



DEPARTMENT OF VETERANS AFFAIRS
Veterans Health Administration
Washington DC 20420

DEC 17 2003

Medical Director (00)
10 Casia Street
San Juan, P.R. 00921-3201

In Reply Refer To:

Dear Mr.

I am responding to the issue raised in your memorandum dated October 16, 2003, concerning the ULP filed by the American Federation of Government Employees (AFGE), Local 2408, regarding the change in tours of duty for the Coronary Care Unit/Intermediate Coronary Care Unit (CCU/ICCU) staff.

Pursuant to the 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 black ink, appearing to read "Robert H. Roswell", is written over the typed name.

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

Enclosure

Title 38 Decision Paper – VAMC San Juan
VA – 03-12

FACTS:

On September 19, 2003, Mrs. _____, Nurse Manager of the San Juan, VA Medical Center Coronary Care Unit/Intermediate Coronary Care Unit (CCU/ICCU), notified the American Federation of Government Employees (AFGE), Local 2408, of the intention to change the hours during which the nursing staff participates in their 12 hour Compressed Work Schedule (CWS). The letter stated that instead of having shifts starting from 6:00 a.m. to 6:30 p.m. and from 6:00 p.m. to 6:30 a.m., the nursing staff would begin their tours of duty from 7:00 a.m. to 7:30 p.m. and from 7:00 p.m. to 7:30 a.m., starting October 5, 2003. Mrs. _____ explained the reasons for the change as follows:

- To provide adequate coverage to all shifts;
- To comply with requirements of the Night Charge Nurse resources; and
- To improve and provide adequate interpersonal relationship with Staff and Managers.

Attachments A and B. In particular, there were two patient care reasons for the change in hours: first, to ensure an adequate nurse-patient ratio; and second, to improve the efficiency of responding to patient care needs by improving nurse staff communication. *Attachment B.*

Mrs. _____ elaborated on the reasons for the change in the tours of duty of the CCU/ICCU staff in a memorandum dated November 7, 2003. She indicated that the Night Charge Nurse is required to meet and participate with Top Nursing Service Management. *Id.* The meeting provides management with valuable input and updates related to the preceding tour of duty, including but not limited to: status of patients, staff, and unit problems.

“Prior to the change, the Night Charge Nurse was unable to participate in these required meetings because their tour of duty ended at 6:30 AM. With the change in tour of CWS, the Night Charge Nurse can now participate in this required event. This will improve direct patient care since it would maintain Top Nursing Management abreast of the CCU/ICCU patient care needs.”

Further, the new tour of duty permits the Team Leader and Nurse Manager to meet with the Night Charge Nurse to discuss events they encountered during their shift. The meetings were not possible prior to the change in tours of duty, since the Night Charge Nurse ended the tour at 6:30 a.m. and the Team Leader and Nurse Manager’s tour began at 7:30 a.m. This communication impacts patient care and is of utmost importance since it keeps the whole team abreast of patient care needs and other situations encountered by the Night Charge Nurse.

Mrs. [redacted] also advised that the change in shift hours increases the required nurse to patient ratio, which previously during certain shifts was only 3.2 or 3.6 FTEE nurses per every eight (8) patients. Combined with other nurse schedules (e.g. part-time and non-CWS) this shift change increases the ratio to 4.0 FTEE registered nurses per every eight (8) patients. This complies with the agency policy that there must be at least one nurse for every two patients to ensure proper coverage and adequate care for each patient. *Id.*

In response, on September 23, 2003, AFGE sent a letter to Ms. [redacted] Associate Director for Nursing Service, with a demand to bargain on the change in tours of duty of the CCU/ICCU staff. *Attachment C.* Subsequently, on September 25, 2003, Ms. [redacted] responded to AFGE's demand to bargain stating that the proposed change in tours of duty would directly impact patient care and would therefore be outside the scope of bargaining pursuant to 38 U.S.C. § 7422. *Attachment D.*

On September 30, 2003, AFGE filed an Unfair Labor Practice (ULP) charge with the Federal Labor Relations Authority (FLRA) alleging that management violated 5 U.S.C. § 7116 by refusing to bargain in good faith over the change in the tours of duty of the CCU/ICCU staff. *Attachment E.*

On October 16, 2003, the Director of the San Juan VA Medical Center, Mr. [redacted], requested a determination from the Under Secretary for Health (USH) on whether the change in the nursing tour of duty is a matter of professional conduct/competence affecting patient care, and thus exempt from collective bargaining under 38 U.S.C. § 7422. *Attachment F.* The Director notified the FLRA and AFGE on the same day. *Attachments G and H.*

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.

The case is ripe for review and time is of the essence. In the October 16, 2003, letter sent to the FLRA, management requested a stay of the proceedings pending the issuance of a decision by the USH. *See Attachment G.* The FLRA has not issued a determination on the request for a stay of the proceedings, and may rule to move forward with the ULP at any time.

The Union was given the opportunity to provide their comments on management's request for a determination by the USH. *Attachment I.* On November 3, 2003, Mr. [redacted] President AFGE Local 2408, sent a letter with the union's comments stating that "[t]he allegations made by the Agency that the change in the tour of duty of

the Nursing Staff of CCU/ICCU is excluded from collective bargaining under 38 USC 7422 (b) is false, misleading and bad faith bargaining." *Attachment J*. She maintains that the change in the tour of duty will not change the number of nurses, but fails to substantiate why. The remainder of her arguments goes to the issue of whether establishing a CWS schedule is an issue of patient care at various units in the facility, an issue unrelated to the management decision to change the tour of duty for CWS at the CCU/ICCU.

The controversy is defined. The Union's demand to bargain requested negotiation over the *substance* of management's decision - based on patient care concerns - to change the shift hours. *Attachment C* ("demanding to bargain over the change in the tour of duty" and "demand that the change . . . be cancelled until negotiations are complete"). The demand fails to raise any peripheral issues that do not involve 38 U.S.C. 7422 patient care and clinical competency concerns.

The change in the tours of duty of the CCU/ICCU staff was implemented on October 5, 2003.

ISSUE:

Whether a decision to change the tours of duty of the CCU/ICCU staff on CWS is a matter or question concerning or arising out of professional conduct or competence within the meaning of 38 U.S.C. § 7422(b).

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 tour of duty for title 38 health care personnel is a fundamental aspect of ensuring adequate patient care. 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.

The regulations contained in VA 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." *Attachment K*. Subsection (d) also states "[o]fficials responsible for establishing work schedules may establish compressed work schedules for employees covered by this chapter. These officials may also restrict the types of compressed work schedules that may be approved if necessary to meet patient care needs." If altering the tour of duty

hours of a title 38 employee CWS program by one hour is required to ensure adequate patient care, then it is non-negotiable under 38 U.S.C. § 7422(b) and not subject to third party review.

In the instant case, the demand to bargain by AFGE arises from a change in the hours during which the CCU/ICCU staff participates in CWS. The CWS program established for the CCU/ICCU staff was altered by one hour to ensure adequate nurse-patient ratio and to permit employees to brief management and the next shift on the status of unit patients and any problems. The change in tour of duty for CWS nurses increases the overall nurse ratio from 3.2 or 3.6 to 4.0 FTEE's for every 8 patients per shift. It also ensures that there is overlap in the shifts of the night and day nurses, permitting the nurses from the preceding shift to attend meetings and fully brief the in-coming shift on patient care issues, status, and problems. Management's decision to change the tours of duty hours was based on patient care reasons, namely improving patient care by allowing the required nurses to be available in each tour at all times. Management's decision was further based on the fact that the change will significantly improve communications between the Night Charge Nurse, Top Nursing Service Management, the Team Leader and Nurse Manager by providing an overlap in shift coverage. This improvement in communication allows for a more efficient response to patient care needs. *Attachment B.*

It is clear that the issue of changing the tour of duty hours for the CCU/ICCU staff on CWS will directly impact patient care. Based on the reasons previously listed and the cited law, the change was essential for improved patient care and non-negotiable under 38 U.S.C. § 7422(b).

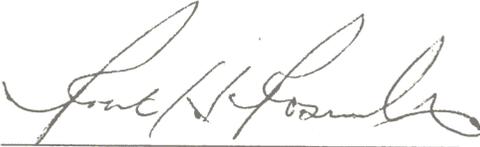
This is consistent with prior USH determinations. In a prior case involving the negotiability of 12-hour tours for Registered Nurses, the USH determined that such shifts involve professional conduct and competence within the meaning of 38 U.S.C. § 7422. Specifically, the USH determined that "[p]rofessional conduct includes the scope, nature, and manner of performance of duties. The VA is responsible for the delivery and direction of the conduct of professional duties and services by Title 38 employees. This responsibility encompasses the establishment of tours of duty and directly impacts on patient care." See Leavenworth VAMC on May 13, 1992. Also see Brockton VAMC on August 24, 1994 and Des Moines VAMC on November 26, 1993 (related to tour of duty changes). *Attachment L.*

RECOMMENDED DECISION

That the decision to change the tours of duty hours of the CCU/ICCU staff 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

12-15-03
Date