



DEPARTMENT OF VETERANS AFFAIRS
UNDER SECRETARY FOR HEALTH
WASHINGTON DC 20420

MAY 22 2009

Nancy Reissener
Acting Director (00)
VA Caribbean Healthcare System
10 Calle Casia
San Juan, PR 00921-3201

Dear Ms. Reissener:

I am responding to the issues raised in your memorandum of June 26, 2008, concerning the Unfair Labor Practice (ULP) charges filed by the American Federation of Government Employees (AFGE), Local 2408, relating to Compressed Work Schedules for the Dental Service at the VA Caribbean Healthcare System in San Juan, Puerto Rico.

Pursuant to delegated authority, I have determined, on the basis of the enclosed decision paper, that the issue presented involving the implementation of the CWS schedule for Dental service employees 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). The issues involving the notice regarding the termination of the CWS, which was provided to the employees prior to notifying the union, and the termination of the CWS schedule itself, are not matters concerning or arising out of professional conduct or competence and are within the scope of collective bargaining.

Please provide this decision to your Regional Counsel as soon as possible.

Sincerely yours,



Gerald M. Cross, MD, FAAFP
Acting Under Secretary for Health

Enclosure

Title 38 Decision Paper
VA Caribbean Healthcare System

VA – 09-0

FACTS

In May 2007, a new Dental Service Chief (Edgardo E. Quiñones, D.M.D., F.A.C.P.) was hired at the VA Caribbean Healthcare System (VACHCS) in San Juan, Puerto Rico. Upon surveying the state of the Service, Dr. Quiñones discovered that over 525 dental patients were not placed in the Electronic Wait List (EWL), and were instead placed on paper waiting lists.¹ Dr. Quiñones and the VACHCS Director had to develop a plan to decrease the Dental wait list. Dr. Quiñones decided to implement a Compressed Work Schedule (CWS) to address the shortages in capacity for Dental Services and to increase patient accessibility to dental care. (Attachment B)

On June 13, 2007, Dr. Quiñones met with Richard Camacho, President of the American Federation of Government Employees (AFGE and or union), Local 2408, to discuss the implementation of a volunteer CWS for Dental Service employees. (Attachment C) Dr. Quiñones explained that the CWS “is an answer for us to be more efficient in our operatory utilization and [to] deliver increase[d] patient care to our veterans and eligible patients. This is a temporary solution in addressing our shortage in dental capacity and to increase dental access to care.” (Attachment C, ¶ 4) The CWS would begin on July 8, 2008 and would be reviewed every six months. (Attachment C, ¶ 5)

On June 27, 2007, Mr. Camacho acknowledged receipt of Dr. Quiñones’ memorandum notifying him of the establishment of the CWS for the Dental Service. (Attachment D). The union accepted the June 19, 2007 memorandum, as a Memorandum of Understanding on the implementation of the CWS.

On July 6, 2007 an e-mail was sent on behalf of Mr. Quiñones to all dental staff to remind them of the start of the CWS. (Attachment E)

On November 6, 2007, Dr. Quiñones notified the Dental Service staff that the CWS would be terminated at the beginning of the first pay period in January 2008.

¹ A memorandum sent by William F. Feeley, Deputy Under Secretary for Health for Operations and Management, to all Network Directors required that “...all patients in dental Classification I-V...receive an initial screening exam within 30 days of application. Subsequent dental care is also to be carried out within 30 days of the desired appointment date. If these appointments cannot be attained within this timeframe, the veteran must be placed on the Electronic Wait List (EWL).” The goal was for all VISNs to have fewer than 50 veterans awaiting dental care for more than 30 days. (Attachment A)

(Attachment F) This information was also disseminated to employees during the November 14, 2007 general staff meeting for Dental Service.² (Attachment G)

On November 26, 2007, the union filed an Unfair Labor Practice (ULP) charge (BN-CA-08-0067) alleging that Dr. Quiñones communicated the termination of the CWS directly to employees, bypassing the union. (Attachment H)

On December 3, 2007, Mr. Camacho sent a memorandum to Dr. Quiñones stating that the union had received a copy of "the 2nd memorandum sent to all Dental Staff on CWS without a formal notification to the Union." (Attachment I) The union requested that Dr. Quiñones cease and desist implementing the termination of the CWS for Dental Service until the completion of negotiations.

On December 5, 2007, Dr. Quiñones communicated with the union and informed Mr. Camacho that he was scheduling a meeting to discuss the elimination of CWS. (Attachment J) The union responded to Dr. Quiñones on December 6, 2007. (Attachment K) In its response, the union stated that it was not available to meet on the time suggested by management but requested the meeting be rescheduled to after January 14, 2008.

On December 17, 2007, Dr. Quiñones responded to the union, acknowledging the cancellation of the meeting scheduled for December 12, 2007. (Attachment L) Dr. Quiñones denied the union's request to reschedule the meeting until after January 14, 2008, and requested that the meeting be held at the union's earliest convenience. Dr. Quiñones explained that "[a]ppointments in Dental Service are out over 50 days. The action I took in early November was anticipated to insure that the normal functions and operation of the Dental Service and patient care not be affected or delayed." (Attachment L, ¶ 3)

On January 22, 2008, the union filed a second ULP (BN-CA-08-0104) alleging that management was refusing to negotiate the termination of the CWS for Dental Service and was continuing to bypass the union by communicating directly with employees in relation to the CWS cancellation.³ (Attachment M)

² The Minutes of the meeting provide the following information in paragraph 2, New Business, (b): "Dr. Quiñones thanked all dental personnel who volunteered for compressed work schedule. This was a temporary solution and it is no longer needed effective the first Pay Period of 2008. He has decided that the Service's goals were met. If any employee understands that they should continue in compressed work schedule, the employee should request it in writing and justify why and it will be considered on a case by case basis. _____ Employee/Labor Management Employee, clarified that compressed work schedule is implemented on short time period to solve temporary situations in the Service. It is not meant to be implemented for the benefit of the employee."

³ The union alleged the following: "On/ around the beginning of January 2008, Dr. Edgardo E. Quinones, Chief Dental Service implemented and refused to negotiate with AFGE Local 2408 (Union) as the exclusive representative in spite of knowledge of Unfair Labor Charge (ULP) filed on/around November 2007 and numerous written documentations of the Union to Dr. Quinones.

In spite of knowledge of ULP Charge, previous understandings (written by Dr. Quinones and agreed by the Union) of the parties and written requests that he meets his obligation Dr. Quinones continued to meet with bargaining unit employees and continued providing them written instructions

By memorandum dated June 26, 2008, the Acting Director of the VA Caribbean Healthcare System requested that the Under Secretary for Health (USH) determine that the union's ULPs 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 N)

On July 8, 2008, Joy Vilardi-Rizzuto, Regional Counsel attorney, notified the union that the Acting Director had submitted a request to the USH for a determination that the issues in the ULPs are outside the scope of bargaining. (Attachment O) Ms. Vilardi-Rizzuto also notified the union that it had 10 days to submit its position paper to the USH.

The union did not submit additional information to the USH.

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).

ISSUE:

Whether the union's ULPs regarding the termination of the CWS for Dental Service staff involves issues 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 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 can be 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 dentists appointed under the authority of 38 U.S.C. § 7401(1) or 7405(a)(1).

in relation to the elimination of the CWS without proper opportunity to the exclusive representative, bypassing the exclusive representative and refusing to negotiate as per Federal Statute."

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.

In the instant case, management implemented a temporary CWS for the Dental Service staff to address shortages in capacity for the Service and to increase patient accessibility to dental care. The union, as well as Dental Service staff, received notice of the temporary implementation of the CWS. The union did not object to the temporary implementation of the CWS.

The Chief of the Dental Service notified the union and employees that the CWS would be terminated once he decided the CWS was no longer necessary to address patient care needs. Per Article 44, section 4, of the VA/AFGE Master Agreement, the local Union President shall be notified of changes in personnel policies, practices, or working conditions affecting the interests of bargaining unit employees. In the instant case, the record does not reflect that management's decision to end the CWS was based on a patient care determination.

The implementation of the CWS for Title 38 Dental service employees is not negotiable or grievable under 38 U.S.C. § 7422. Because management implemented the CWS for the Dental Service staff to address the shortages in capacity for Dental Services and to increase patient accessibility to dental care, the decision was directly related to patient care, and thus exempt from collective bargaining as a matter of professional conduct or competence within the meaning of 38 U.S.C. § 7422(b).

The termination of CWS for Title 38 Dental service employees, however, is not a matter of professional conduct or competence within the meaning of 38 U.S.C. § 7422(b). Management offers no explanation for the termination of the CWS for Title 38 Dental service employees, other than that the CWS was originally implemented as a temporary solution to decrease the dental wait list. Without additional information that the need to return to the original schedule was also related to patient care, the USH is not able to conclude that the termination of the CWS is a matter of professional conduct or competence within the meaning of 38 U.S.C. § 7422.⁴

This decision is consistent with prior USH determination concerning compressed work schedules. See, e.g., VAMC Cleveland, OH (July 9, 2008); Palo Alto HCS (Oct. 11, 2005); AVAHSRO, (August 22, 2005); VAMC West Palm Beach, (April 19, 2005); VAMC Indianapolis, IN, (February 14, 2004); VAMC Alexandria, LA, (October 16, 2003); and VAMC Biloxi, (October 16, 2003).

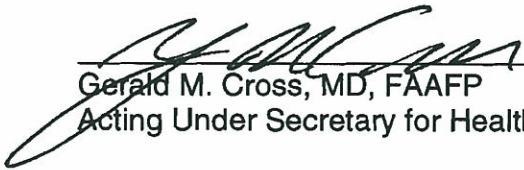
⁴ Although we conclude the termination of the CWS is not 7422 under the circumstances of this case, nothing herein prevents the VAMC from asserting the CWS was agreed to be temporary in defending the ULP.

RECOMMENDED DECISIONS:

That the decision made by management at the VACHCS to implement the CWS for Dental Service staff involves issues concerning or arising out of professional conduct or competence within the meaning of 38 U.S.C. § 7422(b).

APPROVED  _____

DISAPPROVED _____

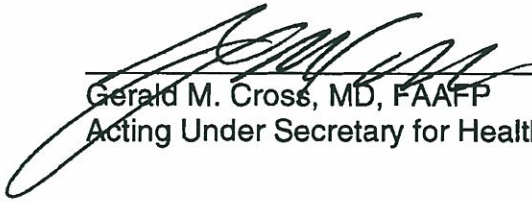

Gerald M. Cross, MD, FAAFP
Acting Under Secretary for Health


Date

That the decision made by management at the VACHCS to eliminate the CWS for Dental Service staff does not involve issues concerning or arising out of professional conduct or competence within the meaning of 38 U.S.C. § 7422(b).

APPROVED  _____

DISAPPROVED _____


Gerald M. Cross, MD, FAAFP
Acting Under Secretary for Health

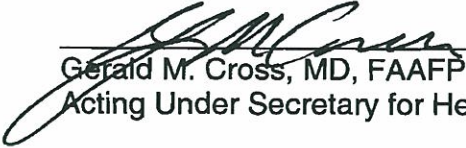

Date

That the decision made management to provide notice to employees of the CWS termination prior to notifying the union is not a matter or question that concerns or arises out of professional conduct or competence within the meaning of 38 U.S.C. § 7422(b).

APPROVED _____



DISAPPROVED _____


Gerald M. Cross, MD, FAAFP
Acting Under Secretary for Health


Date