



DEPARTMENT OF VETERANS AFFAIRS
Veterans Health Administration
Washington DC 20420

FEB 12 2003

In Reply Refer To:

Medical Center Director
John J. Pershing VA Medical Center
Poplar Bluff, MO 63901

Dear

I am responding to the issue raised in your letter of December 23, 2002, concerning the grievance filed by the American Federation of Government Employees (AFGE) Local 2338. The issue pertains to AFGE's dissatisfaction over an alleged failure to give the union reasonable notice and an opportunity to bargain over management's decision to reassign Registered Nurses from the Primary Care Clinic to other areas of the medical center.

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 thus exempted from collective bargaining by 38 U.S.C. section 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".

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

Enclosure

Title 38 Decision Paper – VAMC Poplar Bluff MO

VA --- 03-01

FACTS:

In or about December of 2001, Poplar Bluff VA Medical Center (VAMC) management determined that patient care could be improved and staff clinical skills better utilized through a change in the staffing mix in the VAMC's Primary Care Clinic. The proposed change included the reassignment of one Registered Nurse (RN) from each of two teams in the Primary Care Clinic to other areas of the medical center. Management further proposed to utilize Licensed Practical Nurses (LPNs) to fill the vacant positions in the Primary Care Clinic resulting from the reassignment of the RNs.

Management discussed the proposed staffing change with the local union in a February 14, 2002, Labor Management Collaborative meeting. At that time, the union's first vice president voiced agreement with the decision and indicated the union would "elect to bargain impact and implementation for the effected RNs and LPNs at a later date." (Attachment A). The next day, the union president submitted a Demand to Bargain over RN Staffing Levels in Primary Care. (Attachment B).

On February 21, 2002, the Director responded to the union president, indicating that staffing levels were covered and not negotiable under 5 USC 7106 (b), and that once the union identified issues impacting on working conditions, management would bargain over "impact and implementation" (Attachment C).¹

In March 2002, the union submitted a lengthy request for information pertaining to the staffing mix decision, and management responded to such request. However, the union did not present any impact and implementation bargaining issues. Meanwhile, the RN reassignments became effective.

On April 19, 2002, the union filed a grievance alleging violation of section 4 of Article 46 of the Master Contract, specifically "a failure to provide the local union with reasonable advance notice to the proper union officials prior to implementing a change when Registered Nurses were involuntarily reassigned from Outpatient Clinics to other areas of the facility."² (Attachment D) In addition, the grievance alleged that management violated Article 1, section 3, of the Master Contract when it bypassed the union and entered into formal discussions with bargaining

¹ 5 USC 7106(b)(2), (3). It should be noted that section 7106(b) generally applies to bargaining with Title 5 employees. It is applicable to Title 38 Registered Nurse employees except for matters excluded from collective bargaining by 38 USC 7422(b).

² The VAMC provided the union with notice of the reassignments and discussed them with the union in February and March 2002. The VAMC effected the reassignments in April 2002.

unit employees. In the grievance, the union sought as a remedy for the alleged violations a return to "the status quo ante," meaning a return to the RN and LPN assignments that existed before the change was made. (Attachment D) On June 10, 2002, in responding to the grievance at the third step, the VAMC Director clarified to the union that there were matters raised in the grievance that pertained to professional conduct and competence in that they dealt with direct hands on patient care, clinical competence matters under 38 U.S.C. section 7422. The Director stated that these issues, specifically the RN reassignments, were outside the scope of collective bargaining and non-grievable. (Attachment E) Notwithstanding this clarification, on July 1, 2002, the union invoked arbitration under the negotiated grievance procedure of the Master Contract. (Attachment F)

In a memorandum dated August 15, 2002, the VAMC Director requested a determination of this matter by the Under Secretary for Health (USH) pursuant to 38 U.S.C. section 7422(d). (Attachment G) Thereafter, however, it appeared to management that the union had accepted management's position that only the issues relating to the LPN assignments were grievable. As a result, the VAMC Director's request for a USH decision was put on hold.

In early December, an arbitrator was assigned to hear the grievance. In electronic correspondence dated December 18, 2002, the VAMC Director attempted to clarify the scope of the arbitration with both the arbitrator and the union, stating that 38 U.S.C. section 7422 precluded arbitration of the RN reassignment issues. (Attachment H) The union responded that in their view the "arbitrator would determine the issues." (Attachment H) The union has requested an arbitration hearing date in February 2003. (Attachment H)

Accordingly, by memorandum dated December 23, 2002, the Director has again requested a determination by the USH that the issue of RN reassignments is a matter concerning or arising out of professional conduct or competence and is therefore outside the scope of collective bargaining pursuant to 38 U.S.C. 7422. (Attachment I)

PROCEDURAL HISTORY

The Secretary has delegated to the USH the final authority in the VA 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 questions, "The VA Partnership Council's Guide to Collective Bargaining and Joint resolution of 7422 Issues" provides a procedure for attempting resolution. If the parties are unable to resolve the dispute, the USH is asked to render a decision.

In accordance with the Guide, a call was held on January 15, 2003 with a VACO labor relations specialist and a representative of the AFGE National VA Council. The matter was not resolved.

ISSUE:

Whether a union grievance alleging failure to provide adequate notice and an opportunity to bargain prior to implementing a staffing mix change involving the involuntary reassignments of Registered Nurses, is a matter involving professional conduct or competence.

DISCUSSION:

The Department of Veterans Affairs Labor Relations Act of 1991 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 compensations as determined by the USH.

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. section 7422. These prior determinations include: Fayetteville, NC, VAMC (July 10, 1992); White River Junction, VT, VAMC (July 7, 1994); and most recently in a case decided on October 24, 2002, involving an Unfair Labor Practice charge filed by the union over the reassignment of a Nurse to a Community Based Outpatient Clinic at West Haven VAMC.

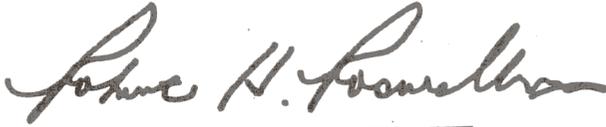
Pursuant to 38 U.S.C. 7421(a), the Secretary has prescribed regulations (contained in VA Directive/Handbook 5005, Part IV, Chapter 3, Sections A and B) to implement assignments, reassignments and details. Section A, paragraph 4(b) of Handbook 5005, Part IV, Chapter 3 provides that in exercising the authorities covered in the handbook, primary consideration will be given to the efficient and effective accomplishment of the VA mission. As mentioned above, the Poplar Bluff VAMC Director made this change in the RN staffing mix to provide for better patient care and more efficient administration. Specifically, having concluded that the two Primary Care Clinics (PCCs) were overstaffed with RNs in relation to other areas, the VAMC Director reassigned one RN from each of the PCCs to fill vacancies in Urgent Care and Extended Care, respectively, where patient care needs required RN professional competencies more urgently than in the PCCs. To concede to an outside arbitrator the authority to potentially order the reassignment of the subject RNs back to the Primary Care Clinic would have negative implications for patient care and would contravene the express provisions of 38 U.S.C. section 7422.

RECOMMENDED DECISION:

That the AFGE grievance over the alleged failure to provide reasonable notice and an opportunity to bargain prior to implementing a decision to change the staffing mix and involuntarily reassign RNs is a matter that concerns or arises out of professional conduct or competence (direct patient care or clinical competence.)

APPROVED ✓

DISAPPROVED _____



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

FEB 12 2003

Date