

United States of America

BEFORE THE FEDERAL SERVICE IMPASSES PANEL

In the Matter of

UNITED STATES DEPARTMENT OF VETERANS
AFFAIRS

And

NATIONAL NURSES ORGANIZING COMMITTEE
NATIONAL NURSES UNITED

Case No. 18 FSIP 042

DECISION AND ORDER

The U.S. Department of Veterans Affairs (Agency or Department) 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, with the National Nurses Organizing Committee, National Nurses United (Union or NNU) over negotiations of a successor master collective bargaining agreement (MCBA).

The mission of the Agency is to fulfill President Lincoln's promise "to care for him who shall have borne the battle, and for his widow, and his orphan" by serving America's veterans "with dignity and compassion and to be their principal advocate in ensuring that they receive care, support, and recognition" for their service to the United States. The Union represents a consolidated bargaining unit of 11,000 Registered Nurses (RNs) who work in 23 facilities throughout the country.

The parties' MCBA expired on November 10, 2015. Prior to the expiration, on August 31, 2015, the Union provided the Agency notification, within the required contractual time period, that it wished to reopen the MCBA.

BACKGROUND

In June 2017, the parties initiated bargaining over their successor MCBA. The parties engaged in bilateral negotiations over a six-month period. The parties were unable to reach a

resolution during the negotiations. In February 2018, they enlisted the services of the Federal Mediation and Conciliation Service (FMCS) and engaged in mediation. The parties reached agreement on several articles in their successor MCBA, but were unable to resolve six articles: Article 6 - RN Rights, Section 5, Counseling (D); Article 19 - Contract RNs; Article 22 - Vacancy Announcements, Section 1(C); Article 52 - Local Supplemental Contracts, Memoranda of Understanding and Agreements; New Article - Registered Nurse Response Network; and New Article - Professional Practice Committee. Accordingly, FMCS released the parties.

The Agency filed a request for Panel assistance over the above-referenced six articles. Following an investigation of the six articles, the Panel asserted jurisdiction over Article 6, Article 19, Article 22, Article 52, and New Article - Registered Nurse Response Network. The Panel declined jurisdiction over New Article - Professional Practice Committee because of colorable arguments regarding the duty-to-bargain. The Panel determined that the five articles should be resolved through a Written Submissions procedure. The parties were informed that, after considering the entire record, the Panel would take whatever action it deemed appropriate to resolve the dispute, which could include the issuance of a binding decision. The Panel has now considered the entire record, including the parties' written submissions and final offers.

ISSUES

1. Article 6, RN Rights, Section 5, Counseling (D)

a. Union's Final Offer

In general, meetings to deliver a counseling do not require the RN to have representation. However, if the supervisor requires additional Department representatives to deliver the counseling the RN will be entitled to have a union representative present.

The Union argued that it wished to maintain the status quo and keep the language from its predecessor MCBA. In general, the Union asserted that counseling meetings do not require an RN to have representation; however, if the supervisor requires additional i.e., more than one, Agency representatives to deliver the counseling, the Union asserted that RNs should be entitled to have a Union representative present to prevent intimidation.

b. Agency's Final Offer

The Agency proposed striking the language in Section 5(D).

The Agency argued that the language in Section 5(D) substantially expands an RN's right to Union representation. The Agency asserted that under the Statute, employees are entitled to a Union representative for *Weingarten* meetings,¹ but not for counseling sessions. The Agency claimed that treating a counseling session like a *Weingarten* meeting is problematic because it conflates the two and treats them the same even though they serve substantially different purposes - a *Weingarten* meeting is used for disciplinary purposes, whereas a counseling session is used to provide employees information about their work performance. Additionally, the Agency stated that if an employee disagrees with the manager's assessment in the counseling session, or feels that the counseling is unreasonable, unfair, or otherwise inappropriate, the employee is entitled to grieve the counseling under the parties' MCBA.

c. Conclusion

Having carefully considered the evidence and arguments presented in support of the parties' positions, we find that the Agency's proposal is the better alternative to resolve the impasse. In this regard, a counseling session is only intended to present information and performance feedback to the employee. Therefore, a Union representative is not needed in those types of meetings. Whereas, in a *Weingarten* meeting, the intent is to question the employee to determine whether to take disciplinary action. In those circumstances, it is more apparent that the employee might need Union representation, which the Statute affords the employee. It's important to allow a manager to provide performance information to an employee during a counseling unencumbered; the presence of a Union representative could unnecessarily alter the focus of this discussion. If the counseling session turns into a *Weingarten* meeting, the employee is statutorily permitted to request a Union representative. Furthermore, the employee can grieve the counseling under the

¹ Under 5 U.S.C. § 7114(a)(2)(B), an exclusive representative of an appropriate unit in an agency shall be given the opportunity to be represented at ... any examination of an employee in the unit by a representative of the agency in connection with an investigation if (i) the employee reasonably believes that the examination may result in disciplinary action against the employee; and (ii) the employee requests representation.

parties' MCBA if he or she feels that the meeting was unjust. Accordingly, the Panel imposes the Agency's proposal.

2. Article 19, Contract RNs

a. Union's Final Offer

Section 1: General

- A. This Article is subject to 38 U.S.C. § 7422. It is not intended to require Union involvement in day-to-day staffing decisions or formal bargaining over matters excluded from bargaining under 38 U.S.C. § 7422(b) or 5 U.S.C. Chapter 71. When the use of Contract RNs causes a change in working conditions of bargaining unit RNs, which triggers a duty to bargain under the Statute, the Department will bargain as appropriate.
- B. It is the responsibility of the Department to provide safe, appropriate, high-quality health care to Veterans, and well-qualified, dedicated and properly oriented RNs are important in fulfilling the Department's mission. The Department is authorized to use Contract RNs to meet mission needs. However, the Department must manage Contract RNs just as it must manage nursing services and RNs who are permanently employed by the Department.
- C. When the Department determines the need to establish a contract for RNs, NNU will be notified.

Section 2: Orientation and Competencies

The Department will maintain a policy(s) regarding the hiring, including pre-employment requirements and utilization of contract employees, which include(s) Contract RNs.

The Union argued that it wished to maintain the status quo, and keep the language from its predecessor MCBA. The Union stated that the status quo represented the Department's commitment to treat its own employees fairly compared to Contract RNs. The Union also asserted that the language minimized the potential of preferential treatment of Contract RNs over RNs hired and employed by the Department.

b. Agency's Final Offer

The Agency proposed striking the following language from Article 19:

Section 1: General

B. However, the Department must manage Contract RNs just as it must manage nursing services and RNs who are permanently employed by the Department.

Section 2: Orientation and Competencies

The Department will maintain a policy(s) regarding the hiring, including pre-employment requirements and utilization of contract employees, which include(s) Contract RNs.

The Agency asserted that it will, from time-to-time, utilize Contract RNs in order to ensure appropriate patient care at its facilities when management cannot permanently hire bargaining unit RNs. The Agency argued that Section 1(B) is problematic because the phrase "just as it must manage" can be interpreted to mean that the Agency must manage Contract RNs the same as bargaining unit RNs when the contractors' conditions of employment are different. For instance, the Agency asserted that Contract RNs do not enjoy the same benefits such as earning sick or annual leave, and are not entitled to government health insurance; their pay, working hours, and other conditions of employment are set exclusively by contract and vary based on the specific requirements of the hiring facility. Therefore, the Agency stated that it must manage Contract RNs differently than bargaining unit RNs.

The Agency also was opposed to the language in Section 2, as it stated it is "overly broad." The Agency stated that a contract provision mandating that the Department create a policy concerning a particular group of employees is inappropriate, as the VA Secretary has unfettered discretion to issue policies relating to RNs' conditions of employment under 38 U.S.C. § 7421. The Agency argued that language which attempts to control or diminish the VA Secretary's authority or discretion should not be included in the successor MCBA.

c. Conclusion

Having carefully considered the evidence and arguments presented in support of the parties' positions, we find that a modified solution is the best alternative to resolve the impasse. It is important that the Agency has the ability to hire, manage, and implement policy for Contract RNs as it sees fit. If the Union is concerned over the equal treatment of employees and Contract RNs, there are other provisions in the parties' MCBA and Statutory safeguards that will allow the Union to protect employees' rights. Accordingly, the Panel orders the parties to remove the last sentence of Section 1(B) in the Union's proposal, remove Section 2, and replace Section 1(B) with the following language:

The Department has unfettered discretion to hire, manage, and implement policy concerning Contract RNs.

3. Article 22, Vacancy Announcements, Section 1(C)

a. Union's Final Offer

The Department recognizes that the announcement of a RN position can enhance retention and career mobility and allow for RNs to gain additional experience. All RN Staff positions will be posted internally electronically, with the posting and application period running simultaneously for a minimum of 10 calendar days.

The Union argued that it wished to maintain the status quo and keep the language from its predecessor MCBA. The Union asserted that the status quo language requires the Agency to advertise a vacancy announcement to all RNs on bulletin boards or by computer for at least 10 calendar days. The Union stated that this language would allow the RNs the opportunity to apply for new positions.

b. Agency's Final Offer

The Agency proposed replacing Section 1(C) with the following two provisions:

Section 1: General Provisions

C. 38 U.S.C. Chapter 74, provides the Secretary of Veterans Affairs with authority to hire personnel listed in 38 U.S.C. § 7401(1) directly, without regard

to civil service hiring requirements. The Department may fill registered nurse positions without posting vacancy announcements. If the Department elects to post a vacancy announcement, it may simultaneously post such positions internally and externally.

- D. When the Department elects to post a vacancy announcement, it will be posted for a minimum of 10 calendar days. However, when there is evidence of a critical staffing shortage or a lack of qualified internal candidates, the Department may fill the position prior to the expiration date of the announcement and will notify the NNU Local.

The Agency argued that under 38 U.S.C. Chapter 74, it benefits from the ability to statutorily hire RNs without posting vacancy announcements, or otherwise follow the typical government hiring requirements. Therefore, the Agency stated that it wished to utilize its authority to fill critical positions that have the largest impact on patient care quickly, e.g., inpatient bed side nursing units like medical/surgical, critical care, operating room, and spinal cord injury units. The Agency stated that it is in competition for highly qualified RNs to fill those positions with the private sector, and because of that, it must have the ability to hire prospective employees without delay. The Agency asserted that requiring it to advertise all positions for 10 days adds substantial delays that impede the effective and efficient operation of the Department. If the Department is not required by a collective bargaining agreement to post every RN vacancy, the Agency stated that the Department can quickly identify qualified individuals, for example at a job fair, and make job offers without the more lengthy process of creating an announcement, posting the announcement for a certain period of time, and reviewing and evaluating qualifications of multiple applicants.

a. Conclusion

Having carefully considered the evidence and arguments presented in support of the parties' positions, we find that the Agency's proposal, with slight modification, is the better alternative to resolve the impasse. The Agency's language offers it flexibility to hire RNs immediately, if needed, yet indicates RN positions, when advertised, will be posted for a minimum of 10 days. The Agency is in constant competition with the private sector for the best qualified nurses. It is important for the Agency to be able to hire without a

contractual requirement mandating that it advertise every RN position, as this can substantially delay the Agency's ability to fill critical positions. Accordingly, the Panel orders the parties to adopt the Agency's proposal with the following modification:

In the second sentence of Section 1(D) of the Agency's proposal, after "However, when," insert the phrase, "management determines that."

4. Article 52, Local Supplemental Contracts, Memoranda of Understanding and Agreements

a. Union's Final Offer

Section 1: Local Supplemental Contracts

- A. Subject to paragraph B of this Section, contract provisions contained in local contracts in existence prior to the Contract will continue in effect insofar as they do not conflict with the Contract. For the purposes of this Article, a local provision is in conflict if it would: (a) alter the terms of the Contract or (b) interfere with or impair its implementation.
- B. Where the Contract in a specific article provides for local supplemental bargaining and there is a current local contract provision or MOU in place, the local provision will continue in effect unless or until changed through renegotiation. Subjects not addressed in the Contract, existing in local contract provisions or MOUs will continue unless or until changed through renegotiation.
- C. Recognizing that this Contract cannot cover all matters or provide definitive language for local adaptability on subjects addressed in this Contract, it is understood that local supplemental contracts may include substantive bargaining on all subjects not covered in this contract. The local parties may also bargain on matters covered by this Contract when specified in this Contract. Local supplemental contracts and MOUs cannot conflict with this Contract. For the purposes of this Article, a local provision is in conflict if it would: (a) alter the terms of the Contract or; (b) interfere with or

impair its implementation. In this regard, benefits for RNs and/or NNU agreed to in this Contract are controlling over those in local supplemental contracts and MOUs unless otherwise authorized in this Contract.

Section 2: Procedures for Local Supplemental Contracts

A. NNU and the Department agree that negotiation of any local supplemental contracts will be postponed until NNU and the Department complete joint labor/management training related to the Master Contract or no sooner than 180 calendar days after the NNU Master Contract has been effectuated.

1. Accordingly, after 180 calendar days or the completion of the joint training, whichever comes first, either party has the right to open negotiations or renegotiations for a local supplemental contract consistent with Section 1 above. The local supplemental contract may include a provision for re-opening the local contract once during the initial term of the National Master Contract.

2. This Section does not preclude local bargaining of a MOU in accordance with the Mid-Term Bargaining Article.

B. If within 30 days of receipt by VACO LMR the Department identifies any illegal provisions it will inform NNU and the local parties of the illegal provisions. The parties will meet to discuss the identified provisions to attempt to resolve the illegal provisions. This meeting may be via teleconference for minor issues or face-to-face depending on the complexity of the issues by mutual consent.

Section 3: Ground Rules for Negotiating Local Supplemental Contracts

Ground rules for negotiating local supplements are an appropriate subject for local bargaining. Ground rules may include, among other things, physical location of bargaining, caucuses, subject matter experts, start date, official time, prep time,

observers, the number of people on each team and administrative matters and materials.

At 6 months up to one year after contract ratification, either party may open this article for renegotiation.

The Union argued that it wished to maintain the status quo and keep the language from its predecessor MCBA, with an added concession in an attempt to reach agreement - allow the parties to reopen the article within 6 months and up to one year after contract ratification. At that point, the Union stated the parties would be in a better position to negotiate over this article. The Union stated that the purpose of the reopener is to allow the parties an opportunity to review all of the agreements and past practices in the 23 facilities across the country where RNs are represented.

b. Agency's Final Offer

Section 1: Termination of Local Supplemental Agreements and Past Practices

- A. Local supplemental agreements (LSAs) and past practices that pre-exist the new Master Contract (Contract) shall terminate upon the effective date of the Contract. The terms and provisions of LSAs and past practices will not continue in effect beyond the termination date.
- B. The local Parties will not negotiate a new LSA during the duration of this Contract. Terms and conditions of LSAs that pre-existed this Contract shall not be treated as past practices or continuing conditions of employment.

Section 2: Local MOUs

- A. Either party may unilaterally open an existing local MOU within 180 days of the effective date of the Contract. If neither party chooses to reopen an MOU, it will continue in effect to the extent that the terms of the MOU are not in conflict with the Contract. A term is in conflict if it would: (a) alter the terms of the Contract or (b) interfere with or impair its implementation.

- B. Unless specifically provided otherwise in this Contract, new local MOUs shall be negotiated exclusively under the terms and conditions of Article 51 - Mid-Term Bargaining. No provision in a newly negotiated local MOU may conflict with, alter, or modify this Contract.

Section 3: National Mid-Term Changes

In the event the Department initiates a mid-term change at the national level, the Department will meet all bargaining obligations at the national level. The local Parties shall not negotiate local MOUs involving a matter already covered by a national level mid-term MOU.

Section 4: National MOUs

National MOUs will continue in effect to the extent that the terms of the MOUs are not in conflict with the Contract. A provision is in conflict if it would: (a) alter the terms of the Contract or (b) interfere with or impair its implementation.

The Agency argued that the Union's proposal provides for additional and potentially perpetual negotiations. The Agency stated that it wished to conclude bargaining since the parties have negotiated over a successor MCBA since June 2017. The Agency asserted that its primary interest in this article is to rely principally on negotiated provisions in the successor MCBA and to place reasonable limits on bargaining during the contract term by terminating LSAs and past practices, as they tend to compound problems because of inconsistency between what is agreed to locally and nationally. The Agency stated that national MOUs should continue in effect, as those agreements tend to be on matters separate and distinct from matters contained in a MCBA. The Agency further stated that it wished to allow the parties the opportunity to reopen existing local MOUs, and limit prospective bargaining over local MOUs to management-initiated changes that are greater than *de minimis*, unless local bargaining is otherwise addressed in a particular article in the successor MCBA.

c. Conclusion

Having carefully considered the evidence and arguments presented in support of the parties' positions, we find that the

Agency's proposal is the better alternative to resolve the impasse. It is important that the parties negotiate in a timely manner to promote an effective and efficient government, and efficiently steward taxpayer dollars. The Agency's proposal accomplishes this objective by concluding the bargaining process over the successor MCBA, and permitting bargaining where it is consistent and does not conflict with the successor MCBA. Accordingly, the Panel imposes the Agency's proposal.

5. New Article, Registered Nurse Response Network

a. Union's Final Offer

The Registered Nurse Response Network (RNRN) is a national network of direct-care RNs that coordinates education, training, and deployment of volunteer RNs to provide humanitarian and/or disaster relief when and where they are needed.

Upon request from the Union or the RN, the Department may grant accrued leave or unpaid leave for education, training, and deployment through the RNRN program. The Union may request in writing up to ten (10) Nurses to participate in the RNRN program per year. Requests made by the Union to exceed ten (10) Nurses will be mutually agreed upon by both parties. All Nurses participating in the RNRN program shall not be on leave for more than thirty (30) calendar days from the first day of release for this program. Nurses may use approved accrued Annual Leave or be in LWOP status while participating in the RNRN program.

The Union stated that the RNRN is a proposal for a new article in the successor MBCA. The RNRN is a national network run by the Union to send volunteer RNs to disaster-stricken areas when and where needed. The Union stated that RNs may be able to utilize their accrued leave should they wish to participate in such disaster relief efforts absent a contractual provision, but it wished to codify the process by which RNs may participate in the RNRN program in the parties' successor MCBA.

b. Agency's Final Offer

The Agency proposed striking the Union's proposal.

The Agency argued that its Office of Emergency Management maintains the Disaster Emergency Medical Personnel System (DEMPS). It is the Agency's main program to deploy clinical

staff to an emergency or a disaster. The DEMPS works with other federal agencies and state authorities, in a coordinated fashion, to respond to disasters, such as hurricanes, earthquakes, and floods. The Agency is concerned that the RNRN may dilute its overall coordinated effort to provide disaster relief through the DEMPS program. The fear, the Agency asserted, is that by adding this article to the MCBA, managers may think that they are required to release the RNs to participate in the program. To avoid confusion, and to preserve the DEMPS program, the Agency stated that it opposed including the Union's RNRN program in the successor MCBA.

c. Conclusion

Having carefully considered the evidence and arguments presented in support of the parties' positions, we find that the Agency's proposal is the better alternative to resolve the impasse. The Agency's proposal allows the RNs to volunteer and provide their assistance to victims in times of emergencies through an Agency sanctioned program - DEMPS. By having one program that is focused on emergency and disaster relief, it will centralize volunteer efforts. If the employees wish to participate in the RNRN program, they may request accrued leave from their supervisor. Accordingly, the Panel imposes the Agency's proposal.

ORDER

Pursuant to the authority vested in it by the Federal Service Labor-Management Relations Statute, 5 U.S.C. § 7119, and because of the failure of the parties to resolve their dispute during the course of proceedings instituted under the Panel's regulations, 5 C.F.R. § 2471.6(a)(2), the Federal Service Impasses Panel, under § 2471.11(a) of its regulations, hereby orders the adoption of the following to resolve the impasse:

1. Article 6 - RN Rights, Section 5, Counseling (D). Remove Section 5(D) from the successor MCBA.
2. Article 19 - Contract RNs. Remove the last sentence of Section 1(B) in the Union's proposal and remove Section 2. Replace Section 1(B) with the following language:

The Department has unfettered discretion to hire, manage, and implement policy concerning Contract RNs.

3. Article 22 - Vacancy Announcements, Section 1(C). Replace Section 1(C) with the following two provisions:

- C. 38 U.S.C. Chapter 74, provides the Secretary of Veterans Affairs with authority to hire personnel listed in 38 U.S.C. §7401(1) directly, without regard to civil service hiring requirements. The Department may fill registered nurse positions without posting vacancy announcements. If the Department elects to post a vacancy announcement, it may simultaneously post such positions internally and externally.
- D. When the Department elects to post a vacancy announcement, it will be posted for a minimum of 10 calendar days. However, when management determines that there is evidence of a critical staffing shortage or a lack of qualified internal candidates, the Department may fill the position prior to the expiration date of the announcement and will notify the NNU Local.

4. Article 52 - Local Supplemental Contracts, Memoranda of Understanding and Agreements:

Section 1: Termination of Local Supplemental Agreements and Past Practices

- A. Local supplemental agreements (LSAs) and past practices that pre-exist the new Master Contract (Contract) shall terminate upon the effective date of the Contract. The terms and provisions of LSAs and past practices will not continue in effect beyond the termination date.
- B. The local Parties will not negotiate a new LSA during the duration of this Contract. Terms and conditions of LSAs that pre-existed this Contract shall not be treated as past practices or continuing conditions of employment.

Section 2: Local MOUs

- A. Either party may unilaterally open an existing local MOU within 180 days of the effective date of the Contract. If neither party chooses to reopen

an MOU, it will continue in effect to the extent that the terms of the MOU are not in conflict with the Contract. A term is in conflict if it would:
(a) alter the terms of the Contract or (b) interfere with or impair its implementation.

B. Unless specifically provided otherwise in this Contract, new local MOUs shall be negotiated exclusively under the terms and conditions of Article 51 - Mid-Term Bargaining. No provision in a newly negotiated local MOU may conflict with, alter, or modify this Contract.

Section 3: National Mid-Term Changes

In the event the Department initiates a mid-term change at the national level, the Department will meet all bargaining obligations at the national level. The local Parties shall not negotiate local MOUs involving a matter already covered by a national level mid-term MOU.

Section 4: National MOUs

National MOUs will continue in effect to the extent that the terms of the MOUs are not in conflict with the Contract. A provision is in conflict if it would:
(a) alter the terms of the Contract or (b) interfere with or impair its implementation.

5. New Article - Registered Nurse Response Network. Not included in the parties' successor MCBA.

By direction of the Panel.



Mark A. Carter
FSIP Chairman

July 12, 2018
Washington, D.C.