

In the Matter of

DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
FEDERAL MEDICAL CENTER
ROCHESTER, MINNESOTA

and

LOCAL 3947, AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES, AFL-CIO

Case No. 10 FSIP 35

ARBITRATOR'S OPINION AND DECISION

The Department of Justice, Federal Bureau of Prisons, Federal Medical Center,^{1/} Rochester, Minnesota (Employer) and Local 3947, American Federation of Government Employees, AFL-CIO (Union), filed a joint 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.

After an investigation of the request for assistance, which arises from mid-term bargaining over fingernail policy, the Panel directed the parties to mediation-arbitration with the writer. The writer conducted a joint preliminary conference call with the parties on March 18, 2010, and a mediation-arbitration proceeding by telephone on March 26, 2010. The Employer was represented by Associate Warden/Chief LMR Scott Young and Ms. Dawn Hellickson, Employee Services Manager and official agency contact in this case. Mr. Michael Squibb, Chief Negotiator for Local 3947, represented the Union.

The mission of the Federal Medical Center (FMC) is to provide medical, dental and mental health services to inmates. At capacity, it has about 510 employees, some 350 of which are

^{1/} The Medical Center does not operate as a full blown hospital. It provides basic medical care and minor outpatient surgery (stitches, provision of a splint, and treatment of minor injuries). It has no operating room, does not perform dialysis and does not have intensive care.

in the bargaining unit represented by the Union. The Union represents a combination of professional and non-professional, Wage Grade and General Schedule employees. The parties are covered by a collective bargaining agreement (CBA) that was executed in 1998 and expired on March 8, 2001. They are living under the terms and conditions of the old CBA and a Local Supplemental Agreement that runs concurrently with it until bargaining is completed on the new national agreement.

The parties' joint request for assistance was filed on December 9, 2009. The Employer proposes to ban all Health Care Workers (HCWs) from wearing artificial nails; extenders to natural nails or having fingernails more than ¼ inch in length. Originally proposed on November 14, 2008, the Employer's "Change in Working Conditions," notified the Union that the Joint Commission on the Accreditation of Healthcare Organizations (JC) was mandating that

our institution become compliant with several standards such as 1C.4.10 and NPSG (National Patient Safety Goals) 7A, which do not allow artificial nails or extenders when in direct contact with high risk patients. JC has deemed FMC Rochester to have a high risk population.

Not believing the change to be substantively negotiable, the Employer offered the Union the opportunity to bargain over the "I&I of the changes prior to implementation." Bargaining was postponed for almost a year because of transitions in Executive Staff. Finally, on October 21, 2009, the parties agreed upon ground rules for their negotiations. They exchanged their first and only proposals on November 9, and they conducted their first and only face-to-face negotiations for not more than 2 hours on November 24, 2009. Though they jointly attempted to bypass FMCS, the parties - with guidance from the Panel - agreed to go to mediation and did so, in a 1-hour session on January 25, 2010.^{2/}

^{2/} It is apparent the parties simply gave up on trying to bilaterally reach agreement and instead opted to have the matter decided by a third party. They jointly misunderstand their obligations under the Statute. Parties are expected to continue bargaining through the process, not simply give the writing of the Agreement over to the Panel.

Things did not improve before the Panel. No changes in their original proposals were made by either side in dealings with the Panel. Oddly, the Medical Center made a special point of telling the Panel this issue was a matter of "life and death." If only the parties' behavior had reflected such gravity this matter may have been resolved long ago.

Historically, all HCWs at the FMC were allowed to wear nails of any length, artificial nails and extenders. No problems were reported. It appears from the file that the trigger for the proposed change was an accreditation review, as reflected in a January 23, 2009, e-mail to Warden Arriola and other management officials. The Employer then notified the Union that it was intent on changing the fingernail policy.

The November 14, 2008, Notice cites 1C.4.10 and NPSG 7A as its authority for stopping the practice of wearing artificial nails and extenders. Goal 7 A says that Bureau of Prisons hospitals must comply with either "current World Health Organization (WHO) or Centers for Disease Control and Prevention (CDC) hand hygiene guidelines." A note is added saying that "Organizations are required to comply with 1A, 1B and 1C of the WHO or CDC guidelines."

It is clear the literature confirms that fingernails, including artificial nails, are efficient disease carriers if not properly trimmed. Nail extensions exacerbate the problem. I can find nothing that suggests gloves over extenders solves the problem, or even if it is possible to do so. The medical information infers that un-gloved hands are never safe and simply does not address whether nail length can be mitigated by gloving.

The Medical Center recognized that only employees dealing with "high risk" patients were subject to the new procedures, but it opted to designate all patients as "high risk." I am of the view that this designation is too broad, but there is insufficient evidence to narrow the covered class.

The Union's proposal essentially provides that employees should "consider" restrictions on nail length but avoids mandatory compliance.

By way of comparison, the Mayo Clinic does not appear to ban artificial nails for all HCWs. Instead, it "recommends" that HCWs "not wear artificial nails when having direct contact with patients at high risk." High risk patients are

specifically defined as "ICU patients, newborns, neonates, dialysis patients, immunocompromised patients, patients undergoing complicated surgical procedures and patients with multiple medical diagnoses or co-morbidities." Similarly, if employees have direct contact with these high risk patients, they must also keep their natural nails less than ¼ inch in length.

The other Bureau of Prisons Medical Facilities provide as follows:

1. FMC Devens: Recommends that natural nails be less than ¼ inch in length. There is no prohibition on extenders or artificial nails.

2. Federal Correctional Complex, Butner, N.C.: Since "clinical studies have implicated artificial nails as a source of health-care associated infection in high risk settings," it is "recommended that the wearing of artificial nails or extenders be discouraged for Dialysis, Oncology, and OR (operating room) staff who have direct patient care" In addition, Butner "recommended" that natural nails be kept at less than ¼ inch in length.

3. United States Medical Center for Federal Prisoners, Springfield, Missouri: HCWs can wear artificial nails or extenders except "when having direct patient contact with patients at high risk (e.g., PACU, operating rooms, dialysis, NO1, etc.). The Springfield Center adds that HCWs "should" (not must) keep natural tips at less than ½ inch in length.

4. FMC, Lexington: The policy itself simply says that "HCWs are not to wear artificial nails or extenders when having direct contact with patients at high risk." However, an attachment thereto (ECP Attachment 2 at page 3) defines high risk as: "e.g., All Patient Care Areas to include, Atwood Clinic, Central Clinic, Tele-medicine Clinic, F4 East and F4 West."

DECISION

In light of the foregoing, the following resolution is ordered:

1. The Medical Center limitations on nail length shall be adopted. Similarly, artificial nails and nail extensions are not permitted for employees working in high risk areas or whose duties could reasonably require they have such contact.

2. This agreement shall remain in effect for a period of 2 years from the date of this opinion. Either party may request to reopen this agreement after that date.

A handwritten signature in cursive script that reads "Tom Angelo". The signature is written in black ink and is positioned above the typed name and title.

Thomas Angelo
Arbitrator

June 8, 2010
Mill Valley, California