

In the Matter of

DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
METROPOLITAN DETENTION CENTER
GUAYNABO
CANTANO, PUERTO RICO

And

LOCAL 4052, AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES, AFL-CIO

Case No. 13 FSIP 105

ARBITRATOR'S OPINION AND DECISION

The Department of Justice, Federal Bureau of Prisons (BOP), Metropolitan Detention Center, Guaynabo, Puerto Rico (MDC or Employer) and the American Federation of Government Employees, AFL-CIO, Local 4052 (Union), jointly filed a request for assistance with the Federal Service Impasses Panel (Panel) to resolve a negotiations impasse under 5 U.S.C. § 7119 of the Federal Service Labor-Management Relations Statute (Statute), 5 U.S.C. § 7101, *et seq.*

After an investigation of the request for assistance, which arose out of negotiations over a 6-month pilot of a 4/10 compressed work schedule (CWS) for Registered Nurses (RNs) in the Employer's Health Services Department (HSD), the Panel directed the parties to submit their dispute to the undersigned, Panel Member Martin H. Malin, for mediation-arbitration by telephone. The parties were informed that if a settlement were not reached on all issues during mediation, I would issue a binding decision to resolve the dispute. Accordingly, on July 15 and August 15, 2013, I held teleconferences with representatives of the parties and conducted a mediation-arbitration proceeding. During the mediation portion of the proceeding, the parties agreed to establish a 6-month 4/10 CWS pilot for the RNs, included the schedules for the five nurses currently working at MDC, and resolved all but one of 12 provisions in their companion Memorandum of Understanding (MOU). Since they were unable to reach a complete settlement, I am required to resolve the remaining issue through a final and binding decision. In reaching this decision, I have considered the entire record in this matter, including the parties' last best offers (LBOs) and other documentary evidence.

BACKGROUND

The BOP's mission is to protect society by confining offenders in the controlled environments of prisons and community-based facilities that are safe, humane, cost-efficient and

appropriately secure. MDC Guaynabo is an administrative institution that temporarily holds male and female inmates at all security levels who are awaiting trial or sentencing. Located 6 miles from San Juan, it also functions as a jail for Puerto Rico. The Employer's current population of almost 1,400 is contained in 12 housing units: 10 for males, 1 for females and 1 for "special" cases. The number of inmates at MDC Guaynabo has fluctuated over the years and is dictated by a number of factors including crime rate and judicial trial and sentencing schedules. Housing units have held as few as 70 and have swelled to hold as many as 150 inmates in order to meet the needs of Puerto Rico and other jurisdictions that rely on the Employer to temporarily house their offenders. The Union represents approximately 180 employees who are part of a nationwide consolidated bargaining unit. The parties are covered by a Master Agreement that has been contractually extended in 1-year increments since its expiration date of March 8, 2001.

ISSUE AT IMPASSE

The parties agree that the RNs will return to 5 day/8-hour shifts if their numbers fall below five during the 6-month trial period. They also agree that the Employer will give the Union notice of its intent to revert to the standard schedule prior to doing so. They disagree, however, on the purpose for and the duration of the notice period. The Union's LBO proposes that "[i]f the Nursing complement falls below [five], the parties will meet and discuss any adverse situation, if applicable, for [1] week, prior [to] any shift reverting back to a 5 day/8-hour shift." The Employer's counter is that "Management will provide 24 hours' notice prior to reverting to a 5 day/8-hour schedule in the event that the staffing level drops below five RNs."

THE PARTIES' POSITIONS

A. The Union's Position

The Union's position shifted during the arbitration. Initially, it argued that a week's notice was necessary because the Employer recently implemented the "primary care provider team concept" in the HSD. The Union acknowledged that the change is in accordance with, and was mandated by, the BOP's issuance of its "2013 HSD Staffing Guidelines, Team Medicine Framework" (Guidelines). In his January 16, 2013, Memorandum accompanying these Guidelines, HSD Assistant Director Newton E. Kendig explained that "[t]he revised 2013 HSD Staffing Guidelines display the Team Medicine Paradigm which defines the specific mix of administrative, clinical and allied health staff for each institution." The "staffing plan" (*i.e.*, the recommended staffing level) for each BOP institution is "comprised of a 'base team' model" which can be supplemented with additional staff if doing so is supported by "criteria such as care level, population volume, special missions and unique class features (*e.g.*, security level, locked units *etc.*)." The Union claimed that the Employer never explained how movement to this "team concept" would affect the protocols followed by the HSD's medical staff. According to the Union, prior to the implementation of the 2013 Guidelines, HSD employees worked under established protocols and pursuant to post orders. HSD doctors assigned protocols or job duties to nurses upon which their performance would be evaluated. Post orders or directives were issued advising RNs of their assigned protocols on any given day or shift. RNs then knew in advance who would be responsible for triage, who would distribute medication, who would perform blood pressure checks, who would do EKGs, and who would respond to emergencies.

The Employer, however, has not yet provided the Union with the protocols it has established for work performance under the new team concept. The “Union does not know if they [the protocols] exist or the Agency simply won’t share them.” The Union represented that if it had the protocols, 24 hours’ notice might be sufficient. However, until the Union does know what protocols have been assigned to individual RNs, it needs additional time – one week – to discuss whether an alternative to forcing the remaining nurses to revert to 5 day/8 hour shifts exists. For instance, depending on a vacating RN’s protocols, HSD’s needs might be sufficiently accommodated by overtime, a partial reassignment of duties or simply moving employees’ shifts around.

After the Employer explained that there are no such protocols or post orders and after the Employer provided sample schedules under the CWS and under a 5 day/8 hour schedule for a staffing level of four, the Union changed its position as to why a week’s notice was necessary. The Union urged that it would need a week’s notice to marshal its efforts to prevent the reversion to the traditional schedule, first attempting to convince the Employer that there would be a feasible alternative and then seeking review in other forums.

B. The Employer’s Position

The Employer maintains that protocols and post orders have never existed for nurses. The duties upon which all RNs are evaluated are clearly and succinctly outlined in the BOP’s 2013 Staffing Guidelines.^{1/} According to the Employer’s Acting Medical Director, all RNs routinely perform all of the duties included in the Guidelines, and some or all of those duties may or may not be assigned to one or more RNs on any given day or shift. Nurses, moreover, perform their assigned duties under his supervision and pursuant to the privileges of his medical license – not in accordance with prescribed protocols and pursuant to written post orders.^{2/} Like nurses and medical doctors (MDs) everywhere else, the HSD’s RNs and MDs follow “specific treatment protocols” for medical procedures. For instance, there are universal medical protocols for taking EKG’s, distributing medications, performing blood pressure checks and making sick calls. But these procedures can be and are performed by all HSD nurses all of the time. The performance of any given procedure on any given day is dictated by the workload of the HSD – a workload that is driven by emergencies as well as by daily changes in the medical needs of the Employer’s fluid inmate population. The determination of who will perform what procedure on any given shift is within the complete discretion of the Employer’s doctors – its Medical Officer

^{1/} RNs at Care Level 2 institutions like MDC Guaynabo “deliver physician-ordered care; perform nursing assessments and nursing procedures; administer medications at designated pill lines; conduct nursing triage; conduct intake screening of newly admitted inmates; conduct nursing clinics; & deliver emergency nursing care. Typically cover evening and weekend shifts.”

^{2/} This delegation of responsibility is in accordance with the Guidelines that state that a licensed independent practitioner (*e.g.*, medical doctor) not only has “authority to assess, diagnose, treat, educate, and prescribe medications,” but also “[m]anages clinical care, supervises clinical practitioners” (*e.g.*, RNs), “oversees specialty care” and “[h]as final institutional authority for clinical decisions per executed privileges.”

and Clinical Director. These treatment protocols, however, have no relationship to, and should not be confused with, the protocols and post orders - rules, regulations, practices and directives – the Employer’s Correctional Officers must follow in order to maintain the physical security of MDC Guaynabo.

On June 20, 2013, the BOP issued a “Program Statement for the Health Services Administration,” Number 6010.04 (Statement). It begins by stating that the purpose of the Administration is “[t]o deliver medically necessary health care to inmates effectively in accordance with proven standards of care without compromising public safety concerns inherent to the [BOP’s] overall mission.” In order to accomplish that goal, BOP’s 2013 Staffing Guidelines recommend that “Stand-Alone Detention Centers” like MDC Guaynabo staff their HSDs with six RNs. Accordingly, until July 15, 2013, the Employer refused to implement a 4/10 CWS with fewer than six nurses. In an effort to reach a voluntary resolution, the Employer agreed during mediation to establish a 4/10 CWS with five RNs but only if the Union would agree that any diminution would result in the RNs’ return to their previous 5 day/8-hour schedules.

Wednesdays and Thursdays are the HSD’s busiest days for two reasons. In its role as Puerto Rico’s jail, the Employer houses those arrested in police raids throughout the island. Those raids often take place on Wednesdays and Thursdays. In addition, on multiple Wednesday afternoons and/or evenings each month, inmates are airlifted into or out of MDC Guaynabo. Between 50 and 90 offenders are affected by each airlift. Those leaving must be evaluated by HSD before they go; those coming in must receive immediate physicals and be processed into the system. Depending on the timing of the plane(s)’ arrivals and the number of inmates affected, this process can, and usually does, take both Wednesday and Thursday to complete. For these reasons, it is imperative that the Employer have at least three RNs at work each day.

If an RN leaves and the Employer is forced to keep its remaining four RNs on a 4/10 CWS for a week, its ability to deliver “medically necessary health care to inmates” will be seriously compromised. The 4/10 CWS schedule to which the parties have agreed has five nurses working on Wednesdays and three on Thursdays. If one RN leaves and the nurses revert to a 5 day/8 hour schedule within 24 hours as proposed by the Employer, the HSD would have an additional RN, or a total of four, on Wednesday and the same number on Thursday. If, however, the Employer is forced to maintain the 4/10 CWS with four nurses for an entire week as proposed by the Union, there will only be three RNs on Wednesdays and two on Thursday to handle the workload occasioned by the airlifts and police raids. The Employer will have to choose between having the HSD become a “potential liability” for MDC Guaynabo or incur overtime expenses by mandating that RNs who are already working long hours in an understaffed department come in and work another 10 hours on 2 days.

CONCLUSIONS

Having carefully considered the entire record in this case, including the evidence and arguments presented by the parties during the mediation-arbitration proceeding, I conclude that the Employer’s proposal should be adopted for the following reasons.

First, I am not persuaded that protocols or post orders ever existed for the nursing staff at MDC Guaynabo. Although the Union argued that RNs in the past were assigned protocols and issued post orders, no documentary evidence was offered to support its claim. Nor did any RN, former or present, nor any other HSD staff member, testify to that effect. The Employer's Acting Medical Director, on the other hand, who, prior to his current position, served as HSD's Medical Officer for 3 years, testified as follows: Although like MDs, RNs follow treatment protocols, they have never, in his 3+ years with the Employer, been asked to follow work protocols or post orders. Formal written protocols and directive post orders interpreting them are essential for critical systems like physical security that must be uniformly and consistently implemented in a prison setting. They are not, however, appropriate for the fluid, daily changing, judgment-based decision making that characterizes physical and mental health. Moreover, issuing protocols and post orders to RNs would be inconsistent with the requirement that nurses work under the supervision of and pursuant to the license and privileges of the Employer's MDs.

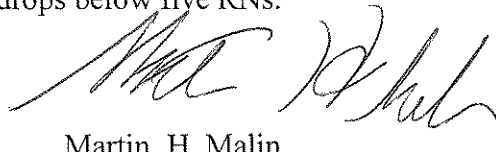
Second, when asked at the arbitration, what the Union would do in a week if one were ordered by the undersigned, the Union's former President of 7 years responded that the Union would try to persuade the Employer to look for an alternative to reverting the four remaining RNs to a 5 day/8-hour schedule. He conceded, however, that if that strategy failed, the Union would attempt to invoke the assistance of higher levels within the Union and the BOP and exercise its appeal rights by filing a grievance and/or an unfair labor practice charge. The Union shifted its position on the purpose of the notice period because once the Employer's Medical Officer rebutted its protocol/post order claim, the Union had no other reasonable reason for needing a week. I find the Union's answer to this question credible. I do not, however, find it reasonable. I find it more reasonable to conclude that, by signing an MOU that established a CWS that "will consist of five (5) positions working 10 hours a day for four days a week," and by agreeing that the RNs' shifts will revert back to 5 day/8-hour shifts if the staffing level falls below five, the Union clearly and unmistakably waived any appeal rights it might have had.

Third, the Employer presented a reasonable explanation for why it cannot afford – either from a mission or cost perspective – to have the HSD staffed by four nurses on a 4/10 CWS for a week. The Employer credibly explained that it tipped the balance as far as it could towards work schedule flexibility when it agreed to a 4/10 CWS that dropped nursing coverage from four to three on Thursdays, one of its two busiest days in the week. However, according to the Employer, if staffing drops to four and it allows the 4/10 CWS to remain in place for a week and either a police raid or airlift occurs during that week, the HSD will be seriously understaffed with three, instead of four, RNs on Wednesday and two, instead of three, on Thursday. The Employer has demonstrated a strong operational need to revert to the 5 day/8 hour schedule when the nursing staff level drops below five, and its proposal to provide 24 hours' notice is far more reasonable than the Union's proposal to be provided a week to marshal its forces to try to prevent what is probably inevitable.

DECISION

The parties shall adopt the Employer's final offer to resolve their impasse. That language is as follows:

The Agency will provide 24-hours' notice prior to reverting to a 5 day/8-hour schedule in the event that staffing level drops below five RNs.

A handwritten signature in black ink, appearing to read 'Martin H. Malin', written in a cursive style.

Martin H. Malin
Arbitrator

September 20, 2013
Chicago, Illinois