FTEE: eight (8) RN's; no LPN; and two (2) Health Technicians. Additionally,

one of the RNs is on light duty and cannot perform direct patient care. It is anticipated that this [light duty assignment] will be permanent. *Id.* ¶ 4

The current CWS "4-10" allows each employee to have one day off during the week. Currently, the SSU has three (3) RN vacancies; one RN on light duty and one (1) LPN vacancy. By continuing the CWS, the unit is short one nurse each day. This becomes compounded when annual leave is used, or when there is unscheduled leave. The SSU is understaffed and it is becoming increasingly more difficult to ensure quality patient care and safety. *Id.* ¶ 8

In an effort to reduce the impact of the CWS on the patient caseload, the Nurse Manager evaluated the SSU Pre-Operative program; made recommendations to help reduce the hiring lag; adjusted the tours; requested volunteers to work eight (8) hour tours; offered overtime to other nursing staff; and requested floaters to assist on high census days. *Id.* ¶ 9

Discontinuing CWS on the SSU will eliminate the need for overtime except in unusual instances; reduce critical staff shortages; provide for sufficient staff during high volume patient care activity; and better enable the unit to meet the Agency's mission and to provide optimal care for the veterans. (*Id.* ¶ 10)

On April 18, 2008, the union submitted its opposition to management's request for a decision by the USH under 38 U.S.C. § 7422. (Attachment K) The union argued that the issue in the instant case is not a direct patient care issue and is covered by 5 U.S.C. § 6131. *Id.* at page 2, ¶ 3. The union also argued that having the SSU nurses in a CWS does not adversely affect the agency or patient care. *Id.* Furthermore, the union explained that "[a]cross the country, nurses are allowed to work compressed work schedules and this helps with retention when a nurse can self schedule and work a 4-day workweek instead of a straight 5-day workweek and sometimes work Alternative work schedules to help with the ECONOMIC MEANS of everyday family life." *Id.* at, page 2, ¶ 2 (emphasis in the original).

The union further explained that the employees liked the 10-hour CWS because it gave them the opportunity to provide continuity of care. *Id.* at page 3. The union stated employees liked being able to provide care to the patients from admission to discharge.

On May 8, 2008, the union filed an Unfair Labor Practice (ULP) charge with the Federal Labor Relations Authority. (Attachment L) The ULP alleged the following:

On April 14, 2008 The [sic] agency and the Nursing managers changed the RN's currently in the Short Stay Units CWS from 10-hour tours to 8-hour tours. The agency entered into negotiations and clearly stated that this was a non-negotiable issue and that it was a 7422 issue which affected Patient Care and that the tours had to be changed to 8 hour tours. However, they were to get a determination from the Under Secretary of [sic] Health for which he is the only one

that can make a 7422 Determination In [sic] reference to the issues that affect Patient Care. On April 8, 2008 the agency sent a package which requested that the Under Secretary of [sic] Health make a determination in reference to this issue. However, they changed the RN's tours on April 14, 2008 without the Under Secretary of [sic] Health determination. [sic] Which is clearly a violation until the Under Secretary of [sic] Health makes this determination everything is to remain status quo this did not happen...[Management] agreed in negotiations that [no shifts would be changed], I am charging the agency with Failure to Bargain in Good Faith.

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 U.S.C. § 7422(b).

ISSUES:

1. Whether the union's demand to bargain and request for assistance from the FSIP regarding the CWS for RNs assigned to the SSU involves issues concerning or arising out of professional conduct or competence within the meaning of 38 U.S.C. § 7422(b).
2. Whether the union's May 8, 2008 ULP charge raises issues of professional conduct or competence within the meaning of 38 U.S.C. § 7422(b).

DISCUSSION:

The Department of Veterans Affairs Labor Relations Act of 1991, 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, peer review, and employee compensation as determined by the USH.

The tours of duty for Title 38 health care personnel are fundamental to establishing the level and quality of patient care to be provided by the Department of Veterans Affairs. Pursuant to 38 U.S.C. § 7421(a), the Secretary has prescribed regulations contained in VA Directive/Handbook 5011, Part II, Chapter 3 regarding the establishment of workweeks, tours of duty, and work schedules for medical professional employees. These regulations grant facility directors the discretionary authority to institute flexible and compressed work schedules for registered nurses appointed under the authority of 38 U.S.C. § 7401(1) or 7405(a)(1).

Handbook 5011, Part II, Chapter 3, Section 5g(1)(a) provides the following:

Compressed work schedules shall be consistent with patient care requirements. For example, compressed work schedules may be adopted to expand clinic service hours, staff mobile clinics, or otherwise improve service to veterans.

As a general proposition, VA has applied the authority of the compressed work schedule (CWS) statute to all of its employees, including Title 38 employees. However, if participation of Title 38 employees in a proposed or ongoing CWS program adversely impacts patient care, then the implementation or continuation of a CWS program is non-negotiable under 38 U.S.C. § 7422(b) and not subject to third party review. In such a case, there is a conflict between 38 U.S.C. § 7422 and the CWS statute, 5 U.S.C. § 6131(c)(2)(A), which provides for the Impasse Panel to rule on the agency's determination that CWS has produced an adverse agency impact. Where, as here, there is such a conflict, 38 U.S.C. § 7425(b) operates to render the Title 5 provision inapplicable. In turn, and in accordance with Article 2, *Governing Laws and Regulations*, section 1, of the Master Agreement, 38 U.S.C. 7425(b), renders inapplicable the provisions in Article 20, *Hours of Work and Overtime*, section 2.E.2.¹

In the instant case, the union argues that the CWS helps with recruitment and retention of employees. The union further argues that understaffing, not the CWS, has necessitated the use of overtime assignments to fully staff the SSU. In addition, the union argues that continuity of care for patients would be affected once the tour is changed. VAMC management has stated that with the 10-hour CWS, the SSU does not have enough staff to adequately take care of patients. The SSU Clinical Manager specifically stated that the CWS leaves the unit one employee short each day. Management further explained that eliminating the CWS would eliminate the need for overtime, reduce critical staff shortages, provide sufficient staff during high volume patient care activity, and better enable the unit to meet the Agency's mission while providing optimal care for veterans.

In the particular situation presented in this case, clinical care to patients would be compromised if the CWS were continued for RNs in the SSU. The union does make a compelling argument about the positive impact of CWS on recruitment and retention of nurses, however, there is no basis for prioritizing nurse recruitment and retention over patient care needs.

Given the impact on patient care posed by the continuation of the 10-hour CWS for RNs assigned to the SSU at the Wade Park Campus, the schedule involves issues of professional conduct or competence (i.e., direct patient care) and is therefore non-negotiable under 38 U.S.C. § 7422.

¹ Article 20, section 2.E.2. states the following:
If a facility experiences adverse impact pursuant to 5 USC 6131 with either the AWS or credit hours, negotiations in accordance with Article 44, Mid-Term Bargaining, will begin immediately to attempt to resolve the impact to both parties' satisfaction.

The union's ULP concerns the same issue raised in its demand to bargain and request for assistance from the FSIP, namely the change in the 10-hour CWS for RNs assigned to the SSU, and further alleges a failure by VAMC management to bargain in good faith. The ULP substantively involves the same patient care related matters as the union's demand to bargain and request for assistance from the FSIP, which are exempted from collective bargaining for the reasons discussed above. Moreover, VAMC management cannot bargain, or fail to bargain in good faith, over patient care matters that are exempted from the collective bargaining process as a whole by 38 U.S.C. § 7422 (b).

This decision is consistent with prior USH determinations in which the USH determined that the elimination of compressed work schedules due to patient care needs was a matter involving professional conduct and competence within the meaning of 38 U.S.C. § 7422 and therefore non-negotiable. See, e.g., AVAHSRO, (August 22, 2005); VAMC West Palm Beach, (March 15, 2005); VAMC Indianapolis, IN, (February 24, 2004); VAMC Alexandria, LA, (October 16, 2003); and VA Gulf Coast Healthcare System, (October 16, 2003).

RECOMMENDED DECISION:

That the decision made by management at the VAMC to eliminate CWS for RNs assigned to the SSU involves issues concerning or arising out of professional conduct or competence within the meaning of 38 U.S.C. § 7422(b).

APPROVED X

DISAPPROVED _____

That the union's May 8, 2008 ULP charge, which is based on the same substantive issues raised in the union's demand to bargain and request for assistance from the FSIP regarding the CWS for RNs assigned to the SSU as well as VAMC management's alleged "failure to bargain in good faith", raises issues concerning or arising out of professional conduct or competence within the meaning of 38 U.S.C. § 7422(b).

APPROVED X

DISAPPROVED _____

Michael J. Kussman
Michael J. Kussman, MD, MS, MACP
Under Secretary for Health

7/9/08
Date