

United States of America

BEFORE THE FEDERAL SERVICE IMPASSES PANEL

In the Matter of

DEPARTMENT OF VETERANS AFFAIRS  
VA MEDICAL CENTER  
MINNEAPOLIS, MINNESOTA

and

LOCAL 3669, AMERICAN FEDERATION OF  
GOVERNMENT EMPLOYEES, AFL-CIO

Case No. 08 FSIP 72

**DECISION AND ORDER**

Local 3669, American Federation of Government Employees, AFL-CIO (Union) filed a request for assistance with the Federal Service Impasses Panel (Panel) to consider a negotiation impasse under the Federal Service Labor-Management Relations Statute (Statute), 5 U.S.C. § 7119, between it and the Department of Veterans Affairs (VA), VA Medical Center, Minneapolis, Minnesota (Employer or VAMC).

Following an investigation of the request for assistance the Panel determined that the dispute, which concerns the implementation of cardiac IV drip medication guidelines at the VAMC, should be resolved through single written submissions from the parties. They were informed that, after considering the entire record, the Panel would issue a *Decision and Order* to resolve the dispute. The parties' final offers and supporting statements of position were received pursuant to this procedure and the Panel has now considered the entire record.

**BACKGROUND**

The VAMC is an affiliated teaching hospital which serves as the tertiary referral center for the Veterans Integrated Service Network 23. It has 237 acute care diagnostic and treatment beds, as well as a 104-bed extended care unit, and provides primary, specialty, mental and behavioral health, and extended care and rehabilitative care to over 80,000 veteran patients. The Union represents all of the approximately 1,000 professional employees

at the VAMC, including 700 registered nurses (RNs), except for physicians. They are either Title 5 (General Schedule) or Title 38 employees, or occupy "hybrid" positions whose conditions of employment are governed by aspects of both Title 5 and Title 38. The parties' master collective-bargaining agreement (MCBA) was due to expire in March 2000 but, by its terms, "if renegotiation of an agreement is in progress but not completed upon the termination date of this Agreement, this Agreement will be automatically extended until a new agreement is negotiated." The parties at the national level are in the process of renegotiating the MCBA.

### ISSUE AT IMPASSE

The parties disagree over whether the Panel has the authority to impose the Union's multi-part proposal concerning the ratio of nurses to patients in the telemetry units where the IV drip medications are administered.

#### a. The Employer's Position

The Employer has no counteroffer concerning the ratio of nurses to patients in the affected telemetry units and provides no arguments or evidence addressing the merits of the Union's proposal. As it alleged during the Panel's initial investigation of the Union's request for assistance, the Union's proposal pertains to the numbers, types and grades of employees to be assigned to a particular work unit or tour of duty and, therefore, is negotiable only at the election of the agency pursuant to 5 U.S.C. § 7106(b)(1). Thus, the Employer is within its rights under the Statute to decline to bargain over the Union's proposal, and "the matter is not within the jurisdiction of the [Panel]." Moreover, the Union's proposal raises issues of patient care within the meaning of 38 U.S.C. § 7422(b) and, therefore, is nonnegotiable and not subject to the Panel's jurisdiction.<sup>1/</sup> Since the Panel chose to assert jurisdiction over

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<sup>1/</sup> 38 U.S.C. § 7422(b) excludes from collective bargaining with unions representing Title 38 medical professionals, including RNs, issues of direct patient care or clinical competence. 38 U.S.C. § 7422(d) authorizes the VA Secretary to determine whether a particular proposal falls within the 38 U.S.C. § 7422(b) exclusions. The VA Secretary has delegated that authority to the Under Secretary for Health. The Employer contends that the VA Under Secretary "has determined on multiple occasions" that proposals pertaining

this matter, the Employer has requested a formal determination from the VA Under Secretary for Health that the Union's proposal is nonnegotiable pursuant to 38 U.S.C. § 7422(b).<sup>2/</sup>

To further support the jurisdictional argument it raised during the initial investigation, the Employer for the first time provided a Memorandum from former Secretary of Veterans Affairs Anthony J. Principi issued to the Union's National Partnership Council on December 11, 2001. In this regard, Article 44, Section 1.B. of the parties' MCBA<sup>3/</sup> permits the VA unilaterally to revoke its contractual commitment to negotiate over § 7106(b)(1) matters if Executive Order 12871, issued by President Clinton, is rescinded.<sup>4/</sup> Among other things, the Principi Memorandum informs the VA's unions that the head of the VA has decided managers will not be required to bargain over permissive subjects. According to the Employer, "the situation contemplated in Article 44 § [1.B.] occurred," i.e., Executive Order 12871 was rescinded, the VA chose not to bargain § 7106(b)(1) matters, and the Principi Memorandum served to reopen the Article to address the § 7106(b)(1) issues. It also states that the Union at the national level should have filed a grievance within 30 days of the issuance of the Memorandum if it had a disagreement over its meaning, but "no such grievance was filed." Therefore, the Panel does not have the authority to impose the Union's proposals concerning the ratio of nurses to patients.

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to staffing ratios for nurses in patient care settings involve direct patient care and, therefore, are nonnegotiable under 38 U.S.C. § 7422(b).

- 2/ As of the date of this *Decision and Order* the Employer has not submitted proof that the VA Under Secretary for Health has excluded the matter from collective bargaining.
- 3/ Article 44, Section 1.B. states, in relevant part: "In the event Executive Order 12871 is rescinded and the Department chooses not to bargain 5 USC Section 7106(b), either party may reopen this Article to address the 7106(b) issues."
- 4/ Executive Order 12871 was rescinded by President Bush on February 17, 2001, through the issuance of Executive Order 13203. Notably, Executive Order 13203 stated that "nothing in this order shall abrogate any collective bargaining agreement in effect on the date of this order."

b. The Union's Position

The Union proposes the following wording regarding the ratio of nurses to patients:

1. Implementation of the Center's "Guidelines for Telemetry" will be in accordance with the following procedures with respect to staffing ratios for RNs who are affected by those Guidelines:

- a. Staffing ratios will be administered to provide safe care for Veterans and other patients, and to not jeopardize the careers of RNs employed by the Center.
- b. Except as provided in c. below, there will be a 1:3 nurse-to-patient staffing ratio for patients on loading or continuous cardiac/vasoactive drips.
- c. The ratio can be increased according to the following:
  - i. If cardiac monitors are installed in each patient room; or, 24-hour monitor technician is provided, either from a central location or on each ward. The ratios would be: day/pm 1:4, nights 1:5, and 1:3 on all shifts for patients on loading doses of these medications for 4 hours and/or until the patient is hemodynamically stable.

OR

- ii. If the Medical Center activates a 24-hour/day central, the Medical Center can opt to change the RN staffing ratio to 1:4. In that case, changes to RNs' conditions of employment resulting from the central monitoring center are subject to bargaining.

OR

- iii. If the RN and the Charge Nurse agree the patient is stable enough for a 1:4

ratio, as indicated by the RN's assessment of the patient's cardiac status, respiratory status, and heart rhythm.

In its response to the jurisdictional arguments the Employer raised during the initial investigation, the Union also cites Article 44, Section 1.B. of the MCBA, which states that "the [VA] will bargain on the numbers, types and grades of employees and positions assigned to any organizational subdivision, work project, tour of duty, and the technology, methods and means of performing work." Also, the ground rules governing the parties' national level renegotiations over the MCBA specifically continue the term of the MCBA. Thus, according to the Union, the Employer is required to negotiate over section 7106(b)(1) matters "and is not now privileged to assert otherwise." As to the Employer's argument that staffing ratios are a matter that is excluded from bargaining under 38 U.S.C. § 7422(b), "a mere announcement of a 7422 exclusion does not deprive the Panel of jurisdiction." Rather, the minimum action required under the law to remove a matter from collective bargaining is a formal ruling by the Under Secretary for Health that it falls within the descriptors of the law, and no such ruling had been made. Moreover, given the number of past Memoranda of Understanding (MOUs) where the VAMC has agreed to specific ratios of nurses to patients, "it is far less likely that the appropriate [VA] appointee will invoke the 7422 exclusion in this matter." For these reasons, the Panel has the authority to impose the Union's proposal concerning the ratio of nurses to patients in the affected telemetry units where the IV drip medications are administered.

Its proposal should be imposed by the Panel because it is reasonable and "consistent with comparable practices in the medical care industry and with numerous MOUs between the parties that cover comparable staffing ratio issues in various units" at the VAMC. The Employer's newly-proposed IV guidelines "add a new medical capability for certain acute care patients" which would further increase RNs workload and the risk of adverse patient reactions. If adverse patient reactions result in negative health consequences, RNs could be disciplined and/or lose their licenses. A 1:3 staffing ratio would "prevent such punitive imposition of the tendency of the organization to blame the RN for what stems from a system shortcoming that is controlled by management." In addition, the proposal provides the Employer with several options for modifying the staffing and/or technology if it determines this would be needed to

implement the new IV drip changes and to improve them subsequently. Furthermore, the proposed staffing ratios can be achieved through a number of methods other than the hiring of additional RNs. Such methods are included in at least 10 MOUs that have been implemented since 1999 addressing ratios and staffing levels for various wards and shifts "without adverse outcomes on the [VAMC]'s ability to function effectively." Finally, its proposal is necessary for the safety of patients as several recent reports and recommendations by medical care experts have concluded that inappropriate staffing ratios "contribute significantly to adverse patient outcomes."

### CONCLUSIONS

After carefully examining Article 44, Section 1.B. of the parties' MCBA in light of the Principi Memorandum, we shall decline to retain jurisdiction over the parties' dispute. The Employer has raised questions concerning its obligation to bargain over the Union's proposal which must be resolved in a more appropriate forum before the Panel can determine whether the parties are at impasse.<sup>5/</sup>

### ORDER

Pursuant to the authority vested in it by the Federal Service Labor-Management Relations Statute, 5 U.S.C. § 7119, the Federal Service Impasses Panel, under 5 C.F.R. § 2471.11(a) of its regulations, hereby declines to retain jurisdiction over the parties' dispute.

By direction of the Panel.

H. Joseph Schimansky  
Executive Director

August 22, 2008  
Washington, D.C.

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<sup>5/</sup> In retrospect, had the Employer entered the Principi Memorandum into the record during the initial investigation of the Union's request for assistance, it is unlikely that the Panel would have asserted jurisdiction over the parties' dispute.