DEPARTMENT OF VETERANS AFFAIRS
UNDER SECRETARY FOR HEALTH
WASHINGTON DC 20420

SEP 26 2008

Steven P. Kleinglass
Director
Minneapolis VAMC
One Veterans Drive
Minneapolis, MN 55417

Jane Nygaard, President
American Federation of Government Employees
Professional Local 3669
One Veterans Drive
Minneapolis, MN 55417

Dear Mr. Kleinglass and Ms. Nygaard:

I am responding to the issue raised in your memoranda of June 19, 2008, regarding an impasse with the Federal Services Impasse Panel (Panel) filed concerning staffing ratios for nurses providing patient care in telemetry units. The Union also filed an Unfair Labor Practice (ULP) charge with the Federal Labor Relations Authority (FLRA) on July 23, 2008 concerning the same issues. I have addressed the ULP as well.

Pursuant to delegated authority, I have decided on the basis of the enclosed decision paper that the issues presented include matters concerning or arising out of professional conduct or competence and thus not subject to collective bargaining. As a result, the issues are non-negotiable and outside the jurisdiction of the FLRA and FSIP pursuant to 38 U.S.C. § 7422(b).

Sincerely yours,

Michael J. Kussman

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

Enclosure

Title 38 Decision Paper
VA Medical Center- Minneapolis VAMC
VA 08-

FACTS:

In 2005, Management at the Minneapolis VA Medical Center (VAMC) began negotiations with the American Federation of Government Employee, Local 3669 (Union) on the standardization of intravenous (IV) medication administration guidelines to be used by nurses in telemetry units throughout the medical center. These guidelines would ensure appropriate nursing care for patients whose cardiac or other functions are monitored via telemetry during the intravenous administration of certain specified medications. Among the topics covered by the guidelines were staffing ratios (i.e. maximum numbers of patients to be assigned to each nurse under different specified circumstances) and the methods and means by which nurses should monitor patients' vital signs, laboratory test results, and other issues pertinent to their care. (Exhibit 1)[1]

During the negotiations, the union made several proposals that addressed, among other things, staffing ratios for units covered by the guidelines. (Exhibits 2, 3, 4 and 5). VAMC management agreed to some of the union's proposals (see Exhibit 3) but did not agree to others (see Exhibits 2, 4 and 5).

On December 10, 2007, Management sent the Union a standardized list of guidelines entitled "Guidelines for Telemetry." (Exhibit 1) These guidelines set general staffing ratios for day and evening tours, night tours, and patients who are receiving certain specified medications and whose conditions have not yet stabilized.

On January 3, 2008, responding to the guidelines for telemetry that management sent to the Union, the Union argued that the proposed guidelines contradicted what the parties' had previously negotiated concerning the staffing ratios. (Exhibit 6) Management informed the Union that it considered staffing ratios to be a management right and, therefore, management would not negotiate the staffing levels. (Exhibit 7)

The parties participated in a mediation session on April 16, 2008 but were unable to resolve the issue. (Exhibit 8)

In a memorandum dated April 18, 2008, Management informed the Union that it would proceed with the implementation of the standardized guidelines effective May 2, 2008. (Exhibit 8)

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[1] These guidelines include a list of medications appropriate for administration in a telemetry setting, a step down unit or a telemetry unit.

In a memorandum dated April 25, 2008, Jane Nygaard, RN, President, AFGE Professional Local 3669, claimed that during the negotiations on September 5, 2007, Management promised a 1:3 nurse/patient ratio for any telemetry patients on cardiac or vasoactive drips. In Ms. Nygaard's memorandum, the Union asserted that impasse was declared at the conclusion of the mediation session and that implementation would constitute an unfair labor practice. (Exhibit 9)

On May 1, 2008, the Union served on management a copy of its Federal Service Impasses Panel (Panel) Request for Assistance and attachments (Exhibit 10). The Union alleged that the past practice at the facility was to negotiate staffing ratios and that management was obligated to negotiate staffing ratios in connection with the telemetry IV administration guidelines. The Union also enumerated four proposals it considered to be at impasse, all four of which mandated specific staffing ratios for the telemetry unit.[2]

On June 16, 2008, the Panel directed Management and the Union to submit to each other its final offer on the issues at impasse and a statement of position, no later than the close of business on Monday, July 7, 2008 (Exhibit 11, ¶ 1). In addition, the Panel requested that if the Under Secretary for Health (USH) excluded the matter from collective bargaining under 38 U.S.C. § 7422 before it issued a Decision and Order, that the Panel be given a copy of that decision immediately. (Exhibit 11, page 2, footnote 2) On August 22, 2008, the Panel declined jurisdiction over the parties' dispute. The Panel found that VA raised questions concerning its obligation to bargain over the Union's proposal, and that those questions should be resolved before the Panel would determine whether the parties are at an impasse. (Exhibit 15)

On June 20, 2008, the VAMC Director requested from the Under Secretary for Health (USH) a determination that the issues before the Panel be excluded from collective bargaining under 38 U.S.C. § 7422 (Exhibit 12). The Director argued that "[t]he Union's proposals raise issues of direct patient care within the meaning of 38 U.S.C. § 7422(b) and are therefore non-negotiable. The proposals at issue in this case all involve staffing ratios and are therefore all permissive topics for bargaining.[3] Management has elected not to bargain over these issues. We

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[2] The union's enumerated proposals were as follows:

1. 3:1 [3 patients to 1 nurse] ratio with patients on loading or continuous cardiac/vasoactive drips.
2. Install cardiac monitors in each patient room, 24 hour monitor technician coverage either from a central location or on each ward, with ratios of day/pm 4:1 [4 patients to 1 nurse], nights 5:1 [5 patients to 1 nurse], and 3:1 [3 patients to 1 nurse] ratio on all shifts for patients on loading doses of these medications until patients are hemodynamically stable, or for 4 hours.
3. Keep the 3:1 [3 patients to 1 nurse] ratio until the central monitoring center is in place, and then revisit the situation.
4. The 3:1 ratio is in place, unless the [Chief Nurse] and assigned nurse concurred that the 3:1 ratio wasn't necessary because the patient was hemodynamically stable and could be safely cared for at a 4:1 ratio.

[3] We do not make any conclusion as to whether the proposals at issue are permissive topics under 5 U.S.C. § 7106(b)(1). If it is the conclusion that these proposals concern or arise out of

believe the proposals clearly involve direct patient care within the meaning of 38 U.S.C. § 7422(b) and are therefore non-negotiable." (Exhibit 12, ¶ 12).

On July 3, 2008, the President of AFGE Local 3669 wrote to the USH requesting that he not find the matter to be excluded from collective bargaining. (Exhibit 13). The union argued that it had signed and executed several MOUs with management pertaining to staffing ratios for nurses in patient care settings between March 1999 and August 2006. The union further asserted that the matter did not involve professional conduct or competence, but whether management could back out of previously agreed to terms. (Exhibit 13, ¶ 2)

On July 23, 2008 the union filed a ULP charge against the Agency for "unilaterally implementing the IV Medication Protocol on Ward 3 even though we are at impasse on the implementation of said protocol." (Exhibit 14)

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 the Union proposals at issue before FSIP and referenced in the subject ULP concern or arise out of professional conduct or competence and are thus exempted from collective bargaining by 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. 38 U.S.C. § 7422(b), (c). The same Act authorized the Secretary of Veterans Affairs to determine whether a particular issue concerns or arises out of one of the excluded topics. 38 U.S.C. § 7422(d). The Secretary has delegated that authority to the USH.

As the Union acknowledged in its submission to the USH (Exhibit 14), the USH has previously determined that nurse staffing and staffing ratios are issues of direct patient care within the meaning of 38 U.S.C. § 7422. However, the Union asserts that those prior determinations are not dispositive of this case, because

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professional conduct or competence, and thus are exempted from collective bargaining by 38 U.S.C. § 7422(b), whether they are permissive topics is of no consequence.

the Union "agreed to ... before and ... still today agrees with the Minneapolis VAMC negotiating team's position on having the 3:1 nurse staffing ratios" on telemetry units. (Exhibit 13, ¶ 16) The Union further asserts that the issue before the Panel (and therefore the issue that the USH must assess for negotiability under 38 U.S.C. § 7422) is "VA's policy of allowing its negotiating team to put staffing ratios, a permissive topic, on the table for inclusion in a negotiated MOU, then allowing a management official (Christine Lund)...to subsequently make a unilateral determination that staffing ratios cannot be included in the MOU." (Exhibit 13, ¶ 17)

The Union's analysis is in error. The issue to be determined here is whether the Union's proposals with respect to nurse staffing ratios were negotiable or non-negotiable under 38 U.S.C. § 7422(b). If they were non-negotiable, then the fact that the Union's proposed staffing ratio was the same as management's is irrelevant, as is the fact that one or more management officials were willing to negotiate over a non-negotiable topic. The threshold issue is whether the Union proposals presented to the Panel and referenced in the ULP are subject to collective bargaining. The negotiability of the Union's proposals does not depend on whether VAMC management originally raised the issue of staffing ratios with the Union, or whether management was at one time willing to negotiate with the union over the topic; rather, the negotiability of the union's proposals depends on whether the proposals involve issues of professional conduct or competence (direct patient care or clinical competence) within the meaning of 38 U.S.C. § 7422(b). Moreover, the Court in *AFGE Local 446 v. U.S. Dep't of Veterans Affairs (Asheville,* 475 F.3d 341 (D.C. Cir. 2007), found that Title 38 places no time restriction on when the Secretary's determination under section 7422 must be made, and the question of jurisdiction may be raised at any stage of the administrative or judicial proceedings.

Once the issue is appropriately framed, it is easily resolved. Nurse staffing ratios go straight to the heart of direct patient care for several reasons. First and most fundamentally, staffing ratios determine the number of patients for which one nurse may be responsible in a particular care setting, thereby determining the amount of nursing time and attention to be devoted to each patient and to some extent even the quality of care available to each patient. Second, nurse staffing ratios may limit the number of patients that can be admitted or transferred to a particular unit on a particular day based on the number of nurses on duty that day. If such limitation means that a patient must stay in another care setting or deter admission to the VAMC until another day that patient's care may be impacted by such delay, as may be the care of other patients if the patient stays in an overcrowded or understaffed unit pending transfer to the unit to which the staffing ratio applies. Third, strict staffing ratios on some units may leave other units staffed at less than optimum levels if nurses must be pulled or floated from one unit to another to achieve a mandated ratio. When a staffing ratio is mandated by a collective bargaining agreement – even one that was initially determined through an appropriate exercise of management discretion -- the patient care impact becomes even more acute, as management is not free to change the ratio to address patient care needs without first bargaining over the

change. For all of these reasons, the determination of an appropriate nurse staffing ratio for a particular unit or setting inherently impacts patient care, and such determination is excluded from collective bargaining pursuant to 38 U.S.C. § 7422(b).

In a prior decision, the USH held that union contract proposals that would establish staff-patient ratios for individual units were exempt from collective bargaining. The USH concluded that by enabling the union to determine staff-patient ratios and other staffing patterns, these proposals would have a direct impact on management's ability to determine the appropriate staff mix, numbers of nurses and the clinical qualifications required within patient areas, and the Secretary already had a number of established policies pertaining to the staffing, assignment and reassignment of nurses. See *Wilmington VAMC,* 12/04/2001. Similarly, the USH held in *VAMC Charleston*, VA 05-06, 5/27/2005, that mandating a reduction in panel size – i.e., limiting the number of patients for whom a particular health care provider must see -- is non-negotiable under 38 U.S.C. § 7422(b). In this case, all four proposals presented by the Union at the April 16, 2008 mediation session mandated staffing ratios. All four are therefore non-negotiable under 38 U.S.C. § 7422(b).

RECOMMENDED DECISION:

That the Union proposals at issue in the subject ULP concern or arise out of professional conduct or competence and are thus exempted from collective bargaining by 38 U.S.C. § 7422(b).

APPROVED X DISAPPROVED _____

Michael J. Kussman

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

9/25/08
Date