



DEPARTMENT OF VETERANS AFFAIRS
UNDER SECRETARY FOR HEALTH
WASHINGTON DC 20420

FEB - 4 2003

Director
Maryland VA Health Care System
10 North Green St
Baltimore, Maryland 21201

Dear

I am responding to the issue raised in your letter of January 24, 2003 concerning the grievance filed by the Professional Staff Nurses' Association union. The issue pertains to union dissatisfaction over the July 2002 reassignment of several Registered Nurses from the Nursing Home Care Unit at the Baltimore Rehabilitation and Extended Care Center to a renovated Nursing Home Care Unit at the Perry Point VA Medical Center. The reassignments were necessitated by a mission change with the overall Maryland VA Health Care System, resulting from the phased closure of the Fort Howard VA 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 and negotiated grievance procedures 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, reading "Robert H. Roswell", is written over a horizontal line.

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

Enclosure

Title 38 Decision Paper -- Maryland VA Health Care System
VA – 03-02

FACTS

In the summer of 2000, the then Secretary of Veterans Affairs approved the closure of the Fort Howard VA Medical Center (VAMC), a part of the Maryland VA Health Care System (MVAHCS) complex. This decision was made due to the age and deterioration of the Fort Howard facility, and a determination that the mission of the VA would be better served by transferring the inpatient operations from Fort Howard to other MVAHCS facilities than by attempting to bring the outdated Fort Howard facility up to current standards. The closure of Fort Howard impacted the mission of the MVAHCS and required relocation of certain categories of geriatric patients receiving treatment in the Nursing Home Care Units of the MVAHCS.

More specifically, the closing of Fort Howard necessitated transferring to the Baltimore Rehabilitation and Extended Care Center (BRECC) three units from Fort Howard – sub-acute, hospice, and medical rehabilitation. These former Fort Howard units were deemed a good fit for BRECC because the BRECC's location allowed the units' mid level patients, who frequently need acute care, to be housed near the Baltimore VAMC's acute care facilities. To make room at the BRECC for the units coming from Fort Howard, MVAHCS management determined that the more stable nursing patients from the BRECC's Nursing Home Care Unit (NHCU) would be relocated to a newly renovated NHCU unit at the Perry Point VAMC, approximately forty- five miles away.

In planning and implementing the Fort Howard closure and related mission change, the MVAHCS Director determined that all employees, including the RNs at the BRECC, should be relocated with their programs so as to maintain consistency in patient care through recognized care givers.

In early 2002, MVAHCS management entered into discussions with the Professional Staff Nurses Association (PSNA) union in an effort to minimize the disruptions that would be caused by the pending relocations. However, the parties were unable to reach any satisfactory understanding, as the union insisted that any reassignments be made on the basis of seniority, despite management's explanation that a seniority-based arrangement would negate the critical clinical patient care reasons behind the original decision to reassign employees with their programs. Throughout the process, of course, management indicated its willingness to consider hardship exceptions to the directed reassignments, but reiterated that quality and consistency of patient care required that RNs relocate with their units wherever possible.

On or about June 13, 2002, management issued reassignment notices to three Registered Nurses (RNs) employed at the BRECC, directing them to the Perry Point VAMC.¹ (Attachment A) On June 12, 2002, the Professional Staff Nurses' Association

¹ One of the RNs who received a reassignment notice was later selected for a vacancy in a unit that stayed at the BRECC. As a result of such selection, the RN has since returned to the BRECC facility. Accordingly, only two RNs' reassignments are currently at issue in the subject grievance.

(PSNA) union filed a grievance alleging that in issuing the reassignment notices, management had violated Article X, section 2 of the parties' collective bargaining agreement, which provides that "every effort will be made not to reassign Registered Nurses outside the same physical division (site specific), i.e., Baltimore within Baltimore, BRECC within BRECC, Perry Point within Perry Point."² (Attachment B) In the grievance, the union requested that management withdraw the reassignment notices and "adhere to the negotiated contract." Management denied the grievance on July 9, 2002. (Attachment C) On July 15, 2002, PSNA invoked arbitration. (Attachment D)

On June 13, 2002, PSNA filed an unfair labor practice (ULP) charge with the Federal Labor Relations Authority, alleging that MVAHCS had committed a ULP by refusing to negotiate over the union's proposal that RN reassignments resulting from the mission change be made solely on the basis of seniority. (Attachment E) PSNA withdrew the ULP on September 9, 2002. (Attachment F)

The arbitration hearing was held on December 3, 2002. At the hearing, the union expanded its claim to state that in addition to violating Article X of the agreement by reassigning the RNs outside their facilities, management had violated Articles I, II and IV by failing to bargain over its seniority-based reassignment proposal.³ In its Agency Statement of Issues submitted prior to the arbitration, management asserted that the reassignment of the RNs was non-grievable under 38 USC § 7422(b) as directly related to patient care. (Attachment G) Management reiterated this position in its Agency Closing Brief after the hearing, and further stated in the Closing Brief that section 7422(b) excluded the RN reassignments from bargaining. (Attachment H) The arbitrator's decision is expected at any time.

² It must be noted that the collective bargaining agreement between MVAHCS and PSNA, dated October 28, 1999, was never submitted to VA Central Office for approval by the Under Secretary for Health, as required by VA policy and the express provisions of 5 U.S.C. § 7114(c). Had the agreement been subject to proper legal and agency head review, Article X would likely have been disapproved as violating management's rights under 5 U.S.C. § 7106(a) to determine its organization and to assign work and employees. More importantly, such review would have clarified that reassignment of RNs to meet patient care needs is a non-negotiable management right under 38 USC § 7422(b). Indeed, the agreement itself recited this limitation on collective bargaining between the parties, providing, in Article II, § 1, that "[n]othing in this Agreement shall restrict the VA in exercising the right under 38 USC Section 7422(b) or in accordance with other applicable laws and regulations to: direct employees of the VA; hire, promote, transfer, assign and retain employees in positions within the VA, and to suspend, demote, discharge or take other disciplinary action against employees; relieve employees from duties because of lack of work or for other legitimate reasons; maintain the efficiency of the Government operation entrusted to the VA; determine the methods, means and personnel by which such operations are to be conducted; and take whatever action may be necessary to carry out the mission of the VA in situations of emergency, except as expressly modified or restricted by a specific provision of this Agreement."

³ Article I of the parties' agreement provides, in pertinent part, that VA management "will not attempt to circumvent, bargain directly with employees or make unilateral changes in the working conditions of bargaining unit employees." Article II provides, in pertinent part, that "[i]n the administration of all matters covered by the Agreement, officials and employees are governed by existing or future laws and the regulations of appropriate authorities, including policies set forth in the Federal Personnel Manual." Article II further cites to 38 USC § 7422(b) (see note 2 above). Article IV provides for the establishment of a local partnership council. The claim that management violated these provisions was apparently based on the same conduct alleged in PSNA's ULP filing (see Exhibit E).

On January 24, 2003, by facsimile letter, the Director of the MVAHCS requested a determination by the Under Secretary for Health (USH) that the issue of the RN reassignments is a matter pertaining or arising out of professional conduct or competence and is therefore outside the scope of collective bargaining pursuant to 38 USC 7422.⁴ (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 or 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.

ISSUES

Whether a union grievance alleging failure to negotiate in good faith and a violation of a contract provision requiring "every effort be made to avoid reassigning RNs outside the same physical division," based upon the directed reassignment of three RNs after a mission change within the MVAHCS, 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 compensation 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. Determining staffing requirements and placement concerns the overall competency of the staff at each facility and their ability to perform without compromising patient care given the staff available.

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) 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.

⁴ Upon receipt of the PSNA grievance in June, management should have submitted a request for a USH determination on these issues. However, management overlooked the need for a USH determination under 38 USC § 7422(d) until after the arbitration hearing was completed.

As mentioned earlier, from the time that MVAHCS announced that the Fort Howard VAMC would be closed and that certain programs would be relocated among MVAHCS facilities, the MVAHCS Director made it clear that all employees would be relocated with their programs. The RNs whose relocations PSNA grieved were directed to accompany their patients from the BRECC to Perry Point in order to ensure continuity and quality of patient care.

Along with members of top management, the Director of Geriatrics and Long Term Care at the MVAHCS expressly determined that quality and consistency of patient care could best be maintained through the reassignment of recognized care givers along with the patients who were relocated. From a clinical standpoint, there are significant dangers associated with moving geriatric (NHCU) patients, particularly those with dementia and Alzheimer's disease, for whom it is vitally important that the stress of new surroundings be minimized by the presence of familiar faces. Moreover, due to their daily contact with patients, RNs are in the best position among primary care givers to discern changes and problems with geriatric patients who have a limited ability to communicate. Accordingly, to allow an outside arbitrator the authority to review the propriety of the subject RN reassignments and potentially order the RNs reassigned back to the BRECC would compromise patient care.

In several prior cases involving involuntary or directed reassignments of Registered Nurses, the USH has determined that such assignments involve professional competence and conduct within the meaning of 38 U.S.C. § 7422(b). These include: Fayetteville, N.C. VAMC on July 10, 1992, White River Junction, VT, VAMC on July 7, 1994 and West Haven VAMC on October 24, 2002.

RECOMMENDED DECISION

That the PSNA grievance alleging that management violated the parties' collective bargaining agreement and failed to bargain in good faith over the directed reassignment of several Registered Nurses is a matter that concerns or arises out of professional conduct or competence (direct patient care or clinical competence.)

APPROVED _____

DISAPPROVED _____



FEB - 4 2003

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

Date