



DEPARTMENT OF VETERANS AFFAIRS
Veterans Health Administration
Washington DC 20420

OCT 28 2003

In Reply Refer To: 10A2

Interim Medical Center Director
VA Medical Center
1030 Jefferson Avenue
Memphis, TN 38104

Dear Ms. .

I am responding to the issue raised in a letter from Dr. dated August 15, 2003, concerning an unfair labor practice charge filed by the American Federation of Government Employees union. The issue pertains to reassignment of registered nurses and nurse practitioners from the Memphis VA Medical Center to a new outpatient clinic.

Pursuant to 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 as soon as possible.

Sincerely yours,

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

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

Enclosure

cc: Director, VISN 9

Title 38 Decision Paper – VAMC Memphis, TN
VA 03-10

FACTS

In April 2003, the VA Medical Center in Memphis, TN received approval from the Under Secretary for Health (USH) to open a satellite clinic, known as the South Clinic, to provide additional space needed for outpatient treatment.

In planning for the opening of the South Clinic, management considered how to go about determining which registered nurses and nurse practitioners should be reassigned to the clinic and which should stay at the Medical Center. Because the clinic would not have laboratory or radiology capabilities, management determined that those providers whose panels consist of more critically ill patients – those most likely to need lab work or x-rays – should stay at the Medical Center, while those whose patients were less acutely ill might be reassigned to the clinic. More specifically, management determined to make reassignment decisions based on the following criteria:

1. vesting efficiency;
2. clinic utilization percentage;
3. patient complaints;
4. performance evaluations;
5. attitude;
6. patient demographics;
7. staff complaints;
8. performance measures;
9. other attributes, including independence or need for supervision and ability to work without lab or x-ray capabilities; and
10. team cohesiveness/function.

As management's decision to open the South Clinic became known to VAMC Memphis employees, representatives of the local American Federation of Government Employees (AFGE) unit, which represents registered nurses (RNs) and nurse practitioners (NPs) at VAMC Memphis, began to tell employees that reassignment from the Medical Center should be on a volunteer basis or, if there were not sufficient volunteers to staff the clinic, on the basis of reverse seniority.

To address employees' concerns and stop further misinformation, on April 28, 2003, VAMC Memphis' Chief, Medical Service, _____, M.D., submitted to the president of the local American Federation of Government Employees (AFGE) unit a memorandum (Attachment A) clarifying management's intention to staff the South Clinic based on individual nurses' professional competencies. In this memorandum, Dr. _____ informed the union that management had determined "to select specific title 38 employees based on the skills and competencies of those employees in order to ensure that we (1) staff the South Clinic with an appropriate mix of competencies and skills, while (2) retaining staff

at the VA Medical Center, Memphis that also have the competencies and skills necessary perform the duties at the Medical Center." Dr. further stated that management "expected that the populations and work requirements [at the clinic and VAMC would] differ and therefore management must be cautious to ensure that the staffing at both facilities is appropriate for the mission of each facility." Dr. acknowledged that the union might have concerns about the impending opening of the clinic and invited further discussion of such concerns, but stressed that "management must retain the right to make [reassignment] decision[s] based on individual competencies and the needs of this Medical Center" and that "the issue is not subject to the provisions of collective bargaining [under] 38 U.S.C. § 7422."

On July 9, 2003, management notified employees that the South Clinic would open on August 26, 2003.

On July 16, 2003, the local union filed an unfair labor practice (ULP) charge (Attachment B), alleging that "management continues to implement VA South [Clinic] initiatives completely bypassing the union and failing to come to the table to conduct negotiations." The ULP further alleged that on April 30, 2003, the union had "requested specific information and invoked its right to negotiate." The union attached a memorandum dated April 30, 2003 and entitled "Demand to Bargain; VA South" to its ULP filing. (Attachment C) However, VAMC Memphis management did not receive this memorandum at any time prior to their receipt of the July 16, 2003 ULP. The April 20, 2003 memorandum did not set forth any specific union proposals, but stated that "AFGE invokes its right under USC 7106 [sic] to negotiate" and demanded documentation from management relating to expected patient populations and proposed nurse work requirements at South Clinic; the proposed operational plan, organizational structure, and operational hours of work at South Clinic; "a copy of the proposed numbers, types and grades of employees who will be required to staff VA South Clinic;" and "a copy of the proposed guidelines or criteria by which management will select and effect the assignment of employees to VA South."

Since the filing of the July 16, 2003 ULP, the local union has continued to insist that management violated the applicable labor relations statutes by not negotiating the manner of assigning bargaining unit members to the South Clinic. More specifically, the union argues that assignments should have been made by requesting volunteers and, if not enough employees volunteered, by assigning based on reverse seniority. As a result of the union's arguments, the FLRA attorney assigned to the ULP has directed VAMC Memphis management to request a determination by the USH pursuant to 38 U.S.C. § 7422(d) whether the procedures for assigning nurses to South Clinic are negotiable. (Attachment D) By letter dated August 15, 2003, management requested this determination. (Attachment E)

ISSUE

Whether the reassignment of Title 38 nurses from VAMC Memphis to the South Clinic is a matter or question concerning or arising out of professional conduct or competence under 38 U.S.C. 7422(b), and is thus exempted from collective bargaining and not subject to review by any other agency under 38 U.S.C. 7422(d).

DISCUSSION

Under 38 U.S.C. § 7422, a matter that concerns or arises out of professional conduct or competence is outside the scope of collective bargaining and is not subject to review by any other agency. The law authorizes the Secretary, or designee, to make the determination of any question arising under its provisions. The Secretary has delegated to the Under Secretary for Health the authority to make these determinations.

The assignment and placement of Title 38 health care personnel is fundamental to establishing the level of patient care to be provided by the Department of Veterans Affairs. Moreover, management's determination of staffing requirements concerns the overall competency of the staff at each facility and the ability of the assigned staff members to perform without compromising patient care.

In several prior cases involving involuntary or directed reassignments of RNs, the USH has determined that the actions and assignment actions involve professional conduct or competence within the meaning of 38 U.S.C. § 7422. These prior determinations include: Hampton, VA VAMC (July 20, 1992); White River Junction, VT VAMC (July 7, 1994); West Haven, MA VAMC (October 24, 2002); Poplar Bluff, MO VAMC (February 4, 2003); and Maryland VA Health Care System (February 4, 2003).¹

¹ It should be noted that the local union has not issued any specific proposals relating to the opening of the South Clinic, but claims more generally that VAMC Memphis management's failure to provide the information requested in the April 30, 2003 memorandum constitutes an unfair labor practice. All of the information requested relates to the substance of management's decisions on structure and staffing of the South Clinic. Pursuant to the Federal Service Labor Management Relations Statute, 5 U.S.C. 7114(b)(4), a union's right to information depends on whether there is an appropriate representational use to which the data might be put. To the extent that such issue is outside the scope of collective bargaining under 38 U.S.C. 7422, there is no representational right of the union that relates to the requested information, and the failure of management to comply with the information request does not give rise to a ULP that is subject to the jurisdiction of FLRA. *Department of Veterans Affairs, Washington, DC and VA Medical Center, Amarillo, TX v. Federal Labor Relations Authority*, 1 F.3d 19 (D.C. Cir. 1993).⁴ See USH decision re Miami, FL VAMC dated December 16, 2002 (where substance of data request was non-negotiable under 38 U.S.C. § 7422(b), consideration of ULP would involve FLRA review of issues not permitted by 38 U.S.C. § 7422(d)).

Pursuant to 38 U.S.C. § 7421(a), the Secretary has prescribed regulations (contained in VA Directive/Handbook 5005, Part IV, Chapter 3, Sections A and B) to implement assignments, reassignments and details. Section A, paragraph 4(b) of Handbook 5005, Part IV, Chapter 3 provides that in exercising the authorities covered in the handbook, primary consideration will be given to the efficient and effective accomplishment of the VA mission. As detailed above, Memphis VAMC management has determined that reassignments from the Medical Center to the South Clinic shall be made based on a number of variables relating to the accomplishment of VA's patient care mission. The substance of this determination is rooted in issues of professional conduct or competence and is therefore non-negotiable under 38 U.S.C. § 7422(b).

RECOMMENDED DECISION

It is recommended that the Under Secretary for Health determine that the reassignment of nurses from VAMC Memphis to the South Clinic is a matter or question concerning or arising out of professional conduct or competence under 38 U.S.C. 7422(b), and is thus exempted from collective bargaining and may not be reviewed by any other agency under 38 U.S.C. 7422(d).

APPROVED ✓

DISAPPROVED _____



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

10-27-03

Date