



DEPARTMENT OF VETERANS AFFAIRS
UNDER SECRETARY FOR HEALTH
WASHINGTON DC 20420

APR 27 2009

Robert H. Beller, FACHE
Director
Clement J. Zablocki VA Medical Center
5000 West National Ave.
Milwaukee, WI 53295

Walter Backlund, RN, BSN, BA Psych
Acting President
Veterans Affairs Staff Nurses Council (VASNC)
Local 5032 (WFNHP)
5000 West National Ave.
Milwaukee, WI 53295

Dear Mr. Beller and Mr. Backlund:

I am responding to the issues raised in your memoranda of October 23, 2008, and January 13, 2009, concerning the grievance and Unfair Labor Practice (ULP) charge filed by VASNC Local 5032 regarding the staffing of the Cardiothoracic (CT) unit, reassignment of [redacted] APN, to the Primary Care Unit at the Milwaukee VA Medical Center, and the allegations of improper compensation.

Pursuant to delegated authority, I have decided on the basis of the enclosed decision paper that the issues concerning the staffing of the CT unit and reassignment of Ms. [redacted] are matters concerning or arising out of professional conduct or competence (i.e. direct patient care and clinical competence) within the meaning of 38 U.S.C. § 7422(b) and are therefore outside the scope of collective bargaining. The issue of improper compensation is subject to the grievance procedure but a remedy that requires the adjustment of compensation by an arbitrator would concern or arise out of the establishment, determination or adjustment of employee compensation and would be excluded under 38 U.S.C. § 7422(b).

Sincerely yours,

A handwritten signature in cursive script that reads "Michael J. Kussman".

Michael J. Kussman, MD, MS, MACP
Under Secretary for Health

Enclosure

Title 38 Decision Paper
VA Medical Center- Milwaukee, WI
VA 09-

This matter involves a grievance filed through the negotiated grievance procedure relating to staffing changes in the Cardiothoracic Surgery (CT) unit at the Clement J. Zablocki VA Medical Center in Milwaukee, WI (the Milwaukee VAMC) and improper compensation of Nurse Practitioner (NP) for hours worked in that unit over the last six years.

FACTS:

On August 7, 2007, Randy Spahos, Human Resources (HR) Specialist, informed Walter Backlund, Acting President, VASNC, Local 5032, of a change in the staffing and job responsibilities of NPs in the CT Service. (Exhibit 1) The changes were necessary after an RN Facilitator that had been temporarily supporting the service returned to her position in the Intensive Care Unit (ICU). To properly address patient care, the new NP role would include additional patient facilitation and weekend rounds. The weekend coverage would be offset by days off during the week. The notice to the union requested that any negotiable issues or questions be presented to the HR Specialist by August 24, 2007.

In a memorandum dated September 14, 2007, Mr. Backlund submitted the union's response. (Exhibit 2) The response focused on Ms. [redacted] six-year history in the unit and the belief that the proposed changes would add to the workload of "an already taxed person's job description." The union questioned how management intended to increase Ms. [redacted] workload while decreasing the number of man-hours on the service. The response further raised issues that included the scheduling of work hours and vacation, questions on how the overtime and duty free lunches would be handled, whether management would be increasing Ms. [redacted] salary by 50%, and if it would accommodate her cultural and religious beliefs (family/ethnic culture, religious holidays and weekly devotions). In addition, the union asked if management would hold Ms. [redacted] blame free for all possible errors, miscommunications, lack of on time face-to-face reports, worsening patient outcomes and legal responsibilities for poor patient outcomes due to the staffing changes. Finally, the memorandum contained numerous requests for information. Although the document was not a formal grievance, [redacted] was referred to as the grievant. Mr. Backlund subsequently requested payroll records and indicated he was challenging calculation of the grievant's overtime and compensation time for the past six years.

On September 21, 2007, Mr. Backlund submitted an electronic communication to Ms. [redacted]'s supervisor, Dr. [redacted] Manager, Surgical Care Division, advising Mr. [redacted] that a Fellow had treated the grievant unprofessionally.

2.

(Exhibit 3) The e-mail also requested that Dr. [redacted] address a recent appraisal of Ms. [redacted] and asserted that the appraisal was biased and appeared to be retribution for Ms. [redacted] complaints.

Ms. [redacted] filed a Report of Contact against Dr. [redacted] based on the allegations Mr. Backlund outlined in the e-mail sent to Dr. [redacted] (Exhibit 4) Ms. [redacted] alleged that Dr. [redacted] created a hostile work environment when she spoke to her inappropriately in front of other employees. Ms. [redacted] also indicated that Dr. [redacted] undermined her authority as a provider of care in a number of ways, specifically by requiring her to remove intra-aortic balloon pumps in a specific way. The document further alleges that Dr. [redacted] told another nurse that if Ms. [redacted] was not following the required procedure, she was not to remove intra-aortic balloon pumps from any of Dr. [redacted] patients.

On September 28, 2007, Mr. Backlund filed a formal grievance. (Exhibit 5) The first part of the grievance (Addendum I) listed 12 paragraphs outlining the bases for the grievance. The bases included, among other things, that Ms. [redacted] had not been receiving sufficient hours toward her continuing education, management was adding duties and weekend shifts to Ms. [redacted] schedule, there were timekeeping and payroll improprieties, and more than one Fellow continually harassed the grievant and the harassment had not been addressed by her immediate supervisor, Dr. [redacted]. The second part of the grievance (Addendum II) listed 14 remedies such as the production of information, guarantees of certain schedules, and back pay.

In response to the claims of harassment, the grievant was temporarily assigned to Primary Care (the Emergency Room (ER)) while the allegations were investigated. In a memorandum dated October 4, 2007, Dr. [redacted] advised Mr. Backlund that Ms. [redacted] should continue to report to her assignment in the ER until the issues raised in the grievance were resolved. (Exhibit 6)

On October 12, 2007, Dr. [redacted] responded to the Step 1 grievance and provided the requested time and leave records. (Exhibit 7) Dr. [redacted] stated that he is committed to addressing compensatory time and overtime in accordance with current regulations; that he believed the facilitation work assignment and the weekend rotation requirements were appropriate; and, that he would support Ms. [redacted] efforts to maintain her credentials. The response further offered to discuss impact and implementation issues related to the staffing changes in CT and requested more information on the allegations of a hostile work environment.

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On November 9, 2007, Mr. Backlund advanced the grievance to Step 2 (Addendum III). (Exhibit 8) On January 15, 2008, a step 2 meeting was conducted but the issues remained unresolved. During the meeting, Mr. Backlund reiterated the allegation that the CT unit was a hostile work environment. Mr. Backlund was asked to summarize the claims and did so in an e-mail sent to Randy Spahos on January 18, 2008. (Exhibit 9) Mr. Backlund summarized the issues as follows:

1. Grievant's hired hours are noted to be 08:00 to 16:30 and will remain as such;
2. Offer a vacation sign-in sheet for the grievant as required;
3. Address Payroll issues such as Sick Leave; Compensatory time; overtime; unpaid lunch time work; unpaid weekend work; and interest for salary lost; and
4. Address hostile work environment and educational needs;

In addition, Mr. Backlund requested the following remedies:

1. Offer a duty free lunch or pay overtime or Compensatory Time Earned (CTE) as requested;
2. Grievant will have the right to chose (sic) overtime or CTE of any overtime she works in patient care arena;
3. Grievant's schedule will be posted three weeks prior to first work day of schedule being posted at any time;
4. Grievant will be offered a posted vacation schedule that includes only CT surgery staff members in her own bargaining unit, in accordance with the Veterans Affairs Staff Nurse Counsel (VASNC), Local 5032 contractual agreement; and
5. Grievant's evaluation process will be handled by nurse in management not an MD.

On January 24, 2008, Randy Spahos summarized the grievance for Dr. Michael Erdmann, Chief of Staff. (Exhibit 10)

On January 28, 2008, Dr. Erdmann provided the Agency response to the Step 2 grievance. (Exhibit 11) The response summarized the grievance as encompassing two main issues: pay and scheduling, and work environment in CT Surgery. Dr. Erdmann confirmed the commitment of the VA to schedule and pay employees in accordance with the applicable laws, regulations, contracts and practices. He noted that Ms. _____ claimed back pay and interest due in excess of \$92,000 which would not be granted because he could not substantiate the amount quoted and the figures were ambiguous. Dr. Erdmann

4.

made Ms. [redacted] reassignment to Primary Care permanent because he believed the relationship between the grievant and the CT had been damaged so as to adversely affect delivery of safe and efficient patient care. Finally, Dr. [redacted] attached an offer to settle Ms. [redacted] claims of unpaid compensation.

On February 14, 2008, the Federal Mediation and Conciliation Service (FMCS Case No. 08-53596) provided a panel of arbitrators, as requested by the union. (Exhibit 12) The parties met on February 27, 2008 and selected Arbitrator Jacalyn Zimmerman from this list.

On April 2, 2008, Mr. Spahos informed Mr. Backlund that he was examining whether the matter was appropriate for arbitration or should be submitted to the Under Secretary for Health (USH) for a determination on whether the issues arose from professional conduct or competence (i.e., direct patient care) and/or the establishment or adjustment of employee compensation, and were therefore excluded from collective bargaining. (Exhibit 13)

On July 10, 2008, Mr. Backlund filed an Unfair Labor Practice (ULP) charge with the Federal Labor Relations Authority (FLRA) over the Agency's refusal to select an arbitration date. (Exhibit 14)

On October 23, 2008, Robert H. Beller, FACHE, Milwaukee VAMC Medical Center Director submitted a request to the USH for a determination that the above referenced issues were excluded from collective bargaining under 38 U.S.C. § 7422(b). (Exhibit 15)

Mr. Backlund requested and was granted an extension until December 1, 2008 to file his response. He was granted another extension until January 8, 2009. He submitted a response dated January 13, 2009. (Exhibit 16)

PROCEDURAL HISTORY:

The Secretary has delegated to the Under Secretary for Health 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).

5.

ISSUES:

1. Whether the grievance raised on behalf of Ms. [redacted] regarding the staffing of the CT unit involves issues concerning or arising out of professional conduct or competence (direct patient care) and/or peer review and the establishment, determination or adjustment of Title 38 employee compensation within the meaning of 38 U.S.C. § 7422(b)?

2. Whether the grievance raised on behalf of Ms. [redacted] regarding her reassignment to the ER involves issues concerning or arising out of professional conduct or competence (direct patient care) and/or peer review and the establishment, determination or adjustment of Title 38 employee compensation within the meaning of 38 U.S.C. § 7422(b)?

3. Whether the grievance raised on behalf of Ms. [redacted] regarding her alleged improper compensation for overtime (OT), compensatory time (CT), lunch time and weekend hours involves issues concerning or arising out of professional conduct or competence (direct patient care) and/or peer review and the establishment, determination or adjustment of Title 38 employee compensation within the meaning of 38 U.S.C. § 7422(b)?

DISCUSSION:

The Department of Veterans Affairs Labor Relations Act of 1991, codified at 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 (i.e., direct patient care and clinical competence), peer review and/or employee compensation as determined by the USH.¹

A. Staffing changes in the CT Unit

38 U.S.C. § 7421(a) authorizes the Secretary to prescribe by regulation the "hours of work, conditions of employment and leaves of absence" of Title 38 medical professionals, including NPs. VA Directive and Handbook 5011 provide

¹ The Union, at the outset, asserts that the VAMC raised the 7422 issues out of time. The Court of Appeals in *VAMC Asheville*, however, upheld the FLRA's ruling in *U.S. Dep't of Veterans Affairs (Asheville) and AFGE, Local 446*, 57 FLRA 681 (2002) that VA could raise § 7422 at any time because it is a jurisdictional issue. *AFGE Local 446 v. U.S. Dep't of Veterans Affairs, et al.*, 475 F.3d 341 (D.C. Cir. 2007)

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the regulations as to the scheduling of Title 38 health care providers. Among the regulations are the following:

Handbook 5011, Part II, Chapter 1, paragraph 2(a) provides "[i]n scheduling hours and tours of duty for VA employees, primary consideration will be given to efficiency in management and conduct of agency functions, and equitable treatment of individual employees. Work schedules will be established in a manner that realistically reflects the actual work requirement."

Handbook 5011, Part II, Chapter 1, paragraph 2(b) provides "[i]n Veterans Health Administration (VHA), the proper care and treatment of patients shall be the primary consideration in scheduling tours of duty under these instructions. Duty schedules shall be established as appropriate and necessary for performance of services in the care and treatment of patients and other essential activities within the administrative discretion of the Under Secretary for Health or designated officials."

Read together, these regulations provide that health care professionals will be assigned such duties on such tours as patient care needs require.

The grievance alleges that the staffing changes in the CT unit are inappropriate and were implemented without bargaining over the impact and implementation of the changes. The evidence submitted by management indicates that the change was made necessary by the return of the RN facilitator position to the ICU and the declining physician resources, including mandated restrictions on resident hours.

The USH may determine the underlying management decision to change the organization and responsibilities within the CT unit involves issues of direct patient care and is therefore non-negotiable under 38 U.S.C. § 7422. Therefore, the USH may also conclude the grievance regarding the implementation of the changes prior to bargaining is barred by 38 U.S.C. § 7422. Further, because this matter is non-negotiable under section 7422, the issue is outside the scope of collective bargaining – there is no bargaining over impact and implementation and no jurisdiction to involve arbitrators, FLRA, or Federal Service Impasses Panel (FSIP) in resolving the dispute.

Such a decision would be consistent with previous USH determinations. The USH has determined that changing the tour and responsibilities of Title 38 employees to meet patient care needs is a matter involving professional care and

7.

competence within the meaning of 38 U.S.C. § 7422. See e.g. VAMC Spokane, July 7, 2008; VA Palo Alto Health Care System, October 11, 2005; and, VAMC West Palm Beach, March 15, 2005.

B. Ms. [redacted] Reassignment from CT to ER

The Secretary has prescribed regulations governing reassignments in VA Handbook 5005, Part IV, Chapter 3, Sections A and B. Section A 4(b) provides that in exercising the authorities covered in this handbook, primary consideration will be given to the efficient and effective accomplishment of the VA mission. The USH has held in numerous decisions that reassignments based on patient care are exempt from the collective bargaining process. See, VAMC Richmond, VA, October 11, 2006 and VAMC Chillicothe, OH, September 6, 2006.

Ms. [redacted] alleged that a hostile work environment existed in the CT Unit. Her belief was based on a situation in which Dr. [redacted] confronted her about how she performed certain procedures. Ms. [redacted] also stated that her evaluation was based on her complaints rather than her performance, but [redacted] supplied no evidence to support these allegations. The union also claims that the actions taken by management were based on gender discrimination. (Exhibit 16 ¶ 11a) If Ms. [redacted] is asserting that the reassignment decision is an EEO violation, based on gender discrimination, she may report the violation to VA's Office of Resolution Management. Ms. [redacted] may not, however, circumvent the mandates of Section 7422 by grieving her reassignment based on it being discriminatory. See VASNHCS, Reno, NV, December 17, 2004 (finding discrimination allegation did not alter or disturb the determination that the doctor's grievance was barred by 38 U.S.C. § 7422 (b)). Moreover, if she believes that the reassignment decision was retaliation for protected activity, this does not afford her any grievance rights as the FLRA held along with the Second Circuit that even where an unfair labor practice is motivated by anti-union animus the FLRA cannot review the peer review or 7422 protection procedures. See AFGE Local 3306 v. FLRA, 2 F.3d 6 (2nd Cir. 1993).

The decision to permanently reassign Ms. [redacted] was made, as stated by the Chief of Staff, because the relationship between the grievant and the CT unit had been sufficiently damaged so as to adversely affect delivery of safe and efficient patient care. Neither Ms. [redacted] nor the union has presented evidence to the contrary and therefore we believe the reassignment of Ms. [redacted] to the ER concerns or arises out of professional conduct or competence (direct patient care) and is outside the scope of collective bargaining pursuant to 38 U.S.C. § 7422(b).

8.

C. Compensation Issues

The union asserts that it is not seeking compensation for Ms. [REDACTED] but rather pay owed to her for hours worked. The union asserts that the Milwaukee VAMC improperly granted compensatory time rather than paid overtime for hours worked by Ms. [REDACTED]. The remedy requested is payment of approximately \$41,977.

Forcing an employee to take compensatory time rather than be paid overtime for officially ordered and approved hours of service in excess of 40 hours a week is a violation of VA Handbook 5007, Part V, Chapter 2, Paragraph 2 (d) (1), which states:

Compensatory Time Off in Lieu of Regular and Irregular or Occasional Overtime for Nurses, PAs, and EFDAs

(1) An official authorized to approve overtime work may, at the written request of eligible employees, grant such employees compensatory time off from their scheduled tour of duty in lieu of overtime pay.

The union claims that management failed to follow VA policy with Ms. [REDACTED].

Although the union references 38 U.S.C. § 7453 rather than the VA regulations, if the Medical Center failed to follow its governing policy and regulations when establishing, determining or adjusting the compensation of employees described in 38 U.S.C. § 7421(b), the exclusions of 38 U.S.C. § 7422 do not apply. See e.g. VAMC West Haven, August 1, 2008. Therefore, the union may grieve the issue of whether the VA complied with its policy in granting compensatory time off rather than paying overtime to Ms. [REDACTED]. As a remedy, the union has requested, among other things, backpay for the lunch periods that were allegedly not duty free, overtime for the compensatory time Ms. [REDACTED] lost due to expiration of her time to take it, and an additional .5 of her hourly rate for all compensatory time used. Such a remedy concerns or arises out of the establishment, determination or adjustment of employee compensation within the meaning of 38 U.S.C. § 7422(b) and is therefore exempt from collective bargaining. If an arbitrator determines that the VAMC failed to follow the applicable compensation regulations and VA policy, the arbitrator can make factual findings as they relate to the actual hours the RN worked and should have been paid overtime for compensatory time lost, and direct the VAMC to pay the overtime in accordance with those findings and VA policy.² The USH has held,

² While an arbitrator may order a VAMC to “comply with applicable law and regulation” where it failed to comply with its applicable regulations and policy, a remedy that requires the adjustment in compensation would concern or arise out of the establishment, determination or adjustment of employee compensation under 38 U.S.C. § 7422. See VAMC West Haven, August 1, 2008.

9.

however, that a grievance seeking payment for overtime hours under 38 U.S.C. § 7453 (e)(1)³ was a matter that concerns or arises out of the establishment, determination or adjustment of employee compensation within the meaning of 38 U.S.C. § 7422(b). See VAMC Louisville, May 19, 2008.

The union also asserts that the VA required Ms. _____ to work during her lunch for all six years of her employment. The union's assertion is based on its belief that Ms. _____ was never accommodated with a duty free lunch because during her lunch period she received pages, wrote notes, consulted her colleagues, and was always available by pager during that time. For the same reasons as those cited regarding compensatory time, if the union grieves a violation of VA policy or regulation and all procedural requirements are met, the arbitrator may determine if the policy was violated, make factual findings as they relate to whether the RN was accommodated with a duty free lunch, and direct the VAMC to pay the overtime in accordance with those findings and VA policy. The arbitrator may not, however, provide a monetary remedy.

Finally, the union's allegation that the VA forced Ms. _____ to work 136 hours on weekends without providing the union the opportunity to negotiate on impact and implementation issues is not greivable. The underlying issue is excluded from collective bargaining pursuant to 38 U.S.C. § 7422 and no bargaining, including impact and implementation bargaining is required.

³ 38 U.S.C. § 7453 (e)(1) states "A nurse performing officially ordered or approved hours of service in excess of 40 hours in an administrative workweek, or in excess of eight hours in a day, shall receive overtime pay for each hour of such additional service. The overtime rates shall be one and one-half times such nurse's hourly rate of basic pay."

10.

RECOMMENDED DECISION:

That the grievance raised on behalf of Ms. _____, regarding the staffing of the CT unit involves issues concerning or arising out of professional conduct or competence (direct patient care) within the meaning of 38 U.S.C. § 7422(b).

APPROVED X

DISAPPROVED _____

That the grievance raised on behalf of Ms. _____ regarding her reassignment to the ER involves issues concerning or arising out of professional conduct or competence (direct patient care) within the meaning of 38 U.S.C. § 7422(b).

APPROVED X

DISAPPROVED _____

That the grievance raised on behalf of Ms. _____ regarding her alleged improper compensation for overtime (OT), compensatory time (CT), lunch time and weekend hours involves issues concerning or arising out of the establishment, determination or adjustment of Title 38 employee compensation within the meaning of 38 U.S.C. § 7422(b).

APPROVED X

DISAPPROVED _____

That the grievance over whether the VA failed to follow the applicable compensation regulations and VA policy in granting overtime (OT), compensatory time (CT), lunch time and weekend hours to Ms. _____ does not involve issues concerning or arising out of the establishment, determination or adjustment of Title 38 employee compensation within the meaning of 38 U.S.C. § 7422(b) and is therefore grievable.

APPROVED X

DISAPPROVED _____

Michael J. Kussman

Michael J. Kussman, MD, MS, MACP
Under Secretary for Health

4/27/09
Date