



DEPARTMENT OF VETERANS AFFAIRS
UNDER SECRETARY FOR HEALTH
WASHINGTON DC 20420

OCT 02 2007

Maxcine Sterling
Director, Worklife and Benefits Service
Department of Veterans Affairs
810 Vermont Avenue NW
Washington, DC 20420

Jane M. Nygaard
National Vice President
AFGE – 8th District
2950 Metro Drive, Suite 315
Minneapolis, MN 55425

Dear Ms. Sterling and Ms. Nygaard:

I am responding to the issues raised in your memoranda of July 26, 2007, and August 13, 2007, concerning two provisions in AFGE's proposed Memorandum of Understanding on VA Handbook 5011/9, "Hours of Duty and Leave".

Pursuant to delegated authority, I have decided on the basis of the enclosed decision paper that the issues presented are matters concerning or arising out of professional conduct or competence and thus exempted from collective bargaining by 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 Handbook 5011/9,
Alternative Work Schedules for Nurses**

FACTS

1. On June 15, 2006, the Department of Veterans Affairs (Department) implemented changes to VA Handbook 5011/9, "Hours of Duty and Leave." (Attachment A.) These changes were made by the Worklife and Benefits Service of the Office of Human Resources Management, which is responsible for the Handbook. The Handbook contains mandatory hours of duty and leave procedures for nurses on alternative work schedules (AWS).
2. On August 15, 2006, the American Federation of Government Employees (AFGE or union) submitted a demand to bargain on "VHA Alternative Work Schedules for Registered Nurses," as established in the Handbook. (Attachment B.) Subsequent to that demand, management officials from the Worklife and Benefits Service and from the Office of Labor-Management Relations engaged in a number of telephonic bargaining sessions relating to the changes to the Handbook.
3. On or about January 4, 2007, the union presented the management bargaining team with a proposed Memorandum of Understanding (MOU). (Attachment C.) The management team agreed to most of the proposed provisions in the MOU but believed that two provisions – Part B, paragraph 2 and Part B, paragraph 6 - were contrary to 38 U.S.C. § 7422(b), which excludes from collective bargaining and from the negotiated grievance procedure any issue concerning or arising out of professional conduct or competence, meaning direct patient care or clinical competence. In a memorandum to the Under Secretary for Health (USH) dated July 23, 2007, Maxcine Sterling, Director of the Worklife and Benefits Service, requested that the USH determine whether these two provisions are excluded from collective bargaining and from the negotiated grievance procedure pursuant to 38 U.S.C. § 7422(b). (Attachment D.)¹ The union submitted its response to management's request in a memorandum to the USH, dated August 13, 2007. (Attachment F)

THE SUBJECT PROPOSALS

1. The first AFGE proposal, set forth in Part B, Paragraph 2 of the MOU, relates to language in VA Handbook 5011/9, Part II, Chapter 3, paragraph

¹ On July 23, 2007, Ms. Sterling provided the union with a copy of management's submission and reminded the union of its right to submit its input on the issues raised to the USH within 10 days. Attachment E.

6.i., which provides that “[r]egistered nurses on any work schedule shall not provide direct patient care in excess of 12 consecutive hours or in excess of 60 hours in any 7-day period, except in the case of nurses providing emergency care.” In Part B, paragraph 2 of the proposed MOU, AFGE proposed to define “emergency care” for purposes of the referenced section of the Handbook as follows:

Emergency shall be defined as commonly stated, “An unexpected situation or sudden occurrence of a serious and urgent nature that demands immediate attention.” Therefore posting short, EAL [emergency annual leave], sick calls do not constitute an emergency. Each facility in collaboration with their local union may further determine what constitutes ‘emergency care’ for purposes of Public Law 108-445, Section 4.b., and VA Handbook 5011, Part II, Chapter 3, paragraph 6.i.

2. On April 11, 2007, management presented the union with the following counter-proposal:

Each facility will determine what constitutes ‘emergency care’ for purposes of Public Law 108-445, Section 4.b. and VA Handbook 5011/9, Part II, Chapter 3, paragraph 6.i. and will share this information with the local union.

3. In her request for a 38 U.S.C. § 7422(b) determination, Ms. Sterling explained that “[t]he union’s proposal defines ‘emergency’ as that term is commonly used by the general population and requires that facility management collaborate with the local unions to further limit or define additional situations that constitute ‘emergency care’. The Union’s proposal also specifies three situations -- posting short, emergency annual leave, and sick calls, all of which involve short staffing situations in which a work unit lacks sufficient RN staff to cover patient care needs -- which would not constitute an emergency that would allow for deviation from the 12 hour maximum tour rule. The effect of this proposal would be to prevent management from defining emergency in terms of patient care needs.” (Attachment D, page 2, ¶ 2.) Ms. Sterling also stated that the union’s proposal would deprive facility management of “the flexibility to decide when there is an emergency that would require a change in a nurse’s schedule to work in excess of 12 consecutive hours or in excess of 60 hours in any 7-day period ... [or] to consider such factors as the availability and qualifications of RN staff and number and acuity level of patients when determining whether an RN should be asked or mandated to work beyond the normal tour limits.” (Attachment D.) Without such flexibility, Ms. Sterling stated, facility management would be unable to make the staffing decisions necessary to meet patient care needs in emergency situations. (Attachment D.)

4. In its response, the union stated that management “has no legal right to define “emergency” in a manner that departs from how that term is used in common usage”, that the “meaning of “emergency” is the meaning of “emergency” as Congress intended that term in Section 4(b)(1) of Public Law 108-445”, but that Congress “did not expressly define “emergency” so management is “obligated to define the term in light of its ordinary meaning.” (Attachment F) The union asserts that any other alternative definition that management adopts will result in the “inevitable abuse of nurses” and “the jeopardizing of sound patient care”. (Attachment F) While the union agreed to withdraw the references to “EAL” and “sick call” in the second sentence of first proposal “in light of NVAC’s recognition that the use of sick leave or emergency annual leave can constitute emergency situations”, it maintained that the “posting short” reference was not withdrawn because “no emergency should ever be attributed to a simple posting of inadequate nursing staff level.” (Attachment F)

5. The second AFGE proposal, set forth in Part B, paragraph 6 of the MOU, provides:

If a nurse who has been mandated to work overtime in excess of 12 consecutive hours feels unsafe to deliver care to patients, the RN should discuss his or her concerns with his or her supervisor in accordance with local procedures. No punitive action will be taken against any nurse who raises such concerns or *who refuses to be mandated because of their concerns.* (Italics added.)

6. The phrase in italics is the only language that the management bargaining team insisted would directly impact direct patient care or clinical competence. Ms. Sterling explained that this provision would effectively prohibit management from assigning RNs to work more than 12 consecutive hours, even in emergency situations, because any individual RN could refuse to be mandated to work simply by raising safety concerns: “Management would have no means of requiring nurses to work overtime because the language prohibits punitive action. Leaving management with absolutely no means of enforcing an order could have disastrous consequences for patient care. In effect, any nurse would be free to refuse to work the overtime and management would have to find other ways to treat the patients.” (Attachment D, page 3, ¶ 1)

7. In its response, the union argued that management’s memorandum to the USH, dated July 26, 2007, was the first notification it was given that management intended to assert a 38 U.S.C. 7422(b)(1) bar to the second proposal. (Attachment F) In addition, the union stated that by preventing a nurse who is “legitimately rendered incapable of providing quality patient care by exhaustion” from refusing to continue his/her duties without punishment, management could force a nurse to be subjected to sanctions “under codes governing a nurse’s retention of license (sic)” that

prohibit a nurse from knowingly providing substandard care. (Attachment F)

PROCEDURAL HISTORY

1. 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, peer review, and employee compensation. 38 U.S.C. § 7422(b) authorizes the Secretary of Veterans Affairs to determine whether a particular bargaining proposal or grievance concerns or arises out of one of the excluded issues. The Secretary has delegated this authority to the USH.

ISSUES

1. Whether the union's proposal in Part B, paragraph 2 of the proposed MOU, that defines "emergency care" is a matter or question concerning or arising out of professional conduct or competence within the meaning of 38 U.S.C. § 7422(b).
2. Whether the union's proposal in Part B, paragraph 6 of the proposed MOU, that prohibits punitive action against nurses who refuse to work more than 12 consecutive hours in an emergency situation is a matter or question concerning or arising out of professional conduct or competence within the meaning of 38 U.S.C. § 7422(b).

DISCUSSION

1. Public Law 108-445, enacted in December 2004, authorized the Department to provide several new alternative work schedule opportunities to registered nurses where necessary to recruit or retain nurses at a particular facility. In that same Public Law, Congress stated that "[i]t is the sense of Congress to encourage the Secretary of Veterans Affairs to prevent work hours by nurses providing direct patient care in excess of 12 consecutive hours or in excess of 60 hours in any 7-day period, except in the case of nurses providing emergency care." That same Public Law required the Secretary to certify to Congress on an annual basis "whether or not each Veterans Health Administration facility has in place, as of the date of such certification, a policy designed to prevent work hours by nurses providing direct patient care (other than nurses providing emergency care) in excess of 12 consecutive hours or in excess of 60 hours in any 7-day period." The Department endeavored to implement these provisions through revisions to VA Handbook 5011, authorizing VHA facilities to offer the new alternative work schedules to RNs and prohibiting RN work hours in excess of 12 consecutive hours

except in cases of emergency care. In addition, VA Handbook 5011 requires VHA facilities to certify that they have these policies pursuant to Public Law 108-445. Further, VA Handbook 5011, Part III, Ch. 3, 6 (e) states "(5) The Director has the option not to establish the work schedule if it is found that a particular Alternate Work Schedule would have an adverse impact on the Departments health-care facility; (6) The Director may discontinue the Alternate Work Schedule(s) of the affected employees if it is determined that a particular Alternate Work Schedule has an adverse impact on the Departments health-care facility. The proposals at issue in this matter stem from the Department's efforts to negotiate over the impact of those changes on registered nurses in the AFGE bargaining unit.

2. The subject proposals would limit the situations in which VHA facilities could schedule RNs to work longer than 12 consecutive hours, and would empower individual RNs to refuse mandatory overtime in excess of 12 consecutive hours based on the RN's own safety concerns.
3. The first proposal, Part B, paragraph 2, would impose limitations, through collective bargaining, on VHA facility management's ability to schedule nurses to work in direct patient care settings for longer than twelve consecutive hours. More specifically, this proposal would define "emergency," as used in the 12-hour limitation in Public Law 108-445 and in the VHA regulations implementing that limitation, to mean "an unexpected situation or sudden occurrence of a serious and urgent nature that demands immediate attention," and would specifically exclude from that definition any staffing shortage occasioned by short staffing². Generally, any definition of emergency in the patient care context involves professional conduct or competence and is excluded from bargaining. Therefore, bargaining over a national or local definitions of "emergency" or the national criteria VA that may issue to define "emergency" is non-negotiable. For this proposal, the patient care impact is four-fold. First, by imposing a collectively bargained-for definition of "emergency," the proposal would render grievable and arbitrable any management determination that a nurse should work beyond 12 hours to meet patient care needs. Second, the proposal would effectively prohibit management from determining that an emergency exists when the specific limitations of the bargained-for definition are not met. Third, the proposal would limit management's options for addressing nurse staffing shortages to (a) leaving the affected unit short-staffed; (b) calling in a contract nurse; or, (c) calling in a staff nurse who has not already worked a 12-hour tour of duty that day. The latter two options could delay adequate nurse staffing for the affected unit, while the former would leave the unit under-staffed for

² The first proposal initially included a prohibition of scheduling an RN to work more than 12 hours where RNs who were scheduled to work a particular shift were out due to emergency annual leave or sick leave. However, since the union withdrew the references to "EAL" and "sick calls" in its response, those situations are not considered in the discussion.

the entire tour. In each of these respects the union's proposal impacts direct patient care and is non-negotiable under 38 U.S.C. § 7422(b). Finally, the proposal would place limitations on management's ability to mandate a particular nurse, with professional qualifications that render him/her the preferable or necessary patient care provider under the circumstances, to work in an emergency, which directly impacts patient care. We also note that under VA Handbook 5011, Part II, Chapter 1, Para. 2b, the primary consideration in establishing work schedules is patient care needs.

4. The union argues that VHA "has no legal right to define "emergency" in a manner that departs from how that term is used in common usage" (Attachment F). More specifically, the union asserts that the "meaning of 'emergency' is the meaning of 'emergency' as Congress intended that term in Section 4(b)(1) of Public Law 108-445," and that because Congress "did not expressly define 'emergency'" in the Public Law, management is "obligated to define the term in light of its ordinary meaning." (Attachment F) This assertion is incorrect as a matter of law. Where statutory language is ambiguous or unclear, it is up to the agency that is charged with implementing the statute to "fill the statutory gap in reasonable fashion." *National Cable & Telecommunications Assoc. v. Brand X Internet Services*, 545 U.S. 967, 980, 125 S. Ct. 2688 (2005). If a statute is ambiguous, and if the implementing agency's interpretation is reasonable, Federal courts must defer to that interpretation. *Chevron v. NRDC*, 467 U.S. 837, 843-844 & n. 11 (1984). In other words, not only does VHA have the right to define "emergency" as used in Public Law 108-445, it also has the responsibility to do so, and its definition is subject to deference irrespective of its resemblance, or lack thereof, to the dictionary definition.
5. The union's second proposal, in Part B, paragraph 6, prohibits disciplinary action against an RN who refuses to work beyond 12 consecutive hours because the RN feels unsafe to deliver care to patients. The effect of this provision would be that RNs could be asked to work longer than 12 hours on a voluntary basis, but could not be mandated to do so even where necessary to meet emergency patient care needs. If no nurse on a unit agrees to work longer than 12 hours, the union's proposal would leave the unit short-staffed, regardless of the impact of such staffing on patient care. As a result, this provision involves direct patient care and is also non-negotiable under 38 U.S.C. § 7422(b).
6. The union also argues that this provision is necessary to protect nurses from the potential impact on their state licensure of working in unsafe conditions. This argument ignores the obvious potential impact on licensure that flows from abandoning patients, and runs contrary to the long-established principle that an employee must obey an order first and grieve it later. Moreover, where an order to work beyond 12 hours might

