



DEPARTMENT OF VETERANS AFFAIRS
Veterans Health Administration
Washington DC 20420

JUL 30 2001

In Reply Refer To:

VA Medical Center
3200 Vine Street
Cincinnati, OH 45220

Dear

I am responding to the issues raised in the November 20, 2000, letter from _____ and _____. These issues pertain to a grievance filed by the Kentucky Nurses Association concerning a nurse who alleged that management prevented her from working previously scheduled overtime. As a remedy, the nurse requested overtime pay and Sunday premium pay.

I have decided, on the basis of the enclosed decision paper, that the issues raised are matters concerning or arising out of the establishment, determination, or adjustment of employee compensation and professional competence, and are thus exempted from collective bargaining by 38 U.S.C. 7422(b).

Please provide this decision to your Regional Counsel as soon as possible.

Sincerely yours,

A handwritten signature in black ink, which appears to read "Thomas L. Garthwaite", is written over a printed name.

Thomas L. Garthwaite, M.D.

Enclosure

Title 38 Decision Paper – VAMC Cincinnati

FACTS

R.N., a nurse at the VA Medical Center in Cincinnati, Ohio, was scheduled to work overtime in the emergency room from 7:30 AM to 4:00 PM on November 1, 1998. She claims that early in the morning on November 1, 1998, the nurse on duty called her at home and told her that her overtime might be cancelled because there was excess staff available from the Medical Intensive Care Unit (MICU) to staff the emergency room. She reported to work anyway. After working 20 minutes, she was sent home and management assigned a nurse from the MICU to cover her overtime shift. was paid for two hours of overtime.

On November 9, 1998, filed a grievance under the negotiated grievance procedure. The Kentucky Nurses Association (KNA) represents the nurses at the VAMC Cincinnati, including In the grievance, alleged that management violated the contract with KNA by preventing her from working previously scheduled overtime and allowing an MICU nurse who was not properly oriented to work the shift in her stead. As a remedy, requested eight hours overtime pay (she had been paid for two hours overtime) and Sunday premium pay for November 1.

The Secretary has delegated to the Under Secretary for Health the final authority in the VA to decide whether a matter or question concerns or arises out of professional competence or the establishment, determination, or adjustment of employee compensation. When labor and management disagree over such matters or questions, "The VA Partnership Council's Guide to Collective Bargaining and Joint Resolution of 38 U.S.C. 7422 Issues" provides a procedure for labor and management to attempt resolution through involvement of the local and national partnership councils. If the parties are unable to resolve the dispute, the Under Secretary for Health is asked to render a decision.

In a letter dated November 20, 2000, labor and management jointly requested that the Under Secretary for Health determine whether grievance is subject to collective bargaining grievance procedures under 38 U.S.C. 7422. In a conference call on February 8, 2001, local and national representatives from labor and management were unable to resolve the dispute. Therefore, the parties are forwarding the matter to the Under Secretary for Health for a decision.

ISSUE

Whether a Title 38 nurse's entitlement to overtime pay and Sunday premium pay for scheduled overtime that was cancelled, and the nurse did not perform the overtime work, is a matter "concerning or arising out of the establishment, determination, or adjustment of employee compensation," and is thus exempted from collective bargaining by 38 U.S.C. 7422(b).

DISCUSSION

Under 38 U.S.C. 7422(b), a matter that concerns or arises out of the establishment, determination, or adjustment of employee compensation is not subject to collective bargaining or to grievance procedures under collective bargaining agreements. Section 7453 and VA's implementing regulations establish and determine premium pay for nurses.

38 U.S.C. 7453(e)(1) authorizes overtime pay for "performing . . . services." Pursuant to 38 U.S.C. 7421(a), the Secretary prescribed regulations in MP-5, Part II, Chapter 3, Section A, governing administration of pay for Title 38 employees. Paragraph 4.g. (4)(b)3 of these regulations states that overtime is payable "for service performed" in excess of 40 hours per workweek, subject to a two-hour minimum for "call-back" overtime under Paragraph 4(a). In addition, "Weekend Pay" is payable only for service on a tour of duty falling on a weekend. Paragraph 4g(2) and 38 U.S.C. 7453(c). Overtime is not a tour of duty. Thus, under the VA statute and regulations, weekend pay is not payable for overtime.

complaints that the regulations were "unclear and nonspecific," at least with respect to the situation in her grievance. Nevertheless, interpreting these pay statutes and implementing regulations as they apply to situation is clearly a "matter that concerns or arises out of the establishment, determination, or adjustment of employee compensation," and is excluded from collective grievance procedures under 38 U.S.C. 7422.

ISSUE

Whether the VAMC's determination to assign an MICU nurse as competent to work in the emergency room is a matter concerning or arising out of professional competence, and is thus exempted from collective bargaining by 38 U.S.C. 7422(b).

DISCUSSION

Under 38 U.S.C. 7422, a matter that concerns or arises out of professional conduct or competence is not subject to collective bargaining or to grievance procedures under collective bargaining agreements.

was instructed not to work overtime on November 1, 1998, because management reassigned a nurse from MICU to the emergency room where was scheduled to work, thus obviating the need for services on an overtime basis. In her grievance, I alleged that the MICU nurse did not have the proper orientation to work in the emergency room. Among other things, she asserts a violation of Article 14, Section 9 of the applicable collective bargaining agreement, which states that certain

assignments will be "equitably offered to nurses of that assigned base ward dependent upon the nurse's completion of the orientation period, and demonstrated ability to execute the assignment." (emphasis added) Further, she asserts a violation of Article 15, Section 1 of the agreement, requiring that nursing assignments "promote the public interest which requires high standards of nursing care," claiming that "[a]ppropriate orientation is required to provide essential service in patient care and treatment. Without appropriate orientation, patient treatment could be impaired."

The grievance thus alleges that the MICU nurse's lack of orientation affected her ability to treat patients. However, in assigning the MICU nurse, the VAMC implicitly determined that the MICU nurse actually had the professional ability to provide the required care. The union argues that this case raises an issue of "logistical" rather than "professional" competence. The union also asserts that, "without the proper orientation, an otherwise qualified nurse might be unable to find the necessary supplies to treat a critical patient." The union's "logistical/professional" dichotomy is a false one. A nurse's "professional competence" includes, at least, her ability to actually provide nursing care to patients in the nursing position to which she has been assigned. This includes the ability to find the necessary equipment and supplies, as well as other skills commonly acquired in orientation programs. Thus, grievance clearly raises a matter or question concerning or arising out of clinical competence, and is not subject to collective bargaining or a grievance procedure under 38 U.S.C. 7422.

RECOMMENDED DECISIONS

The issue of entitlement to overtime pay and Sunday premium pay for scheduled overtime that was cancelled, and the overtime work that was not performed, is a matter "concerning or arising out of the establishment, determination, or adjustment of employee compensation," and is thus exempted from collective bargaining by 38 U.S.C. 7422(b).

APPROVED: _____

DISAPPROVED _____

The issue of whether an MICU nurse was competent to work in the emergency room because of her qualifications as an MICU nurse, is a matter concerning or arising out of professional competence, and is thus exempted from collective bargaining by 38 U.S.C. 7422(b).

APPROVED _____

DISAPPROVED _____



Under Secretary for Health

7/29/01

Date