Title 38 Decision Paper
Department of Veterans Affairs (VA)
Michael E. DeBakey VA Medical Center

FACTS

On January 12, 2017, the Nursing leadership for Spinal Cord Injury (SCI) at the Michael E. DeBakey VA Medical Center requested to implement a 12-hour Compressed Work Schedule (CWS) for the inpatient SCI registered nurses (RNs) in Units NU1A and NU1B (also referred to as Nursing Units 1A and 1B). (Attachment A).

On February 9, 2017, the SCI Nurse Executive notified the President of the American Federation of Government Employees, Local 1633 (Union) that staff meetings would be held on February 16, 2017 to discuss the implementation of the 12-hour tours. (Attachment B).

On February 27, 2017, the Union filed a Demand to Bargain. (Attachment C). The SCI Nurse Executive replied noting that the 12-hour tours "may be a matter arising out of professional conduct or competence which is specifically excluded from bargaining under the statue 38 U.S.C. 7422." (Attachment D).

On April 5, 2017, the Union filed an Unfair Labor Practice charge (ULP) with the Federal Labor Relations Authority (FLRA). (Attachment E). The ULP charged the Medical Center with "refusing to negotiate in regard to the registered nurses on nursing units 1A and 1B." *Id.*

On April 17, 2017, the Medical Center submitted its response to the ULP to the FLRA. (Attachment F).

On June 14, 2017, the Medical Center submitted a request for a 38 U.S.C. § 7422 determination. (Attachment G; Attachment H). The Union did not submit a response to the Medical Center's request.

AUTHORITY

The Secretary of Veterans Affairs has the final authority to decide 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). On August 23, 2015, the Secretary delegated his authority to the Under Secretary for Health. (Attachment I).

ISSUE

Whether a ULP charge regarding the Medical Center's refusal to bargain over the implementation of a 12-hour CWS for RNs assigned to Units NU1A and NU1B involves

a matter or question concerning or arising out of professional conduct or competence within the meaning of 38 U.S.C. § 7422(b), and thus, is excluded from collective bargaining.

DISCUSSION

The Department of Veterans Affairs Labor Relations Improvement Act of 1991, codified in part at 38 U.S.C. § 7422, granted limited collective bargaining rights to employees appointed under title 38 of the United States Code (Title 38), and specifically excluded from the collective bargaining process matters or questions concerning or arising out of professional conduct or competence (i.e., direct patient care or clinical competence), peer review, or employee compensation, as determined by the Secretary. "Professional conduct or competence" is defined to mean "direct patient care" and "clinical competence." 38 U.S.C. § 7422(c).

Pursuant to 38 U.S.C. § 7421(a), the Secretary has prescribed regulations contained in VA Handbook 5011, Part II, Chapter 3 regarding the establishment of workweeks, tours of duty, and work schedules for medical professional employees. Medical center directors have the discretionary authority to "prescribe any tour of duty to ensure adequate professional care and treatment to the patient[.]" (Attachment M, VA Handbook 5011, Part II, Chapter 3, Paragraph 2(d)). In addition, medical center directors are authorized to approve flexible and Compressed Work Schedules for employees under their jurisdiction. (Attachment M, VA Handbook 5011, Part II, Chapter 3, Paragraph 6 (f) (1)).

In this case, the Medical Center's decision to refuse to negotiate the implementation of a 12-hour CWS is consistent with established VA policy. The SCI Nursing leadership requested approval to implement that 12-hour CWS to achieve better patient care through a 20% reduction in overtime used to staff the inpatient units, decrease RN staff turnover, and improve RN recruitment as well as staff and patient satisfaction. (Attachment A; Attachment G).

In past decisions, the Secretary has consistently concluded that scheduling proposals involving Title 38 employees that impact direct patient care are excluded from collective bargaining under 38 U.S.C. § 7422. For example, in *Ann Arbor*, in order to address nurse staffing imbalances, the "Medical Center decided to temporarily rotate Registered Nurses to different shifts to ensure the appropriate number of nurses were available for each shift". (Attachment J, (VAMC Ann Arbor (Aug. 5, 2015)). The Secretary concluded that the scheduling of RNs is a matter or question concerning or arising out of professional conduct or competence within the meaning of 38 U.S.C. § 7422(b) and the rotation of RNs to different shifts "goes to the core of professional conduct or competency because the [Medical Center's] ability to provide direct patient care would be severely impacted without the ability to schedule RNs when their services are needed most." *Id.*

In *Iron Mountain*, although the RNs in the ICU proposed a 12-hour CWS, it was determined by management that "for a small facility like the Iron Mountain VAMC, with a limited number of qualified registered nurses, a 12-hour Compressed Work Schedule would compromise the level and degree of patient care in ICU/ED." (Attachment K, VAMC Iron Mountain (Dec 6, 2013)). The Secretary decided that the matter was excluded from collective bargaining under 38 U.S.C. § 7422. *Id*.

In *Cleveland,* the Under Secretary for Health concluded that the unilateral "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)". (Attachment L, VAMC Cleveland (July 9, 2008)). The rationale for the change from ten-hour tours to 8-hour tours was the need to "have every staff member here each day throughout the week and will be able to safely care for patients with this schedule." *Id.*

This decision is consistent with prior determinations that RN schedules directly impact patient care and frequently are matters involving professional conduct and competence within the meaning of 38 U.S.C. § 7422, and therefore excluded from collective bargaining.

RECOMMENDED DECISION

The ULP charge that the Medical Center's refusal to bargain over the implementation of 12-hour CWS for RNs assigned to NU1A and NU1B is a matter or question concerning or arising out of professional conduct or competence within the meaning of 38 U.S.C. § 7422(b) and is thereby excluded from collective bargaining.

January 27, 2021

Richard A. Stone, M.D.
Acting Under Secretary for Health

Date