DEPARTMENT OF VETERANS AFFAIRS
UNDER SECRETARY FOR HEALTH
WASHINGTON DC 20420

DEC 0 4 2001

Mr. Dexter Dix
VA Medical and Regional Office Center
1601 Kirkwood Highway
Wilmington, DE. 19805

Dear Mr. Dix:

I am responding to the issues raised in your letter of October 5, 2001 concerning the negotiability petition filed by the local unit of the Professional Staff Nurses Association. The issue pertains to management's decision not to enter into negotiations over several proposals presented by the union in local contract bargaining.

Pursuant to delegated authority, I have decided, on the basis of the enclosed decision paper, that the issues presented are matters concerning or arising under professional conduct or competence and thus exempted from collective bargaining by 38 USC 7422(b). The specific provisions so exempted are identified on page 8 of the attached Decision Paper.

Please provide this decision to your Regional Counsel as soon as possible.

Sincerely yours,

Thomas L. Garthwaite, M.D.

Enclosure

Title 38 Decision Paper - VA Medical and Regional Office Center Wilmington

FACTS:

During negotiations over a local contract covering Registered Nurses at the VAMC&RO Wilmington, management declined to negotiate with the Professional Staff Nurses' Association union over numerous proposals contained in articles they had submitted entitled *Role of the Professional Registered Nurse* and *Role of the Professional Registered Nurse Practitioner*. The reason cited for the management position was that the proposed contract provisions involved matters concerning professional conduct or competence, which, pursuant to 38 U.S.C. 7422(b), are not subject to collective bargaining. Section 7422(d), by its terms, provides that the Secretary has the exclusive authority to make section 7422(b) determinations, and such determinations are not subject to collective bargaining or review by any other agency.

The specific union contract proposals in question are as follows:

Article 21-Role of the Professional Registered Nurse

Section 1 – Nursing Care Advisory Committees

The parties agree to establish a Nursing Care Advisory Committee within each clinical center/service line in which RNs are employed to review, monitor, and make recommendations on the following:

A. Appropriate staff-patient ratios for individual units within each clinical center/service line and in keeping with the role and mission of the unit, the patient population, budget and nursing roles within that unit;

B. Adequate support to enable nurses to devote maximum time in the direct care of the veteran patient;

C. Overall role of the Charge Nurse and reduction of patient assignments for charge nurses; and

D. Staffing patterns that will allow for equitable distribution of RN work assignments.

Section 2 – Composition of the Nursing Care Advisory Committees

Nursing Care Advisory Committees shall be created in each of the Clinical Centers/Service Lines of the VAMROC: Medicine, Surgery, Mental Health, Extended Care, and Managed Care/Ambulatory Care. Each Advisory Committee will report to

the Clinical Center Executive Leadership Council and be composed of the following core group:

A. Clinical Center Nurse Executive or designee, Co-Chair

B. PSNA Officer or designee, Co-Chair

C. Clinical Center Business Manager

D. Staff Nurse At-Large from the Clinical Center selected by PSNA

Section 3 – Nursing Care Advisory Committee Meetings

Meetings of the Nursing Care Advisory Committees shall be held on a regular basis, as established by the co-chairs. Either co-chair may schedule additional or ad hoc meetings. Other members of the clinical center will be invited to attend the meetings to address unit specific issues; such staff would normally be the nurse manager or site manager and a staff nurse from the specific unit. Also, staff from other programs and services may be invited to participate when related issues arise.

When issues of concern to the individual staff nurse arise, such as staffing or assignments, it is anticipated that the Professional Registered Nurse will report the problem to the supervisor of the unit when on duty and available, or the Nurse Officer of the Day, to resolve the problem at the time of the occurrence. When staff do not find adequate resolution to the problem through this method, they may elect to petition the advisory committee through their representative to assist. When this occurs, either of the co-chairs may schedule an ad hoc meeting as soon as practical for all parties who need to attend.

Section 4 – Non-Clinical Duties

The Employer and the Association share the underlying philosophy that Registered Nurses should devote their work time to delivering quality nursing care to our nation's veterans. In keeping with this philosophy, the Employer agrees that relief from non-clinical duties is essential to further increase the availability of professional nursing care to the veterans/patients, as well as promote the professional practice of nursing. The Association and Management will work in Partnership to address this issue as specified in the Memorandum of Understanding entered into by the parties, entitled Partnership for Preventing Non-Clinical Duties.

Section 5 – Float/Relief of Staff Registered Nurses

A. The Employer shall make every effort to see the nurses who are subject to float relief as set forth herein, shall only be floated /reassigned:

B. To perform Professional Registered Nurse responsibilities only;

C. To a unit for which she/he has been properly oriented;

D. To a unit which is in her/his area of expertise as described below, and

E. To a unit for which the nurse has the appropriate competencies.

F. Proper or minimum orientation shall be defined as including, but not limited to, up to (1) one hour of instruction on the unit, the completion of the orientation checklist and the identification of a resource person for the tour assigned.

G. When the Employer determines that the interests of the Veterans/patient care require that staff nurses be floated/relieved from one unit to another, and after consideration census data, potential admissions, transfers ort other relevant information, a nurse or nurse may be subject to float relief or to the actions set forth herein and in the order of priority set forth below. The Employer shall maintain a log of all float/relief that occurs and provide such lists to the appropriate Nursing Care Advisory Committee when requested.

H. When float/relief occurs, it shall be done in the following order:

I. A volunteer Nurse shall be sought out from the sending unit.

J. An Agency Nurse may be floated to a like unit for which they have been contracted

K. A Per Diem Nurse

L. A Cross-trained Nurse

M. Float/relief of a regularly scheduled staff nurse shall be done on a rotating basis within the affected unit, beginning with the least senior nurse.

Section 7 – Recruitment and Retention

The Employer agrees to make every effort to honor transfer requests and retain current employees. When RN vacancies occur, the Employer will:

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A. Announce RN vacancies via VISTA/DHCP or other agreeable means 10 days prior to the deadline to submit a consideration request.

B. Provide full and impartial consideration to qualified applicants from within the VAMCHS and give current RN employees priority consideration.

C. Whenever possible, provide a currently employed RN from the unit or like area the opportunity to interview perspective candidates. The RN interviewer will forward his/her recommendation to the selecting official.

Article 22 – Role of the Professional Registered Nurse Practitioner

Section 1 – Panel Size

The panel size for all full-time Professional Registered Nurse Practitioners (NPs) shall not exceed 1,000 patients. Panel size for part-time NPs shall be strictly pro-rated based on FTEE.

Section 2 – Scheduling

A. Appointments

Appointments shall begin 20 minutes after the beginning of the scheduled shift and the last appointment shall be scheduled no later than 40 minutes before the end of the scheduled shift.

Appointments shall be no less than 20 minutes in duration for follow-up visits and 40 minutes for new patients. Further there shall be no more than one (1) new patient during morning hours and no more than one (1) new patient during the afternoon hours.

Overbooks

The Employer shall not schedule more than one (1) patient for each 20 minute appointment slot.

Section 3 – Leave Request

Patient Re-Scheduling

The NP shall not have the responsibility to reschedule patients who had appointments that could not be served as a result of Section 3(A) and (B) above– (scheduled and non-scheduled sick leave)

Section 4 – Specialty Exam

NPs who treat patients requiring a specialty exam, defined as but not limited to, Compensation/Pension (C/P); Physical Assessment; Persian Gulf and Agent Orange, shall only be required to schedule one of each of the exams listed above in this section per week.

All NPs shall perform C/P exams. However, NPs who are currently assigned to perform Persian Gulf, Agent Orange, and Physical Assessment shall continue that role but, no NP shall be required to perform any of the above specified specialty exams, other than that which she/he currently performs, unless mutually agreed. Specialty exams shall be scheduled in one (1) hour time slots, per section 2 of this article.

Section 5 – Re-Assignment

Unless mutually agreed, no NP shall be re-assigned, either temporarily or permanently, to any other Clinic, position or location.

Section 6 – Administration Time

Each NP shall be provided with two (2) hours per week to perform administrative duties in addition to the time currently allowed for physician consultation.

PROCEDURAL HISTORY

On August 17, 2001, the PSNA filed a negotiability petition with the Federal Labor Relations Authority (FLRA) challenging the position taken by Wilmington VAMC management. At an October 24, 2001 post petition conference, the FLRA referred the matter to alternative dispute resolution (ADR). At the ADR hearing(s), the parties will be expected to engage in interest-based bargaining on all non-exempt issues. Should ADR prove unsuccessful in resolving the parties' dispute, the matter will be remanded back to FLRA for further proceedings. Management maintains that the FLRA has no jurisdiction to determine the negotiability of the proposals because they concern professional competence, which is not subject to bargaining for Title 38 employees.

The Secretary 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 competence (direct patient care or clinical competence).

In a letter dated October 5, 2001, the Director of the Wilmington VAMC&RO requested that, in accordance with 38 USC 7422, the Under Secretary for Health decide whether the union's contract proposals are outside the duty to bargain.

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ISSUE

Whether the above-recited provisions of the contract proposals submitted by the PSNA union concern or arise out of a matter of professional conduct or competence and are thus exempted from collective bargaining by 38 USC 7422(b).

DISCUSSION

PSNA's proposed Articles 21 and 22 concern a number of matters relating to staffing, work assignments and re-assignments for registered nurses and nurse practitioners. These matters are fundamental to VAMC management's ability to establish and maintain an appropriate level of patient care. Staffing determinations and work assignments directly impact the overall competency of the nursing staff at the facility as well as individual nurses' ability to perform their jobs without compromising patient care.

The Secretary has established policies pertaining to staffing, assignment and re-assignment of nurses at all VAMC facilities. Such policies are set forth in a number of internal Agency publications, including Veterans Health Administration (VHA) Directive and Handbook 5111; VHA Manual M-2, Part V; and portions of VA manual MP-5 Pt. II and the VHA supplement thereto. These policies represent the Agency's exercise of its regulatory authority with respect to staffing, assignment and reassignment of nurses, all matters concerning or arising under professional competence and direct patient care within the meaning of 38 U.S.C. § 7422, and the Union's proposed Articles 21 and 22 relating to these same matters are non-negotiable.

The substance and likely impact of the specific provisions of proposed Articles 21 and 22 are as follows.

Article 21, sections 1, 2 and 3 would require the establishment of Nursing Care Advisory Committees within each Clinical Center/Service Line of the Wilmington VAMROC to review and monitor operations and make recommendations on a number of work matters related to direct patient care such as nursing roles, work assignments and staffing patterns. Section 1 dictates the areas of patient care that the Advisory Committees would address, while Section 2 states which service lines will have committees and who will be the core members of each group. By enabling Advisory Committees to determine staff-patient ratios and other staffing patterns, these sections would have a direct impact on management's ability to determine the appropriate staff-mix, both as to numbers of nurses and clinical qualifications required within patient care areas. Section 3, which sets forth the methods by which regular and ad hoc meetings of the Advisory Committees would be convened, also impacts patient care, in that the meetings scheduled pursuant to that section would address topics directly relating to patient care.

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Article 21, section 4 is entitled Non-Clinical Duties and seeks to limit the non-clinical duties to which nurses may be assigned. Relief from non-clinical duties would be in direct conflict with the Wilmington VAMC&RO organizational structure, which is built on the principle of Patient Focused Care and the concept of multi-skills. Provisions of this nature would in all probability result in increased staffing and would have a negative impact on patient care, and would introduce a subjective standard as to the separation between clinical and non-clinical work assignments, thereby clearly having implications for management as to assigning specific nurse tasks related to hands-on patient care. Inclusion of this subjective standard in collective bargaining would subject VA's determinations over whether duties were clinical or non-clinical to third party review, contrary to section 7422(d).

Article 21, Section 5 subparagraphs A through M would prescribe specific criteria governing how VA management could make nursing assignments, including clinical qualifications determinations, thereby restricting management's ability to make assignments and to determine the clinical qualifications and professional competence of registered nurses as needed for such assignments and as a result clearly impacting on the accessibility, timeliness, and quality of patient care.

Article 21, Section 7C would require that RNs be allowed to interview candidates for employment and make recommendations to the selecting official. This proposal would impact on management's right and ability to determine the professional qualifications and competence of RN staff.

Article 22, Section 1 would provide specific limitations on panel size, or the number of patients a Registered Nurse Practitioner may be required to care for on the ward. This proposal directly and significantly impacts patient care. It is a fundamental principle that VA nursing management must consider many factors in establishing panel sizes. These include such factors as number and qualifications of support staff available, accessibility to appropriate technology, physical layout and, most vital, the nurse practitioner's qualifications, experience and professional competency. Management must always maintain the ability to adjust panel sizes and staff schedules to ensure access to quality patient care in a timely manner, and PSNA's proposal to strictly limit panel size would clearly compromise that ability.

Article 22, Section 2 would provide specific criteria for the number and timing of patient appointments and procedures for overbooks of appointments. These proposals restrict the length of time individual patients will be treated and the number of patients treated in a day, both restrictions having direct significant impact on patient care. Management must make staffing assignments that ensure that patients are cared for competently and in a timely manner, and this proposal would clearly interfere with management's rights in this regard.

Article 22, Section 3 would restrict management's ability to reschedule patients for treatment when their original appointments need to be rescheduled, and as a result

would hamper the VA's ability to ensure timely and competent patient care. Management must maintain the right and ability to reconcile patient scheduling to staff schedules so as to ensure that the nurse assigned to a patient has the competency to complete the type of exam appropriate to that patient. This proposal would unacceptably limit this right.

Article 22, Section 4 would limit the number and time of specialty exams to be performed by a nurse practitioner each week. In addition, this proposal would require that a nurse practitioner be assigned to no more than one of a particular type of specialty exam (e.g. Persian Gulf, Agent Orange, or Physical Assessment exams) per week. This would impede patients' access to timely and competent care and would further limit management's ability to assign specialty examination assignments as needed to the nurses most competent and qualified to perform such exams.

Article 22, Section 5 would limit management's right to reassign a Nurse Practitioner outside of his or her regular duty station. This would have a negative impact on management's ability to assign and reassign nurse staff on the basis of competence and qualification to meet patient care needs.

Article 22, Section 6 requires that nurse practitioners be allotted a specific block of time each week for administrative duties. This proposal impedes management's responsibility to provide care for veterans by limiting the time during which nurse practitioners may be assigned to provide direct patient care.

RECOMMENDED DECISION

That the proposed contract provisions marked below concern or arise out of matters of professional competence (direct patient care or clinical competence) and are thus exempted from collective bargaining by 38 USC 7422(b).

To provide guidance to the parties in the ADR process and in any further FLRA proceeding, it is requested that the specific provisions deemed to be exempt from bargaining under 38 USC 7422(b) be identified below.

Proposal	Exempt	Non-Exempt
Article 21, Section 1	X	
Article 21, Section 2	X	
Article 21, Section 3	X	
Article 21, Section 4	X	
Article 21, Section 5	X	
Article 21, Section 7C	X	
Article 22, Section 1	X	
Article 22, Section 3	X	
Article 22, Section 4	X	
Article 22, Section 5	X	
Article 22, Section 6	X	

APPROVED ✓

Thomas L Garthwaite

Under Secretary for Health

DISAPPROVED _____

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Date