



DEPARTMENT OF VETERANS AFFAIRS
UNDER SECRETARY FOR HEALTH
WASHINGTON DC 20420

JUL 07 2008

Sharon M. Helman, Director
Spokane VAMC
4815 N. Assembly St.
Spokane, WA 99205

Dena Corwin, President
National Federation of Federal Employees
Local 1641
4815 N. Assembly St.
Spokane, WA 99205

Dear Ms. Helman and Ms. Corwin:

I am responding to the issue raised in Acting Director Hal Blair's memorandum of January 18, 2008, concerning an Unfair Labor Practice (ULP) charge filed by NFFE Local 1641 regarding the scheduling of physicians at the Spokane VAMC.

Pursuant to delegated authority, I have decided on the basis of the enclosed decision paper that the issue presented by this ULP is a matter concerning or arising out of professional conduct or competence and thus not subject to collective bargaining.

Sincerely yours,

A handwritten signature in cursive script that reads "Michael J. Kussman".

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

Enclosure

**Title 38 Decision Paper
VA Medical Center- Spokane, WA
VA 08-XX**

FACTS:

On August 5, 2007, newly appointed Chief of Staff Nirmala Rozario, M.D., identified a patient care access issue resulting from the Spokane VA Medical Center's (VAMC) process for assigning weekend duty to primary care physicians and hospitalists at the VAMC. Primary care physicians and hospitalists (inpatient physicians) with a regular tour of duty of Monday through Friday from 8:00 AM to 4:30 PM were assigned to cover weekends on a rotating basis; when a physician performed this duty, he or she was then given two days off during the week. This scheduling caused a shortage of physicians in the Primary Care Clinic during the week, resulting in a reduction of the number of patients that could be seen and longer patient wait times.

On September 12, 2007, Dr. Rozario met with the Dena Corwin, President of National Federation of Federal Employees (NFFE) Local 1641 to discuss proposed changes to the system of assigning physicians to cover weekends. (Attachment 1). The initial plan provided that hospitalists and primary care physicians would rotate approximately once every seventh week to do weekend rounds. The scheduled physician would complete the rounds (approximately 2-4 hours) and then leave the VAMC. He or she would then work his/her normal Monday through Friday tour.

On September 14, 2007, Ms. Corwin stated that VA Handbook 5011 Part II, Chapter 3 (Attachment 2) precluded Dr. Rozario from scheduling a physician to work Monday through Friday, do rounds on the weekend and then work Monday through Friday again, as this would not allow the physicians two non-duty days in the administrative work week.

On September 18, 2007, Jacqueline Ross, Chief of Human Resources, sent Ms. Corwin an email reminding her that management was awaiting her input based on the September 12th meeting (Attachment 3). On September 25, 2007, Ms. Corwin requested to bargain the schedule changes (Attachment 4).

On November 5, 2007, Dr. Rozario revised her physician coverage plan and submitted it to Ms. Corwin (Attachment 5). This revised plan provided that hospitalists and primary care physicians would rotate weekend rounding duty and that two physicians would round each week, but would hand over cases to the Medical Officer of the Day after rounding rather than staying on station the entire weekend day. Moreover, the revised plan provided that physicians taking weekend rounds would not be scheduled for direct patient care on the Monday morning following the rounds and would use that time for indirect patient care activities. Moreover, if the weekend rounds resulted in long hours, physicians

could request authorized absence for the following Monday “for rest and relaxation.”

On November 13, 2007, Acting VAMC Director Hal Blair sent an email to Ms. Corwin stressing the need to change the weekend coverage process to address both patient safety and employee safety issues and asking for union support of Dr. Rozario’s November 5 coverage plan (Attachment 6).

On November 20, 2007, Ms. Corwin sent Dr. Rozario a counterproposal providing that one physician do rounds on the weekend and receive two full days off during the following week (Attachment 7).

On November 20, 2007, Ms. Ross sent an email to Ms. Corwin on behalf of Mr. Blair (Attachment 8). This email stated that, based on input from the union, management had decided to include only hospitalists in the weekend rounds rotation and exclude the primary care physicians from that duty to avoid adverse impact on the weekday Primary Care Clinic. The email further advised Ms. Corwin that the new weekend coverage plan must be implemented on January 6, 2008 “to correct holes created in the Primary Care Clinic by the present rounding system.”

Ms. Corwin responded to Ms. Ross’ November 20 email with an email of the same date asking if management was refusing to bargain. (Attachment 9) Ms. Ross responded that “management has made a decision on a patient care matter which is not subject to collective bargaining.” (Attachment 9).

On December 7, 2007, Mr. Blair sent a memo to Ms. Corwin advising her that the tours of duty of five hospitalists would be changed effective January 7, 2008, such that each hospitalist would cover the weekend tour once every four weeks and would have the following Tuesday and Wednesday off. (Attachment 10).

On December 20, 2007, Ms. Corwin sent a request to bargain over the new hospitalists’ tours (Attachment 11).

By email dated December 20, 2007, Mr. Blair responded that physician scheduling was an issue of patient care and thus excluded from bargaining under 38 U.S.C. § 7422 (Attachment 12).

On January 7, 2008, Ms. Corwin filed an unfair labor practice (ULP) charge with the Federal Labor Relations Authority alleging that Mr. Blair had committed a ULP by failing to bargain over the change of the hospitalists’ tours (Attachment 13).

On January 18, 2008, management referred this matter to the Under Secretary for Health (USH) for a 38 U.S.C. § 7422(d) decision (Attachment 14). Mr. Blair provided Ms. Corwin with a copy of his 38 U.S.C. § 7422(d) decision request, but the union did not provide the USH with any responsive information or documentation.

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 (i.e., direct patient care and clinical competence), peer review, or employee compensation within the meaning of 38 U.S.C. § 7422(b).

ISSUE:

Whether the Union's ULP charge in Case No. SF-CA-08-0166, regarding management's change of tours for the hospitalists at the Spokane VAMC, 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, 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 employee compensation as 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. The Secretary has exercised this authority by prescribing regulations contained in the VA Directives and Handbook 5011 relating to scheduling of Title 38 health care providers. Among these regulations are the following:

Handbook 5011, Part II, Chapter 1, paragraph 2(b) provides "[i]n Veterans Health Administration (VHA), the proper care and treatment of patients shall be the primary consideration in scheduling tours of duty under these instructions. Duty schedules shall be established as appropriate and necessary for performance of services in the care and treatment of patients and other essential activities within the administrative discretion of the Under Secretary for Health or designated officials."

Handbook 5011, Part II, Chapter 3, paragraph 2.a., provides that "[f]ull-time physicians...to whom the provisions of this chapter apply shall be continuously subject to call unless officially excused by proper authority. This requirement exists 24 hours per day, 7 days per week."

Handbook 5011, Part II, Chapter 3, paragraph 2.d., 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 on such tours as patient care needs require.

The ULP alleges that Acting Director Hal Blair implemented a change in working conditions for four physicians and refused to bargain this change as requested by Local 1641 on December 20, 2007. The evidence submitted by management indicates that Mr. Blair made the schedule change to provide coverage for weekend rounds and to minimize the adverse impact of such coverage on the Primary Care Clinic, which had been forced to reduce weekday patient appointments when primary care physicians had shared the weekend rounding rotation with the hospitalists.

The underlying management decision to change the tour of duty of hospitalists to provide for weekend rounds involves issues of direct patient care and is therefore non-negotiable under 38 U.S.C. § 7422. The union requested to bargain over the schedule change. While VAMC management did seek the union’s input before changing the process for assigning weekend rounding duty, management had no obligation to bargain over that change. Accordingly, the ULP for failure to bargain is barred by 38 U.S.C. § 7422.

This decision is consistent with previous USH determinations. The USH has determined in prior 38 U.S.C. §7422 decisions that a change in physician schedules to meet patient care needs was a matter involving professional care and competence within the meaning of U.S.C. § 7422 and therefore non-negotiable. See, e.g., Alaska VA Health Care System, August 22, 2005; VA Palo Alto Health Care System, October 11, 2005; and, VAMC West Palm Beach, March 15, 2005.

RECOMMENDED DECISION:

That the change of tours for hospitalists (inpatient physicians) at the Spokane VAMC involves issues concerning or arising out of professional conduct or competence (direct patient care) 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

7/7/08
Date