



DEPARTMENT OF VETERANS AFFAIRS
UNDER SECRETARY FOR HEALTH
WASHINGTON DC 20420

SEP 06 2006

Medical Center Director
17273 State Route 104
Chillicothe, OH 45601

Vice-President, Professional Unit
AFGE Local 1631
17273 State Route 104
Chillicothe, Ohio 45601

Dear Mr. _____ and Ms. _____

I am responding to the issue raised in your memoranda of March 23, 2006 and April 20, 2006 relating to the Union's Unfair Labor Practice charge relating to the reassignment of three registered nurses at the Chillicothe, Ohio, VA Medical Center from the Psychiatric Residential Rehabilitation Treatment Program to the Acute Mental Health Inpatient Unit and the Mental Health Consumers Rehabilitation Program Unit.

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 (i.e., direct patient care and/or clinical competence) and is therefore exempt from collective bargaining under 38 U.S.C. § 7422(b).

Please provide a copy of this letter to Regional Counsel and/or the Federal Labor Relations Authority at your earliest convenience.

Sincerely yours,

A handwritten signature in cursive script, reading "Michael J. Kussman".

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

Title 38 Decision Paper
VAMC Chillicothe, Ohio
VA – 06 – 02

FACTS

In 2005, VISN 10 leadership directed the VA Medical Center (VAMC) in Chillicothe, Ohio, to conduct an assessment of the Registered Nurse (RN) staffing levels in the VAMC's Mental Health Care Line (MHCL) to determine whether the VAMC's Psychiatric Residential Rehabilitation Treatment Program (PRRTP) was optimally staffed with RNs. (Attachment A). The PRRTP at the Chillicothe VAMC had 4 tracks: dual diagnosis, ambulatory detoxification, transitional, and psychosocial rehabilitation. PRRTP inpatients were housed in 25 beds on unit 35A. However, the average daily census for those beds was only 60 percent, as most PRRTP patients received the vast majority of their treatment in outpatient areas of the VAMC rather than on an inpatient basis. (Attachment A, page1).

In an effort to better match staffing levels to the patient care needs of each unit, management decided to reassign three RNs from unit 35A to other areas of the MHCL where additional staffing was needed. More specifically, management determined that RNs from unit 35A should be reassigned to vacancies in the Acute Mental Health Inpatient Unit (AMHI) and the Mental Health Consumer Rehabilitation Program Unit (MHCPR).

On October 11, 2005, management provided AFGE Local 1631 (Union) a report showing the results of the survey of PRRTP staffing levels and informed the Union that management intended to reassign a number of RNs from the PRRTP unit to other vacancies within the same care line.

Management and the union met on October 26, 2005 to discuss the planned RN reassignments. (Attachment B.) At that meeting, parties determined that management's proposal would require renegotiation of a July 1, 2002 Memorandum of Understanding between the parties (the July 2002 MOU) which required that PRRTP RN staffing levels remain at 8.0 FTEE.¹ (Attachment C.) The parties agreed on ground rules for the renegotiation of the July 2002 MOU, and management agreed to provide the union with a specific proposal to change the existing staff mix on unit 35A, including the number of FTEE to be reassigned and the names of affected employees, at their next weekly meeting. (Attachment B.)

¹ More specifically, the July 2002 MOU, which arose out of an earlier reorganization of unit 35A, set specific staffing levels (in full-time employee equivalents) for RNs, Licensed Practical Nurses, Health Technicians (permanent), and Health Technicians (temporary), and also set 1.0 FTEE staffing levels for a PRRTP Coordinator (Nurse Manager) and a ward clerk. (See Attachment B, section 2.) The July 2002 MOU further provided that one of the RN FTEEs would be entitled to .8 FTEE official time for Union representational work and that minimum staffing for the unit at all times would be one RN and one other PRRTP staff member. (Id.)

On November 2, 2005, the parties met again to discuss the planned reassignments. At that meeting, management provided the union with the names of two RNs it intended to reassign; explained to the union that these RNs were selected for reassignment because they were the least senior in the unit; and further explained that patient care needs required that vacant RN positions in other areas of MHCL be filled by excess RNs from unit 35A. (Attachment D.)

On November 30, 2005, management and the union met again to discuss the reassignment issue. At this meeting management informed the union that three RNs would be reassigned from unit 35A, not two, because three MHCL RN vacancies needed to be filled (two in unit 26CD and one in unit 35C). (Attachment E.) Management further stated that it would solicit volunteers for the reassignments but intended to complete the reassignments, whether voluntary or involuntary, by December 25, 2005. (Id., page 2.) The union stated that management was acting inappropriately in changing the proposed staffing reduction from 2 RNs to 3 after the parties' negotiations had begun. (Id.)

Management received no volunteers for the referenced reassignments.

On December 16, 2005, the union presented a written "impact and implementation bargaining proposal" to management. (Attachment F.) In this proposal the union proposed, among other things, that the reduction of 3 RN FTEE from PR RTP be accomplished through attrition (id., § 1); that the remaining bargaining unit staff would "not be required to absorb additional/collateral duties due to staff reductions" (id., § 3); that PR RTP staff would not be required to respond to "code orange, code blue" or to cover the dining room during meals (id., § 4); that PR RTP employees would be provided coverage during lunch periods and breaks, or, "[i]f coverage is not available the agency will provide lunch to the employee on the unit at the agencies [sic] expense" (id., § 6); that PR RTP bargaining unit employees would not be "pre-scheduled for mandatory overtime (id., § 7); and that management would "ensure that a minimum of three staff will be maintained in [unit 35A] at all times." (Id., § 8.)

On December 29, 2005, management notified _____, RN, that she would be reassigned from unit 35A to 26CD. (Attachment G.)

On January 4, 2006, the parties met to discuss the union's December 16, 2005 proposals. At that meeting, management told the union that "attrition is not an option as attrition will not work in this case." (Attachment H, page 1.) Instead, management intended to reassign the three least senior RNs from unit 35A and would permit the senior-most of those RNs to have first choice among the reassignment options. (Id.) Management further advised the union that it could not guarantee that the remaining unit 35A employees would not be required to absorb additional or collateral duties or that there would always be three staff on

duty in the unit, but that existing unit policies for dealing with code orange and code blue situations, meal periods and breaks, and mandatory overtime would be maintained. (Id., page 2). Management indicated that it was in agreement with items 2, 5, 9, 10 and 11 of the union's December 16, 2005 proposal. (Id., pages 2-3.)

On January 9, 2006, the union filed an Unfair Labor Practice Charge (ULP) with the Federal Labor Relations Authority (FLRA), alleging that management did not bargain in good faith when it reassigned three RNs from the PR RTP unit. (Attachment I.)

The parties met again on January 11, 2006. During that meeting, management completed its response to the union's December 16, 2005 bargaining proposals. Thereafter, the parties discussed but could not resolve the scope of management's bargaining obligation. Management requested that AFGE prepare a response to management's counteroffer before the parties' next weekly meeting. (Attachment J.)

When the parties met again on January 18, 2006, management presented the union with a memorandum indicating that management had met its bargaining obligation and would not negotiate further. (Attachment K.) Management stated in the memorandum that the issues raised by the union's December 16, 2005 proposal "are supervisory issues existing prior to the negotiations and would be best resolved in a different forum such as partnership and/or as a grievance." (Id.) Management therefore recommended that once the three least senior RNs had been reassigned, the parties should suspend any further negotiations for four months to allow the PR RTP unit to operate at the recommended staffing levels for that time. Thereafter, management indicated it would "revisit the actual number of staff required" on the unit and would "review... the additional issues in question [with the union] in order to resolve these issues." (Id.)

On January 20, 2006, management notified [redacted], RN², and [redacted] RN, that they would be reassigned from unit 35A to Ward 35C and Ward 26CD, respectively. (Attachments L and M.)

On March 28, 2006, the Director of the Chillicothe VAMC submitted a request for a determination from the Under Secretary of Health (USH) whether the reassignment of three RNs from the PR RTP is excluded from collective bargaining pursuant to 38 U.S.C. § 7422(b), and, therefore, not subject to an unfair labor practice charge. (Attachment N.)

On April 20, 2006, the union submitted a memorandum responding to management's request for a 7422 decision from the USH. (Attachment O). In that memorandum, the union averred that management is "...attempting to hide

² Ms. [redacted] was the vice president of the union's professional unit and was assigned .8 FTEE official time and .2 FTEE patient care duties.

their failure to bargain in good faith regarding the Implementation and Impact of a staffing readjustment to the PR RTP unit under a cloak of [38] USC 7422(b)." (Id., ¶ 1). The union further stated that all the staff of the PR RTP unit will be affected by the reassignments, not only the "removed" RNs. (Id.) The union alleged that management made confusing and contradictory statements about its intent and obligation to renegotiate the issues addressed in the July 2002 MOU and provided erroneous numbers to the VISN regarding the pre-existing staffing levels of the PR RTP unit. (Id., ¶ 4). In conclusion, the union stated that "...the agency is attempting to use 7422 as a means of bypassing substantial and appropriate arrangement bargaining obligations." (Id., ¶ 5).

PROCEDURAL HISTORY

The Secretary has delegated to the USH the authority to determine 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 the union's unfair labor practice charge relating to management's alleged failure to complete bargaining over the reassignments of three RNs from the PR RTP to other MHCL units involves professional conduct or competence (direct patient care) 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 or employee compensation as determined by the USH.

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. The assignment and placement of Title 38 healthcare personnel is fundamental to the patient care mission of all VA health care facilities.

In the instant case, management was faced with inefficient staffing levels in the PR RTP unit and several RN vacancies in the VAMC's other Mental Health units. Management therefore determined that patient care needs in the MHCL

generally would be better served if three RNs were reassigned from the PR RTP to other units. That decision was directly related to patient care. The RNs' reassignments were thus exempt from collective bargaining as a matter of professional conduct or competence within the meaning of 38 U.S.C. § 7422(b).

In its memorandum responding to management's request for a § 7422 determination, the union states that § 7422 excludes from collective bargaining "matters of direct patient care such as conduct or competencies ... [but] we do not believe [the statutory exclusions are] meant to include unit staffing reorganizations." (Attachment O, ¶ 5.) The union's interpretation is in error. In a number of § 7422 determinations, the USH has found that staffing levels and staff mix impact direct patient care within the meaning of 38 U.S.C. § 7422(b). See, e.g., Northampton VAMC, VA-05-01(2/8/2005); Popular Bluff VAMC, VA-03-01 (2/12/2003); VA Gulf Coast HCS, VA-04-17 (1/5/2005). In the Poplar Bluff decision -- which, like this matter, involved the reassignment of RNs from an overstaffed unit to other units having greater need of RN FTEE to care for patients -- the USH noted that "to concede to an outside arbitrator the authority to potentially order the reassignment of the subject RNs back to [their former unit] would have negative implications for patient care and would contravene the express provisions of 38 U.S.C. section 7422." The union's insistence in this case that Chillicothe management should have bargained over the substance of management's determination to reassign the three RNs from unit 35A to other MHCL units would likewise concede to the union (or, in the context of the union's ULP charge, to the FLRA) the power to determine whether the RNs should stay in their new assignments or be returned to 35A. This is clearly contrary to the intent of section 7422.³

The union also states in its memorandum that "management is attempting to hide their [sic] failure to bargain in good faith regarding the implementation and impact of a staffing readjustment to the PR RTP unit under a cloak of USC [sic] 7422(b)." (Attachment O, ¶ 1.) This argument evidences a misunderstanding of the applicable law. Although the general labor relations statute (5 U.S.C. § 7106(b)(2) and (3)) specifically provides for bargaining on procedures and appropriate arrangements to ameliorate the adverse effects of management's reserved rights, 38 U.S.C. § 7422 does not. As a result, proposals are non-negotiable under 38 U.S.C. § 7422 if they involve issues of professional conduct or competence (clinical competence or direct patient care), peer review or employee compensation, irrespective of their procedural nature or tendency to

³ For the same reason, the portion of paragraph 2 of the July 2002 MOU setting specific FTEE requirements for Nurse Manager and RN positions within PR RTP is non-negotiable under 38 U.S.C. § 7422. The balance of that paragraph -- which set negotiated staffing levels for Title 5 and hybrid positions within PR RTP -- involved "numbers, types and grades" provisions within the meaning of 5 U.S.C. § 7106(b)(1) and was therefore negotiable only at the election of the Agency. See generally *NAGE, Local R5-184 and U.S. Department of Veterans Affairs, Medical Center, Lexington, KY*, FLRA No. 96; 55 FLRA 549 (1999).

