

Title 38 Decision Paper
Department of Veterans Affairs (VA)
Richard L. Roudebush VA Medical Center (VAMC)

FACTS

In September 2008, the [REDACTED] VAMC opened a new inpatient unit known as 8 North (8N). This unit normally requires staffing of five registered nurses (RN) on day shift (7:30 a.m. – 4:00 p.m.), five RNs on evening shift (3:30 p.m. – 12:00 a.m.), and four RNs on night shift (11:30 p.m. – 8:00 a.m.), depending on patient care needs. This unit is also an educational unit that provides clinical experiences for health professional trainees, such as nursing students. When the unit opened, [REDACTED], Unit Manager, allowed RNs to work a compressed work schedule (CWS) that consists of, during each pay period, six 12-hour shifts and one 8-hour shift. These 12-hour CWS shifts are either 7:30 a.m. to 8 p.m. (days) or 7:30 p.m. to 8 a.m. (nights).¹ (Attachment A)

Due to the incongruity between 12-hour shifts and 8-hour shifts, all CWS RNs must, one day per pay period, work their 8-hour “off-tour” shift outside of their normal 12-hour shift working hours. Specifically, nurses who work a CWS of 7:30 p.m. to 8 a.m. work their 8-hour “off-tour” shift either on the evening shift (3:30 p.m. – 12:00 a.m.) or on the night shift (11:30 p.m. – 8:00 a.m.). Nurses who work a CWS of 7:30 a.m. to 8 p.m. work their 8-hour shift either on the evening shift (3:30 p.m. – 12:00 a.m.) or on the day shift (7:30 a.m. – 4:00 p.m.). [REDACTED] often requires the CWS RNs to work their 8-hour “off-tour” shift during the evening shift in order to meet educational and patient care needs. (Attachments A, B)

On March 29, 2010, [REDACTED] and [REDACTED] the local American Federation of Government Employees (AFGE) President, discussed the rotation of shifts on 8N. On April 7, 2010, in response to the discussion, [REDACTED] wrote an e-mail to [REDACTED] stating that the CWS RNs who are scheduled to work their 8-hour “off-tour” shifts during the evening shift are assigned to the evening shift based on the need to provide safe, quality patient care on the evening shift, which is consistent with past practice since the unit opened. [REDACTED] wrote that the practice of assigning 8-hour evening shifts to CWS RNs would continue. (Attachment C)

On April 9, 2010, [REDACTED], AFGE Chief Steward, filed a Step 1 grievance, alleging violations of Article 20 of the AFGE Master Agreement.² (Attachment D) Although the grievance did not specify, it appears that the grievance was filed in

¹ In Attachments A and B, the Medical Center Director and [REDACTED] incorrectly noted that the CWS shift times are from 7:00 a.m. to 8:00 p.m. and from 7:00 a.m. to 8:00 p.m.

² The parties' submissions refer to the 1997 VA-AFGE Master Agreement. On March 15, 2011, VA and AFGE approved a new Master Agreement. All Master Agreement citations herein refer to provisions of the 1997 Master Agreement. However, the Master Agreement section at issue is Article 21 in the 2011 Master Agreement.

response to the e-mail _____ sent to _____ (Attachment C) It appears that the facility did not respond to the Step 1 grievance.

On April 27, 2010, AFGE filed a Step 2 grievance, alleging violations of Article 20 and requesting the following corrective action: "Management will honor the Master Agreement, Article 20, when dealing with rotation to off-tours. Day/evening or day/night rotation will be done as it has been done over 30 years within the VA system and currently at this facility with the exception of one ward in violation." (Attachment E) The language referred to by AFGE is in Article 20, Section 3(E), which provides, "Rotation – Scheduled off tours will be rotated fairly and equitably among affected employees, i.e., day/evening, day/night." On May 17, 2010, the facility and the union met to discuss the grievance. (Attachment F) _____ Chief, Patient Care Services/Medicine Service, issued a written response on June 3, 2010, denying the grievance. (*Id.*) Regarding the concerns raised in the Step 2 grievance, Ms. Dunleavy wrote that 8N RNs working a CWS would continue to work 8-hour shifts during the evening shift when necessary. (*Id.*)

On June 8, 2010, AFGE filed a Step 3 grievance alleging violations of Article 20, Section 3(E) and other unnamed provisions of the Master Agreement. (Attachment G) A meeting to hear the grievance was held with the Medical Center Director, _____, on June 30, 2010. (Attachment H) The union's position was that Section 3(E) should be interpreted so that the only permissible rotations are day/evening and day/night. In other words, it appears that the union argued that under the Master Agreement employees may only be assigned to work an evening or night "off-tour" shift if the employees' regular 12-hour tour is a day tour. Its concern was that the off-tour shift rotations on 8N were not in accordance with the Master Agreement because some employees' regular 12-hour tour was at night and thus a day or evening 8-hour "off-tour" was not contemplated by the Master Agreement because the Master Agreement only refers to "day/evening, day/night." The Director denied the grievance and noted that the rotations described in Section 3(E) ("day/evening, day/night") were intended to be examples and were "not intended to be the only possible rotations." (*Id.*) The Director further noted that Section 3(C) of the Master Agreement made reference to day, evening, and night shifts. (*Id.*)

On July 30, 2010, AFGE notified Management of its intent to invoke arbitration over Management's alleged violation of Article 20 of the Master Agreement. The requested remedy was that Management honor Article 20 when dealing with rotation of off-tours. (Attachment I)

By memorandum dated October 12, 2010, the Director requested a determination that the actions and issues raised in the union's grievance be excluded from collective bargaining under 38 United States Code (U.S.C.) § 7422(b). (Attachment A) Specifically, the Director requested a determination on two issues: "[w]hether the 2010 grievance over the Nurse Manager's scheduling of her CWS Registered Nurses to work their eight (8) hour shift during the evening tour of duty to ensure proper ward coverage, 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 whether “Article 20, Section 3(E) of the Master Agreement between DVA and AFGE contains provisions relating to nurse scheduling that impede patient care and are therefore non-negotiable under 38 U.S.C. § 7422(b).” (*Id.*)

On October 25, 2010, the union responded to the Director’s request for a 7422 decision with its own request for a 7422 decision, along with argument in support of the union’s position that these issues were not excluded from collective bargaining. (Attachment J) However, the union articulated the issue differently than the Director, stating that the issue was whether “Registered Nurses (RNs) on 8 North [are] covered by the provision(s) of the Master Agreement contract for Compressed Work Schedules (CWS), Article 20 Section 2 E. (1) (2) (3) and Section 3? (e)? [sic].” (*Id.*) The union further asked, “Are work schedules, [sic] direct patient care within the meaning of ‘direct patient care’?” (*Id.*)

PROCEDURAL HISTORY

The Secretary has 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).

ISSUE

While it seems that the parties cannot agree on the issues presented, the arguments and evidence submitted by the parties suggest that the issue which is appropriately presented for determination by the Secretary is whether Management’s scheduling of night CWS RNs to work evening 8-hour shifts 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 thus not subject to collective bargaining or any grievance procedure provided under any collective bargaining agreement.

DISCUSSION

The Department of Veterans Affairs Labor Relations Act of 1991, 38 U.S.C. § 7422, granted conditional collective bargaining rights to title 38 employees in accordance with title 5 provisions. However, specifically excluded from collective bargaining were matters or questions concerning or arising out of professional conduct or competence, peer review, and employee compensation as determined by the Secretary. Congress defined “professional conduct or competence” to mean either “direct patient care” or “clinical competence.” 38 U.S.C. § 7422(c).

Pursuant to 38 U.S.C. § 7421(a), the Secretary has prescribed regulations regarding the hours of work, conditions of employment, and leaves of absence of title 38 medical professionals, including nurses. These regulations alone govern work scheduling for nurses.

The Secretary has prescribed regulations contained in VA Handbook 5011 relating to scheduling of title 38 health care professionals. In pertinent part, these regulations provide:

Handbook 5011, Part II, Chapter 1, paragraphs 2(a) and 2(b):

- a. In scheduling hours and tours of duty for VA employees, primary consideration will be given to efficiency in management and conduct of agency functions, and equitable treatment of individual employees. Work schedules will be established in a manner that realistically reflects the actual work requirement.
- b. In 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(d):

Because 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.

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

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.

Handbook 5011, Part II, Chapter 3, Section 5(e)(1):

Facility directors are authorized to approve flexible and compressed work schedules for employees under their jurisdiction.

In the instant case, AFGE seeks to grieve Management's right to assign 8-hour "off-tour" evening shifts to RNs who work their 12-hour CWS shifts at night. The Agency's authority to control title 38 work schedules goes to the heart of professional conduct or competence because the Agency's ability to provide direct patient care would be severely impacted without the flexibility to assign title 38 personnel to shifts where their services are most needed. The workweeks, tours of duty, and work schedules for title 38 health care professionals—RN's, in particular—are fundamental to

ensuring the level and quality of patient care provided by the Agency. Accordingly, this issue is non-negotiable under 38 U.S.C. § 7422(b) and not subject to third-party review under 38 U.S.C. § 7422(d).

AFGE made several arguments in support of its position, though all are unavailing because this issue is non-negotiable. AFGE alleges that assigning evening 8-hour shifts to RNs who work their 12-hour CWS shifts at night is prohibited because it is not specifically mentioned in Article 20, Section 3(E) of the Master Agreement (“day/evening, day/night”). Because this issue is non-negotiable, the Master Agreement’s provisions cannot control.

The union raised additional arguments that are not relevant to the issue of whether the scheduling of night RNs to work evening 8-hour tours is non-negotiable. The union argued that the “dispute is really about the procedural mechanism of filling scheduling “holes” in [the] 8N work schedule.” The union suggests that the facility inadequately staffs 8N and attempts to “cover up” this problem by inappropriately rotating night nurses to evening 8-hour shifts. Assuming this allegation were true, it would not change the fact that the issue is non-negotiable. Moreover, addressing “holes” in direct patient care coverage is—just like the issue of assigning RNs to particular shifts—a direct patient care issue under 38 U.S.C. § 7422(b).

The union also argued that this issue cannot be excluded from collective bargaining because VA RNs are “managers of care” who rarely provide direct patient care services and instead delegate direct patient care services to other VA employees. The Agency disagrees with the assertion that RNs rarely provide direct patient care. Even assuming that this assertion is correct, RNs are necessary to the provision of direct patient care and thus any issue that concerns their work schedules concerns or arises out of direct patient care.

Finally, the union argued that “self-scheduling” does not actually occur at the facility. This argument is apparently intended to contradict Management’s assertion that RNs in 8N are allowed to schedule their shifts. However, whether Management allows self-scheduling is irrelevant to the issue of whether rotating night CWS RNs to an evening 8-hour shift is related to direct patient care.

RECOMMENDED DECISION

That a grievance concerning Management scheduling night CWS nurses to work 8-hour shifts during the evening tour of duty to ensure proper coverage is a matter or question concerning or arising out of professional conduct or competence within the meaning of 38 U.S.C. § 7422(b).

APPROVED / DISAPPROVED


Eric K. Shinseki
Secretary

5/29/2013
Date