



DEPARTMENT OF VETERANS AFFAIRS
Veterans Health Administration
Washington DC 20420

OCT 16 2003

Acting Medical Center Director
VA Medical Center
P.O. Box 69004
Alexandria, Louisiana 71306-9004

In Reply Refer To:

Dear Ms.

I am responding to the issue raised in your memorandum of August 11, 2003, concerning the charge of unfair labor practice filed by the American Federation of Government Employees (AFGE or Union) Local 1972, alleging failure to comply with a mediation agreement, dated August 24, 2001. The issue pertains to whether management is required to negotiate, pursuant to the mediation agreement, with the Union over registered nurses (RNs) at the ICU/7BU unit participation in a compressed work schedule (CWS) program. The requested remedy is "reestablishing" CWS for the RNs at the ICU/7BN unit.

Pursuant to delegated authority, I have decided on the basis of the enclosed paper that the issue presented is a matter of professional conduct or competence and 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, appearing 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 Alexandria, Louisiana
VA – 03-07

FACTS

In a memorandum dated March 16, 2001, the Director of the Alexandria Louisiana Department of Veterans Affairs Medical Center (VAMC) made a decision to, in pertinent part, discontinue 12-hour compressed work schedules (CWS) for all registered nurses (RNs), effective April 22, 2001. The cited reason for the change was the adverse impact the schedules had on the facility's operations, employees, and patient care. *Attachment A*.

On April 17, 2001, American Federation of Government Employees (AFGE) Local 1972 (Union) filed an unfair labor practice (ULP) charge alleging that management failed to bargain in good faith over the discontinuance of CWS. *Attachment B*. CWS was discontinued per the March 2001 memorandum on April 22, 2001. On May 16, 2001, management responded to the charge. *Attachment C*. Management asserted that all collective bargaining obligations and negotiations were completed prior to the discontinuance of CWS. It denied committing an ULP, and stated that CWS was discontinued due to an adverse impact on medical center operations and patient care. *Id.* Management also noted that the "Union initialed off on the Memorandum from the Nurse Executive . . . recommending CWS be discontinued." *Id.*, p. 4.

The parties participated in mediation on August 22 through 24, 2001. *Attachment D*. On August 24, 2001, the parties came to an agreement. In pertinent part, the agreement established that management would reestablish CWS for Union member RNs at the intensive care unit (ICU/7BN) for six months as a pilot program.¹ The parties agreed that no RN would be removed from CWS "until all negotiations are complete." *Id.*, ¶ 4. Pursuant to the mediation agreement, AFGE withdrew the ULP. *Attachment E*. The CWS ICU/7BU pilot program became effective on October 7, 2001. *Attachment F*. Thereafter, management worked with the Union to complete the remainder of the mediation agreement provisions.²

In a memorandum dated April 3, 2003, Ms. Rheta Morgan, RN, Head Nurse of the ICU/7BN unit, recommended the discontinuance of the compressed schedules for RNs at the ICU/7BN. *Attachment G*. Among the eight reasons detailed, Ms. Morgan noted:

¹ The agreement also included the following pertinent terms: (1) creation of labor-management nurse survey to review CWS for RNs, (2) reestablishment of CWS for administrative services, (3) renegotiation of MCM 05-51 on CWS, and (4) monthly meetings of the survey group to assess overtime costs etc.

² The parties conducted the survey of CWS for RNs, reestablished CWS for purely administrative bargaining unit employees, renegotiated MC 05-51, and conducted monthly meetings to assess the survey results.

- Much of the RN staff is new and therefore, without eliminating CWS shifts, the unit will be inadequately staffed by RNs with the necessary clinical competency to ensure quality patient care.
- Staffing coverage is inadequate to ensure patient safety, evidenced by an increase in patient falls attributed directly to inadequate staffing.
- Staff RN use of unscheduled leave equates to the loss of two to three FTEE each month.

The ICU/7BN's Head Nurse concurred with the report on July 10, 2003.
Attachment H.

On July 11, 2003, the Union filed an ULP charge, concerning management's alleged failure to abide by the mediation agreement and failure to bargain in good faith over "reestablishing" compressed tours for nurses. *Attachment I.* As relief, the Union asks that compressed work schedules be reestablished for all nurses who had previously been on CWS, and to maintain the status quo for employees who are currently on CWS until "all union negotiations are complete." In response to the ULP charge, on August 1, 2003, management asserted that it met all of the obligations of the mediation agreement and that the issue of compressed work schedules is not negotiable under 38 U.S.C. 7422.
Attachment J.

An August 2, 2003, memorandum from the Nurse Executive summarized the managing RNs information and also recommended discontinuing CWS for nursing staff at ICU/7BN unit. *Attachment K.* The Nurse Executive, Patricia Eicke, stated "[d]ue to the current nursing resources, patient care cannot be efficiently, effectively provided and meet/exceed our customer satisfaction using CWS." She noted that it resulted in inadequate staffing. She further stated:

To continue . . . CWS will create an adverse impact on the facility's operations and nursing employees, competency of nursing staff to be able to provide adequate patient care, cause staffing issues, and has potential to contribute to not meeting VACO and [Joint commission on Accreditation of Healthcare Organizations] requirements.

In light of the ULP and nurse management recommendations, on August 11, 2003, the Acting Medical Center Director requested an Under Secretary of Health determination on whether issue is a matter involving professional conduct or competency within the meaning of 38 U.S.C. § 7422. *Attachment L.* The Local AFGE President was notified. *Attachment M.*

As of the date of this decision paper, the compressed schedules have not been discontinued for ICU/7BN nurses pending resolution of the ULP.

PROCEDURAL HISTORY:

Time is of the essence because (1) the Federal Labor Relations Board has refused to suspend proceedings on the ULP pending the Under Secretary for Health 7422 determination, and hence may rule on this matter at any time; and (2) in light of the pending ULP, management cannot effectuate the discontinuance of CWS for RNs which continues to affect quality patient care in the ICU/7BN unit. *Attachment N.*

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.

On August 13, 2003, the Local Union President acknowledged receipt of notice of the facility's request to the USH. *Attachment M.* On September 9, 2003, the Union was further notified that it could officially submit its position on the issue to the USH, through the Office of Labor Management Relations, no later than September 15, 2003. *Attachment O.* On September 26, 2003, management received the union submission. The submission did not address why the union believed this matter did not involve professional conduct or competence. *Attachment P.* It requested delay of the USH determination to allow for local consensus on the matter. It was referred back to local management for appropriate action.

ISSUE

Whether an unfair labor practice charge that the Alexandria VAMC failed to bargain in good faith over the Union's insistence that certain registered nurses have 12-hour compressed work schedules is a matter involving professional conduct or competence within the meaning of 38 U.S.C. 7422(b).

DISCUSSION

As a general proposition, VA has applied the authority of the 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 USC 7422(b) and not subject to third party review under 38 USC 7422(d). 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.

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 an adequate staffing level to assure quality patient care. Determining appropriate personnel to cover patient care at all times is affected by the availability of staff with the necessary competency, expertise, and experience.

Pursuant to 38 U.S.C. 7421(a), the Secretary prescribed regulations regarding the establishment of workweeks, tours of duty, and work schedules for medical professional employees. See VA Directive/Handbook 5011, Part II, Chapter 3. These regulations grant facility directors the discretionary authority to institute flexible and compressed work schedules for registered nurses appointed under the authority of 38 U.S.C. 7401(1) or 7405(a)(1). VA Directive 5001, section 3(e). The regulations however state 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." VA Handbook 5011, Part II, Chapter 3, section 5(g)(1)(a).

In the case at hand, the facility has a CWS program in place for RNs at the ICU/7BN unit. In 2003, due to changes in Title 38 employee resources and patient care demands, the ICU/7BN managing nurse recommended discontinuing CWS for RNs because of the negative impact on the quality of patient care. The nurse manager recommendations support this recommendation with statistics about staffing lacking qualified personnel to provide adequate coverage at all times, and an increase in patient care problems. See *Attachments G, H, and K*. The facility management decision to discontinue the CWS program for RNs at the ICU/7BN is therefore a matter or question concerning or arising out of professional conduct or competence, namely patient care. Management determined continuing the program under the current circumstances directly and adversely impacts on patient care. It is therefore non-negotiable under 38 U.S.C. § 7422(b) and not subject to third party review under 38 U.S.C. § 7422(d).

This is also consistent with a prior USH 7422 determination, which also found changes to Title 38 employees' tour of duty matters or questions concerning or arising out of professional conduct or competence. See e.g. Leavenworth VAMC on May 13, 1992 (CWS).

RECOMMENDED DECISION

That the Alexandria VAMC's decision to discontinue 12-hour compressed work schedules for registered nurses at the ICU/7BN unit, which gave rise to the ULP charge of failure to bargain in good faith, is a matter that concerns or arises out of professional conduct or competence (direct patient care or clinical competence) under 38 U.S.C. 7422.

APPROVED ✓

DISAPPROVED _____



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

10-15-03

Date