



DEPARTMENT OF VETERANS AFFAIRS
UNDER SECRETARY FOR HEALTH
WASHINGTON DC 20420

JAN 16 2004

Director, VA Medical Center
4100 West Third Street
Dayton, OH 45428

President, AFGE, Local 2209
P.O. Box 306
Dayton, OH 45417

Dear Dr. and Ms.

I am responding to the issues raised in your respective memoranda of November 6, 2003; November 14, 2003; December 9, 2003; and December 22, 2003 concerning the Unfair Labor Practice Charge and Federal Service Impasses Panel Request for Assistance filed by the American Federation of Government Employees (AFGE) Local 2209. The issue pertains to AFGE's dissatisfaction over management's decision to change full-time staff radiologists' tours of duty from Monday through Friday to include a rotation on the weekends.

Pursuant to delegated authority, I have decided on the basis of the enclosed decision 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).

Sincerely yours,

A handwritten signature in cursive script, appearing to read "Robert H. Roswell", is written in black ink.

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

Enclosure

Title 38 Decision Paper – VAMC Dayton, OH

VA -- 03-13

FACTS:

In June 2002, the Dayton VA Medical Center determined that in order to meet current standards of patient care, it was necessary to provide weekend coverage of Radiology Services. For that reason, management determined to change the tours of duty of all full-time staff radiologists from Monday through Friday to include a rotation on the weekends, so that one radiologist was available for four (4) hours on Saturday and four (4) hours on Sunday. The effect of this change was that each staff radiologist would work one weekend every four weeks.

Management determined that this change was required because the staff radiologists are responsible for reading all x-ray films, including those from the Emergency Room (ER). With no radiologist on duty on Saturday or Sunday, x-ray films taken on the weekend would sometimes sit for two or three days before being read, including emergency CT scans of ER patients. ER physicians, including residents, attempted to remedy the situation by reading their patients' films themselves when no radiologist was on duty, without the requisite specialized radiology training. If any films taken over the weekend were improperly read, the error might not be discovered for days. Radiologists coming in on Monday would find at times whole carts of unread films from the weekend and would need to review both the backlog of films and also the current films taken that day. This created a significant gap in patient care. In one instance, a patient had an emergency CT scan of his head on a Saturday but his subdural hematoma was not discovered until a radiologist read the CT films on Monday afternoon. Fortunately, the patient underwent emergency surgery and survived.

VAMC management notified the staff radiologists and the union of the change in the radiologists' tours of duty on June 28, 2002. (Attachment A.) On July 2, 2002, AFGE Local 2209 issued a demand to bargain over the change. (Attachment B.) Management and union officials had several meetings to discuss the issue but were unable to reach an informal resolution. On October 4, 2002, management announced that the change would be implemented on October 19, 2002. (Attachment C.) The union filed an unfair labor practice (ULP) charge with the Federal Labor Relations Authority (FLRA) on October 4, 2002. (Attachment D.)

On November 25, 2002, the union proposed that weekend radiology coverage be staffed by a contracting group that already provided Interventional Radiology for the Dayton VAMC. (Attachment E.) Management rejected this proposal, but on December 5, 2002, offered the union a Memorandum of Understanding ("MOU") providing that volunteers for weekend coverage would be solicited first and, if that failed, then the staff radiologists would cover the weekends on a rotating basis. (Attachment F.) The union did not respond to the MOU, but did withdraw its ULP on January 6, 2003.

On September 18, 2003, management notified the radiologists of its intent to immediately implement a rotational weekend schedule, with the first staff radiologist scheduled to cover a weekend on October 11, 2003. (Attachment G.)

On September 19, 2003, the union filed a second ULP on the issue, alleging that management had bypassed the exclusive bargaining representative in informing the radiologists of the weekend duty rotation. (Attachment H.) On September 22, 2003, the union filed a Request for Assistance with the Federal Service Impasses Panel (FSIP), stating that the parties were at impasse over the issue of weekend tours for the radiologists. (Attachment I.) On September 23, 2003, both the FLRA and the FSIP acknowledged receipt of the union's filings, and indicated that investigators had been assigned to investigate the union's allegations. (Attachment J.) The union withdrew its second ULP and filed a third ULP on October 14, 2003. (Attachments K and L.) To date, neither FSIP nor FLRA has scheduled a hearing or other activity in this matter.

On November 6, 2003, VAMC Dayton management submitted a memorandum to the Under Secretary for Health (USH) requesting a 38 U.S.C. § 7422 determination relating to the change in the staff radiologists' tour of duty to provide weekend coverage for the emergency room and other patients. (Attachment M.) On that same day, management provided a copy of the 7422 request to the union and solicited the union's input into the issue for the Under Secretary. (Attachment N.)

On November 14, 2003, the union issued a written memorandum regarding the issue. (Attachment O.) In that memorandum, the union took issue with management's recitation of events and stated that the problems in Radiology have less to do with tours of duty than with simple understaffing. More particularly, the union stated that there are only two staff radiologists remaining in the bargaining unit and opined that while it "does not deny weekend coverage may be necessary ... [it] opposes operating a unit understaffed." The union further stated that it had "provided management two alternatives until such time [sic] staffing was achieved, [sic] 1) the facility contract out weekend coverage of film readings until staffing is achieved, and 2) that management provide the ability for Staff Radiologist [sic] to read film from their home." Although the union conceded that weekend coverage is necessary and that such coverage is a patient care issue, it averred that "the working conditions of staff, appropriate arrangements and substantive bargaining" remained negotiable, presumably including the proposals that weekend coverage be contracted out or that staff radiologists be permitted to read films from home.

On December 9, 2003, management submitted a second memorandum responding to the allegations made by the union regarding this issue. (Attachment P.) In that memorandum, management denied the union's allegation that the Radiology department is understaffed, noting that while there are two vacant Staff Radiologist positions, "workload is being met," and one of

the vacancies is currently "being advertised for replacement."¹ Management also clarified its reasons for not accepting the proposals made by the union. Management rejected the union's proposal that Staff radiologists be allowed to read films from home because "a special waiver of VA [telework] regulations would need to be obtained in order for this proposal to be effectuated" and, more importantly, because the Staff radiologists themselves refused this proposal.² Management rejected the union's second proposal, that weekend work be contracted out, because of the untenable delays associated with contracting out: not only would management be required to undertake a cost benefit analysis to determine whether outsourcing was warranted, but thereafter – assuming such analysis did justify contracting out – each member of any outside Radiology Group would need to be vetted through the Dayton VAMC's Credentialing & Privileging process before they could begin work at the facility. Moreover, because contractors are independent providers, the VAMC would lose a degree of direction and control over the provision of care if an outside service were to provide weekend Radiology coverage. In management's view, the union's outsourcing proposal "would not produce the result of meeting patient care needs immediately, which is what is required."

On December 22, 2003, the union submitted additional arguments responding to the points raised in management's December 9 memorandum. (Attachment Q.) First, the union argued that management's concerns about misread films, misdiagnoses and mistreatments due to the lack of weekend Radiology coverage where "hypothetical," and further that such incidents are inevitable in a medical facility and training hospital. Next, the union stated that the backlog of unread films was not occasioned by the lack of weekend coverage, but by the fact that the Radiologist staff had fallen from five to two. Third, the union asserted that 38 U.S.C. § 7422's bargaining exclusions do not apply to the staff radiologists because "Staff radiologists are not Title 38 employees ... because they are individuals with doctorate degrees in Radiology, not physicians" within the meaning of 38 USC 7402.³ In this regard, the union asserted that the staff radiologists were hybrid employees within the meaning of Public Law 108-170⁴

¹ Management clarified that while there are two radiology staff positions currently unfilled, "it is the opinion of the Administrative Officer in Radiology that the workload only justifies filling one of the two vacant positions ... [and although t]he Administrative Officer's opinion is not shared by the staff radiologists themselves ... workload is being met, though admittedly with some difficulty, by the current staffing levels."

² VA's current alternative workplace arrangements (telework) regulations do not authorize the participation of title 38 professionals. We understand that the revised policy, currently under review, would authorize such participation only on a case-by-case basis. In any event, telework can only be authorized with the employee's consent.

³ It should be noted that the State Medical Board of Ohio lists both of the staff radiologists at the Dayton VAMC as licensed medical doctors. (Attachment R) Consistent with this licensure, VA appointed them as physicians pursuant to 38 U.S.C. § 7401(1), as it does with all physicians regardless of specialty, and subject to the limitations on collective bargaining provided by 38 U.S.C. § 7422.

⁴ The union's reliance on section 301 of P.L. 108-170 is misplaced. That section applies to hybrid allied health personnel (e.g. diagnostic radiologic *technicians*). Because the staff radiologists at the Dayton VAMC are physicians, not hybrid allied health personnel, nothing in section 301 is applicable them.

and that "the parties must [therefore] meet and confer with each other ... in 'collaboration'" over the union's telework and outsourcing proposals.⁵

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), peer review, or employee compensation within the meaning of 38 U.S.C. § 7422(b).

ISSUE:

Whether a local union's ULP and bargaining proposals relating to the decision of VAMC Dayton management to change the tours of duty of staff radiologists to provided weekend radiology coverage involve issues 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 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. Moreover, that Act provided that the issue whether a particular matter or question arises out of professional conduct or competence, peer review, or employee compensation will be decided by the Secretary of Veterans Affairs and is not itself subject to collective bargaining or review by any other agency. The Secretary has delegated such authority to the Under Secretary for Health.

38 U.S.C. § 7421(a) authorizes the Secretary to determine the hours of work and tours of duty of Title 38 health care professionals. The Secretary has exercised his regulatory authority under 38 U.S.C. § 7421(a) by prescribing the regulations set forth in VA Handbook 5011, Part II, Chapter 3. Under these regulations, full-time physicians (including the staff radiologists at the Dayton VAMC) are required to be available for duty 24 hours per day, 7 days per week. VA Handbook 5011, Part II, Chapter 3, Section 2.a. Although full-time physicians are generally permitted "some periods of time free from official duty [each week] to the extent that this does not impair provision of essential services in patient treatment and care," facility Directors are authorized "to alter these provisions for specific individuals or groups of individuals in the best interests of the service." VA Handbook 5011, Part II, Chapter 3, Section 2.b. More specifically, "[b]ecause of the continuous nature of the services rendered at hospitals, the facility Director,

⁵ Section 301(b) of P.L. 108-170 requires that the VA Secretary develop systems for promotion and advancement of each of the new hybrid occupations "in collaboration with, and with the participation of, exclusive employee representatives of such occupational category of employees." As noted above, because the staff radiologists at the Dayton VAMC are physicians, not hybrids, this section has no application to them.

or designee (in no case less than a chief of service), has the authority to prescribe any tour of duty to ensure adequate professional care and treatment to the patient, consistent with these provisions." VA Handbook 5011, Part II, Chapter 3, Section 2.d.

In two prior cases involving changes in the hours of work and tours of duty for Title 38 medical professionals, the USH has determined that where such changes are necessary to provide uninterrupted patient care, they involve professional conduct or competence within the meaning of 38 U.S.C. § 7422. These prior determinations include VA 03-07, Alexandria, LA (October 15, 2003), and VAMC Leavenworth, KS, May 13, 1992.

RECOMMENDED DECISION:

That the union ULP and Request for Assistance to the FSIP, relating to the decision of VAMC Dayton management to change the tours of duty of staff radiologists to provided weekend radiology coverage, involve issues 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

1-16-04
Date