

Title 38 Decision Paper
Department of Veterans Affairs (VA)
Robley Rex VA Medical Center (VAMC), Louisville, Kentucky

I. FACTS

On January 31, 2011, the American Federation of Government Employees Local 1133 (AFGE or Union), filed a Step 2 grievance, complaining that management at the Robley Rex VA Medical Center in Louisville, Kentucky (Louisville VAMC or Medical Center), reduced the number of registered nurses (RN) that could be on annual leave at any one time. Exhibit 1. AFGE claimed that, following the 2010 annual leave open period, RNs in the Surgical Intensive Care Unit (Surgical ICU or SICU) and Medical Intensive Care Unit (Medical ICU or MICU) were notified by Louisville VAMC management that fewer nurses per week would be allowed to take annual leave than in the past. Id. The Union argued that the decision was at odds with Nursing Service Policy 97-54, dated October 1997 (Nursing Service Policy), which provided the number of individuals "allowed on annual leave per week."¹ Id. AFGE stated that, in addition to the Nursing Service Policy, nurse managers at the Louisville VAMC had granted annual leave for nurses in the two ICUs in a manner consistent with the Nursing Service Policy for the past 11 years. Id.

Deputy Nurse Executive, met with the Union to discuss the grievance on February 23, 2011. Dr. filed the Agency's Step 2 response on March 2, 2011. Exhibit 3. She explained that, until the grievance was filed, she was unaware of the Nursing Service Policy. Dr. further stated that no specific information was supplied to her identifying any nurses impacted by the alleged change in the annual leave approval process. Id. She also stated that, following the grievance meeting, she learned that the Nursing Service Policy was in effect from October 1997 through October 2001, but was rescinded by the Medical Center after that date. She explained that the Medical Center's "intent is to ensure adequate staffing in order to provide our patient veterans quality care," and that "[e]ven under current budgeting and staffing constraints, Nursing Service provides as much opportunity as possible for employees in the MICU and SICU to take AL." Id.

On March 4, 2011, the Union advanced its existing Step 2 grievance to Step 3, without modification. Exhibit 4. Ms. Associate Director for Patient Care Services, met with the Union on March 9, 2011. Ms. also met with the Union and the Surgical ICU and Medical ICU nursing staff on March 23, 2011, in an effort to resolve the grievance. Exhibit 5.

¹ The policy indicates that two registered nurses could be released per leave week in Surgical ICU and one (First Priority) registered nurse and one licensed practical nurse could be released per leave week in Medical ICU. Exhibit 2.

Ms. _____ issued the Medical Center's response to the Step 3 grievance on April 6, 2011. Id. According to Ms. _____, the Nursing Service Policy was rescinded and replaced by VA Medical Center Memorandum No. 603-10-05-013, Leave Policy and Procedures, dated July 16, 2010 (2010 Leave Policy). Id. She stated that the Medical Center did not violate any current policy or the parties' negotiated master agreement, and she cited a portion of the 2010 Leave Policy that sets out the Medical Center's leave approval guideline that, "approval of any type, amount, or length of leave will be based primarily on patient needs and/or work requirements of the medical center." Exhibit 6. Ms. _____ emphasized that, "Nursing Service's mission is to provide adequate staffing to ensure our Veteran patients receive the comprehensive care they deserve. Even under current staffing constraints, Nursing Service has continued to approve annual leave requests in the MICU and the SICU whenever workload and staffing allow." Exhibit 5.

The Union invoked arbitration on April 12, 2011. Exhibit 7. Although an Arbitrator was selected, the parties have not, to date, arbitrated the issue. Exhibit 8. On October 23, 2011, the Union submitted a request for a 38 United States Code (U.S.C.) § 7422 determination to the Under Secretary for Health.² Exhibit 9. In its request, AFGE reiterated its earlier claim that Dr. _____ "changed the process by which registered nurses of the Medical and Surgical Intensive Care units received approval for annual leave for the leave year of 2011." Id. AFGE claimed that the "new practice implemented in 2010 would only allow one registered nurse from day shift and one registered nurse from night shift to take Annual Leave from both respective units." According to the request, the Medical Center's decision was implemented "without due regard to projected patient care needs" Id.

AFGE also asserted that RNs were regularly pulled from the Medical and Surgical ICUs to provide non-nurse support services in other non-critical areas due to staffing shortages in those areas. Id. The Union complained that Dr. _____ did not adequately explore other options that would have allowed additional RNs opportunities to take annual leave. The request also claimed that, prior to changing the leave granting process, Louisville VAMC management failed to notify the Union and failed to involve the Union pre-decisionally, as required by the President's Executive Order 13522. Id.

On December 14, 2011, Louisville VAMC Medical Director, Mr. _____ requested a 38 U.S.C. § 7422 determination. Exhibit 10. In the request, the Medical Center Director explained that, in accordance with the parties' 1998 Local Supplemental Agreement, employees may request up to two weeks of preferred leave for the following leave year during an "open window," which is the period of time from October 31 through November 15. Id. Art 32, § 2(A1). Once the requests are received, Medical Center management reviews the requests and either approves or disapproves the leave requests based on its knowledge of staffing and workload requirements at the time of

² The Union's request is addressed to the Under Secretary for Health, but the Secretary currently retains the authority to issue decisions regarding 38 U.S.C. § 7422(b).

review. *Id.* According to the Medical Center Director, “[t]he number of RNs granted leave at any given time directly affects the number of RNs available to staff the ward and provide patient care. Management determined that in order to ensure the proper staffing ratio at maximum census and considering the number of RNs on staff at that time, no more than two RNs could be approved at one time.” *Id.* Finally, the Medical Center Director claimed that a mandate to allow a specific number of RNS to take annual leave at the same time would impact both the quality and quantity of patient care. *Id.*

II. TITLE 38 U.S.C. § 7422 AUTHORITY

The Secretary has the final authority in the Agency to decide whether a matter or question concerns or arises out of professional conduct or competence, peer review, or employee compensation within the meaning of 38 U.S.C. § 7422(b) and therefore is not subject to collective bargaining and any grievance procedure provided under a collective bargaining agreement.

III. ISSUE

Whether a grievance concerning the Louisville VAMC’s decision to reduce the number of Medical ICU and Surgical ICU RNs allowed to take annual leave involves an issue concerning or arising out of professional conduct or competence (patient care) within the meaning of 38 U.S.C. § 7422(b).

IV. DISCUSSION

The Department of Veterans Affairs Labor Relations Improvement Act of 1991 granted collective bargaining rights to Title 38 employees but specifically excluded from the collective bargaining process matters or questions concerning or arising out of professional conduct or competence, peer review, or employee compensation, as determined by the Secretary. 38 U.S.C. § 7422(b). Professional conduct or competence means direct patient care or clinical competence. 38 U.S.C. § 7422(c).

Pursuant to 38 U.S.C. § 7421(a), the VA Secretary has prescribed regulations contained in VA Directive and Handbook 5011 concerning annual leave determinations. With respect to annual leave decisions, these regulations provide:

“[t]he proper care and treatment of patients shall be the primary consideration in granting of leave.”

VA Handbook 5011, Part III, Chapter 3, Paragraph 2(a).

The Union claims that the Medical Center’s ability to modify its annual leave consideration process for critical care RNs is subject to collective bargaining. The Union claims that the Medical Center is bound by the parties’ 1997 Nursing Service Policy, which sets out minimum numbers of Medical and Surgical ICU nurses that must

be granted for annual leave per week.³ Exhibit 9. In the alternative, the Union asserts that in the past the Medical Center followed a long-standing annual-leave granting practice consistent with the Nursing Service Policy, and should continue to be bound by the past practice. Id.

Title 38 U.S.C. Section 7422 excludes from collective bargaining any matter or question that concerns or arises out of professional conduct or competence, including direct patient care. In its request for determination, the Medical Center management explained how its annual leave decisions for RNs implicate direct patient care. According to the Medical Center Director, care in the Medical and Surgical ICUs requires specialized skills and qualifications from the registered nursing staff. Exhibit 10. The Medical Center asserts fewer qualified nurses on duty at any one time limit the number of patients that can be transferred into the particular ICU care settings. Id. Patients may have to remain in a different, inappropriate setting, or be denied admission altogether, and such delays may negatively impact those patients. For those patients already admitted to the Medical Center, an overcrowded or understaffed unit can result in lower quality care. Id. Finally, the Medical Center management stated that its determination of the number of RNs that may be granted leave at any particular time is based upon the number of staff available and the need to ensure adequate staffing for high quality patient care. Id.

Ensuring that there are sufficient RNs on duty is a matter that concerns direct patient care, and so the Medical Center's decision regarding the number of RNs granted annual leave at any one time 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) and is excluded from the negotiated grievance procedure. While the Union complained that Dr. Hamrick failed to exhaust all other avenues to ensure appropriate staffing, management has the responsibility to make decisions about the best manner to provide quality care to patients.⁴ Compelling the Louisville VAMC to grant leave to a specific number of RNs without regard to the impact on the level of patient care could compromise the Medical Center's ability to fulfill its primary mission.

This decision is consistent with an earlier 38 U.S.C. § 7422 decision, VAMC Minneapolis (September 26, 2008), which involved Union proposals concerning RN staffing ratios. Exhibit 14. In VAMC Minneapolis, the Under Secretary concluded that staffing ratios "go straight to the heart of direct patient care" because the ratios determine the amount of nursing time and attention that may be devoted to each patient, limit the number of patients that can be admitted or transferred to a unit on a particular day, and may leave other units understaffed if nurses must be pulled or floated from one unit to another to achieve a mandated ratio. Id. at 4.

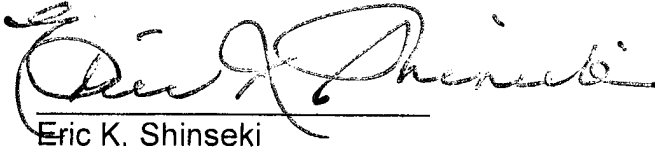
³ Louisville VAMC management claims the 1997 Nursing Service Policy was rescinded in 2001. Exhibit 5. The Union suggested it was never notified of the rescission. Exhibit 9.

⁴ Nonetheless, before changing its practice, management should provide advance notice to the Union and engage in good faith dialogue concerning the anticipated change. See Joint 38 U.S.C. § 7422 Workgroup Recommendations As Revised and Approved by the Secretary of the Department of Veterans Affairs, §§ C(4) and C(5) (December 2010); Exhibit 11.

V. RECOMMENDED DECISION

The grievance concerning the Louisville VAMC's decision to reduce the number of Medical ICU and Surgical ICU RNs allowed to take annual leave during any one leave week involves an issue 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 of Veterans Affairs

9/13/2013
Date