



DEPARTMENT OF VETERANS AFFAIRS
UNDER SECRETARY FOR HEALTH
WASHINGTON DC 20420

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Charlene S. Ehret, FACHE
Director
James H. Quillen VA Medical Center
P.O. Box 4000
Mountain Home, TN 37684

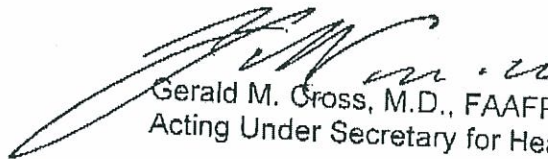
Shiryll L. Durham,
President, AFGE Local 1687
James H. Quillen VA Medical Center
P.O. Box 518
Mountain Home, TN 37684

Dear Ms. Ehret and Ms. Durham:

I am responding to the issues raised in Ms. Ehret's memoranda of January 14, 2009, concerning the American Federation of Government Employees (AFGE), Local 1687 Unfair Labor Practice (ULP) Charge over the change in tours of duty for the Community Living Center (CLC) physicians who were placed on a rotating on-call roster coverage of CLC patients after normal duty hours and weekends.

Pursuant to delegated authority, I have decided, on the basis of the enclosed paper, that there is insufficient information to make a determination that the issue presented in the ULP is a matter concerning or arising out of professional conduct or competence (direct patient care) within the meaning of 38 U.S.C. § 7422(b). As a result, the issue presented by the ULP is within the scope of collective bargaining.

Sincerely yours,


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

Title 38 Decision Paper
VA Medical Center, Mountain Home, TN

VA -- 09-0

FACTS:

On October 15, 2008, an adverse patient outcome occurred at the Mountain Home, TN VA Medical Center's (VAMC) Community Living Center (CLC) and an investigation started immediately.¹ An internal Peer Review and an external VISN investigation revealed the VAMC was in violation of the American College of Graduate Medical Education guidelines with respect to safe clinical coverage for patients in the CLC. The Chief of Staff determined the best option to ensure safe clinical coverage was to place CLC physicians on a rotating on-call roster of CLC patients after normal duty hours and weekends.²

During a meeting scheduled for November 18, 2008, the Chief of Staff instituted the following guidelines to ensure safe clinical coverage for the CLC:

"a. When the CLC Physicians are scheduled for the weekend coverage, they will be provided with a compensatory day off the following week. This day will be scheduled with the [Associate Chief of Staff] ACOS Extended Care prior to the weekend.

b. When the CLC Physicians are designated to cover a weekday on-call following the end of their normal tour of duty from 4:30 pm until 8 PM, they are not to report to duty until 11:30 on the day scheduled for evening on call."

The guidelines were to remain in effect until new hospitalists could be hired to provide on call coverage for the CLC during all after hours and weekend shifts."

On or about November 3 or 4, 2008, the ACOS Extended Care had a discussion with the CLC Physicians regarding the above mentioned adverse patient outcome, and informed them that they would be placed on a rotating schedule to take calls from home via beeper to handle any and all crisis issues. These physicians would be provided VA laptops with VPN access to provide safe clinical coverage after normal duty hours and on weekends. It is important to

¹ The event involved a patient transferred from a medical/surgical/oncology inpatient unit Ward C Ground (Ward CG) to the CLC. The patient received too much insulin in the CLC and the resident on call who responded to the CLC nursing staff's call did not address the error. The patient was subsequently transferred to the Emergency Department (ED) where the error was discovered by the ED staff. Once stabilized, the patient was transferred to Ward CG where he expired on October 25, 2008.

² There was no documentation presented to support this paragraph. The information comes from paragraphs 2 and 3 of the request to the USI for a decision that the referenced issues are non-negotiable pursuant to 38 U.S.C. § 7422. (Attachment 3)

note that this schedule was proposed as a temporary solution until additional Hospitalists could be hired.³

On November 10, 2008, the President of the American Federation of Government Employees (AFGE) Local 1687 submitted a letter to the Chief of Staff (COS) demanding that the VAMC "cease and desist the implementation of on call duty schedules for physicians in Extended Care." (Attachment 1) The COS and ACOS of Extended Care moved forward with implementation.⁴

On November 14, 2008, AFGE Local 1687 filed an Unfair Labor Practice (ULP) Charge with the Federal Labor Relations Authority. (Attachment 2) The union alleged that "[o]n or about November 3, 2008, Dr. David Reagan, Chief of Staff, invoked changes in working conditions for the Physicians in Extended Care without proper notification to AFGE Local 1687." The union further stated that it is its understanding that "Dr. _____ Dr. _____ and Dr. _____

accepted the positions at the medical center based on their agreement and clear understanding with the Chief of Staff that there would be no 'On Call Duty' within their scope of duties." The union alleged violation of Article 1, section 4 of the VA/AFGE Master Agreement and requested as remedies that management "fulfill its bargaining obligation to notify and/or involve AFGE in all predecisional changes in the bargaining units working conditions prior to putting them in place. That Dr. Reagan immediately cease and desist the mandate to require Extended Care Physicians to do 'On Call Duty.'"

On January 14, 2009 the Director of the Mountain Home, TN, VAMC submitted a request to the Under Secretary for Health (USH) for a determination that the above-referenced issue is a matter concerning or arising out of professional conduct or competence (i.e., direct patient care) and is thus exempted from collective bargaining by 38 U.S.C. § 7422(b). (Attachment 3) The Director further explained that "management has made every effort to minimize the effects of [the] decision to change these physicians' schedules by offering a rotating schedule to be on-call and pull resources from other areas to abate the situation."

The union did not submit a position paper to the USH.

PROCEDURAL HISTORY:

The Secretary has delegated to the Under Secretary of Health (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),

³ This information comes from paragraph 5 of Attachment 3. There was no additional information or document to evidence the referred to discussion.

⁴ This information comes from paragraph 6 of Attachment 3. No documentation was submitted to evidence this claim.

peer review, or employee compensation within the meaning of 38 U.S.C. § 7422(b).

ISSUE:

Whether the Union's ULP charge regarding management's change in tours of duty for the CLC physicians who were placed on rotating on-call roster coverage of CLC patients after normal duty hours and weekends 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 Improvement Act of 1991, codified in 38 U.S.C. § 7422, granted limited collective bargaining rights to Title 38 employees, but specifically excluded from the collective bargaining process matters or questions concerning or arising out of professional competence or conduct, peer review, and the establishment, determination, or adjustment of 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 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 that "[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, dentists, podiatrists, chiropractors, and optometrists to whom the provisions of this chapter apply 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."

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 provide that full-time physicians will be assigned such duties on such tours as patient care needs require.

In its ULP, the union alleges that management violated Article 1, section 4 of the VA/AFGE Master Agreement. Article 1, section 4, Unit Clarification states, in relevant part:

"A. The union will be predecisionally involved in bargaining unit determinations for position changes and establishment of new positions. When a position changes, and the parties do not agree over whether the position (s) is/are inside or outside the unit, the parties are encouraged to utilize the Alternate Dispute Resolution (ADR) process."

The issues presented in this case are not related to whether position changes or new positions are inside or outside of the bargaining unit (i.e., Unit Clarification petitions), making Article 1, section 4 irrelevant in this case. However, because management failed to present evidence that confirms that the best option to ensure safe clinical coverage was to have the CLC Physicians cover the CLC on an on-call rotating schedule, there is insufficient evidence to support a finding that the on-call rotating schedule concerned or arose out of professional conduct or competence under 38 U.S.C. § 7422.

The Medical Center Director's memorandum requesting a section 7422 determination from the USH is the only written basis provided by the medical facility to assess whether the Chief of Staff's decision to change the tours of duty for the CLC physicians was for patient care reasons and/or related to professional conduct or competence.⁵ (Attachment 3) There is no additional factual basis or supporting documentation that the rotating on-call schedule of the CLC physicians was for patient care. While the underlying management decision to place CLC Physicians on a rotating on-call roster coverage of CLC patients after normal duty hours and weekends normally involves issues concerning or arising out of professional conduct or competence within the meaning of 38 USC § 7422 (b), because there is no supporting documentation,⁶ the USH has no factual basis for determining that the on-call rotating schedule was based on patient care needs, and is therefore unable to conclude that this matter is excluded by section 7422.

This decision is consistent with a previous USH decision in which management failed to provide sufficient information to support a USH determination that 38 U.S.C. § 7422 applies. See VAMC Baltimore (6/30/08)

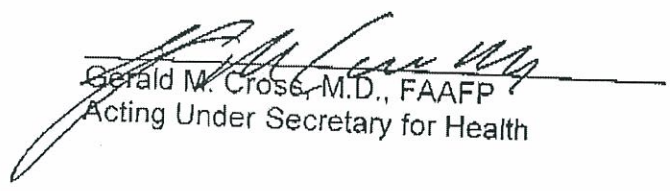
⁵ Paragraph 3 of the Request for 38 U.S.C. § 7422(b) Determination states, in relevant part, "The Chief of Staff determined the best option to ensure safe clinical coverage was to have the CLC Physicians cover the CLC on an on-call rotating schedule, until other options requiring more resources can be exercised."

⁶ The Office of Labor Management Relations contacted the medical center on numerous occasions requesting supporting documentation but never received any additional information.

RECOMMENDED DECISION

That there is insufficient information to make the determination that the change in tours of duty for the CLC physicians who were placed on a rotating on-call roster coverage of CLC patients after normal duty hours and weekends 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 ✓ DISAPPROVED _____


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

30 Nov 07
Date