



DEPARTMENT OF VETERANS AFFAIRS
Veterans Health Administration
Washington DC 20420

OCT 16 2003

Director (00/05)
VA Gulf Coast Health Care System
Biloxi, MS 39531

In Reply Refer To:

Dear

I am responding to the issue raised in your memorandum dated September 16, 2003, concerning the unfair labor practice charge filed by the American Federation of Government Employees (AFGE), Local 1045, regarding the change in current 12-hour tour to an 8-hour tour for Registered Nurses (RNs).

Pursuant to my delegated authority, I have decided on the basis of the enclosed paper, that the issue presented is a matter concerning or arising out of professional conduct or competence and is thus exempted from collective bargaining by 38 U.S.C. § 7422(b).

Please provide this decision to your Regional Counsel and Human Resources Officer as soon as possible.

Sincerely yours,

A handwritten signature in cursive script, which appears to read "Robert H. Roswell", is written over a horizontal line.

Robert H. Roswell, M.D.
Under Secretary for Health

Enclosure

Title 38 Decision Paper – VAMC Biloxi, MS
VA – 03-09

FACTS

In May 2003, the Associate Chief of Staff for Nursing Service at the VA Gulf Coast Health Care System (GCVHCS) Biloxi, Dr. _____, determined that a change in the nursing tours of duty of the Acute Care and Extended Care/Nursing Home Unit was necessary to improve the quality of patient care in those areas. *Attachment A*. Specifically, Dr. _____ determined that the 12-hour (or compressed work schedule (CWS)) tour of duty should be terminated in favor of 8-hour tours to improve patient care. Dr. _____ recommendation for the change in nursing tours included the following reasons:

- The 12-hour tour shift changes occur during peak patient movement causing the 12-hour day tour employees to be inundated with both admissions and discharges late into the shift;
- The 12-hour tour leaves major gaps in information and knowledge of patient status and does not promote exchange of information in the units;
- The change to an 8-hour tour would improve continuity of patient care when fact finding/problem solving is necessary;
- The 8-hour shifts would enhance the staff's ability for improved communication between staff members and patients;
- The 8-hour shifts would provide fresh and rested employees who will be better able to handle the ever-changing fast paced patient workload;
- The 8-hour shifts would enhance the coordination of care and communication of information across the tours; and
- The 8-hour shifts would allow for a more equitable distribution of the workload among employees, thus improving overall productivity and direct patient care.

Attachment B.

On June 6, 2003, GCVHCS (management) notified the American Federation of Government Employees (AFGE or Union), Local 1045, of the intention to change the tour of duty of Registered Nurses (RNs). On June 27 and July 9, 2003, AFGE Local 1045 sent a letter to GCVHCS's Chief of Human Resource Management (HR), with a request to bargain on the proposed change in the nursing tour and a request to cease and desist implementation of the initiative. *Attachments C and D*. In response, on July 10, 2003, HR informed AFGE that the tour change would directly impact patient care, making the change outside the scope of bargaining pursuant to 38 U.S.C. § 7422. *Attachment E*. HR noted however that it "would be open to listening and attempting to resolve any issues dealing with the registered nurses." HR met with AFGE to discuss the issues concerning RNs on July 11, 2003.

On July 18, 2003, AFGE filed an unfair labor practice (ULP) charge with the Federal Labor Relations Authority (FLRA) alleging that management had refused to bargain in good faith and requesting injunctive relief to preclude implementation of the change in tours of duty, due to take effect on August 10, 2003. *Attachment F*. AFGE also filed a request for assistance to the Federal Service Impasse Panel (FSIP), on or about July 22, 2003. *Attachment G*.

On August 28, 2003, AFGE withdrew the request for impasse from FSIP *Attachment H*. The ULP charge was also withdrawn on September 10, 2003. *Attachment I*. Both cases were withdrawn following management's agreement not to implement the change to the nurse tour of duty pending a determination by the Under Secretary for Health (USH) of the Department of Veterans Affairs pursuant to 38 U.S.C. § 7422. See also *Attachment H* and *I*.

On September 16, 2003, the Director of GCVHCS requested a determination from the USH on whether the change in the nursing tour of duty, eliminating CWS or 12-hour shifts, is a matter of professional conduct/competence affecting patient care, and thus exempt from collective bargaining under 38 U.S.C. § 7422. *Attachment J*. GCVHCS officially notified AFGE of the request the same day. *Attachment K*.

PROCEDURAL HISTORY:

The Secretary of Veterans Affairs (Secretary) delegated to the USH the final authority to decide whether a matter or question concerns or arises out of professional conduct or competence (direct patient care, clinical competence). When labor and management disagree over such matters or question and the parties are unable to resolve the dispute, the USH is asked to render a decision.

In this case, the issue is well defined and ripe for review. Further, the Union has been provided with an opportunity to comment on the determination. *Attachment K*.¹ Management confirmed that the Union has not submitted any comments as of October __, 2003.²

ISSUE:

Whether a decision to eliminate 12-hour (CWS) tours and to replace them with 8-hour tours for Registered Nurses is a matter or question concerning or arising out of professional conduct or competence within the meaning of 38 U.S.C. § 7422(b).

¹ The September 16, 2003, memorandum to AFGE provided the Union with ten (10) days, from the receipt, to respond to the issues addressed in the request for a USH determination.

² On September 26, 2003, the Union contacted LMR to seek a two-week enlargement in time to comment on the request. The same day, the Union also contacted GCVHCS for a three-week extension. The decision process for these determinations does not provide for extensions of time for the Union's comments. Nevertheless, before the USH determination was completed for approval, management attempted to verify that no Union comments were submitted.

DISCUSSION

The Department of Veterans Affairs Labor Relations Act of 1991, 38 U.S.C. § 7422, granted collective bargaining rights to Title 38 employees in accordance with Title 5 provisions, but specifically excluded from the collective bargaining process matters or questions concerning or arising out of professional conduct or competence, peer review, and employee compensation as determined by the USH.

The tours of duty for Title 38 health care personnel are fundamental to establishing the level of patient care to be provided by the Department of Veterans Affairs. Pursuant to 38 U.S.C. § 7421(a), the Secretary has prescribed regulations contained in VA Directive/Handbook 5011, Part II, Chapter 3 regarding the establishment of workweeks, tours of duty, and work schedules for medical professional employees.

As a general proposition, VA has applied the authority of the compressed work schedule (CWS) statute to all Federal employees, including Title 38 employees. However, if the CWS program, applicable to a Title 38 employee, has a direct adverse impact on patient care, then it is non-negotiable under 38 U.S.C. § 7422(b) and not subject to third party review. In such a case, there is a conflict between 38 U.S.C. § 7422 and the CWS statute (i.e. 5 U.S.C. § 6131(c)(2)(A), which provides for the Impasse Panel to rule on the agency's determination that CWS has produced an adverse agency impact). Where, as here, there is such a conflict, 38 U.S.C. § 7425(b) operates to render the Title 5 provision inapplicable.

Therefore, notwithstanding any law, Executive order or regulation, and pursuant to 38 U.S.C. §§ 7421(a) and 7425(b), the Secretary's regulations govern flexible and compressed work schedules for registered nurses appointed under the authority of 38 U.S.C. §§ 7401(1) or 7405(a)(1). The regulations contained in VA Directive/Handbook 5011, Part II, Chapter 3, section 5g(1)(a), establish that "[c]ompressed 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."

In the instant case, it is clear that the issue of changing from a 12-hour tour of duty to an 8-hour tour of duty for RNs will directly impact patient care. Based on the reasons previously listed and the cited law, the recommended change is essential for improved patient care and thus non-negotiable under 38 U.S.C. § 7422(b).

This is consistent with prior USH determinations. See e.g. Leavenworth VAMC on May 13, 1992 (relating to RN 12-hour shifts). In particular, the most recent USH decision, number 03-07, relating to the Alexandria Louisiana Medical Center is on point. In that decision, the USH determined that termination of CWS

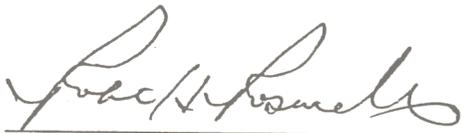
for RNs due to patient care requirements was a matter involving professional competence or conduct within the meaning of 38 U.S.C. § 7422.

RECOMMENDED DECISION

That the decision to eliminate 12-hour shifts (or CWS) for Registered Nurses 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 _____



Robert H. Roswell, M.D.
Under Secretary for Health

10-15-03

Date