



THE SECRETARY OF VETERANS AFFAIRS  
WASHINGTON  
May 29, 2013

Director  
West Palm Beach VA Medical Center  
7305 N. Military Trail  
West Palm Beach, FL 33410

Dear

I am responding to the issues raised in the September 9, 2010, and September 16, 2010, memoranda concerning the American Federation of Government Employees Local 507 request to bargain compressed work schedules for registered nurses in Quality Management Service at the West Palm Beach Department of Veterans Affairs Medical Center.

This decision has taken far too long to reach the parties. Going forward, I have provided clear instruction that the process by which decisions concerning the applicability of 38 United States Code (U.S.C.) § 7422 are reviewed and recommended will be governed by strict timeframes. Training on this process was included as part of the joint labor-management 7422 training and was presented over the last 18 months. Additional training will be available online to all union and management officials. Future 7422 decisions will be provided in a much more timely manner.

I have decided, on the basis of the enclosed decision paper, that the issue presented in this bargaining is a matter concerning or arising out of professional conduct or competence within the meaning of 38 U.S.C. § 7422(b) and is, therefore, outside the scope of collective bargaining.

Sincerely,

A handwritten signature in blue ink, which appears to read "Eric K. Shinseki", is positioned above the printed name.

Eric K. Shinseki

Enclosure



THE SECRETARY OF VETERANS AFFAIRS  
WASHINGTON

May 29, 2013

President  
AFGE Local 507  
P.O. Box 10822  
Riviera Beach, FL 33419

Dear

I am responding to the issues raised in the September 9, 2010, and September 16, 2010, memoranda concerning the American Federation of Government Employees Local 507 request to bargain compressed work schedules for registered nurses in Quality Management Service at the West Palm Beach Department of Veterans Affairs Medical Center.

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Sincerely,

A handwritten signature in blue ink, reading "Eric K. Shinseki", is written over the typed name. The signature is fluid and cursive, with a long, sweeping tail that extends to the right.

Eric K. Shinseki

Enclosure

Title 38 Decision Paper  
Department of Veterans Affairs (VA)  
Medical Center, West Palm Beach, Florida  
VA – 11 –

FACTS

On September 22, 2009, four registered nurses (RN) at the VA Medical Center (VAMC) in West Palm Beach, Florida, submitted a memorandum to the Chief of Quality Management Service (QMS) requesting to be placed on a compressed work schedule (CWS).<sup>1</sup> (Attachment A) On September 29, 2009, QMS, denied the request. (Attachment B) She stated that the QMS staff is too small to accommodate compressed tours. She further explained that staff members have specialized training in specific areas where immediate attention of problems cannot be delayed until a nurse returns to work. These areas include infection control, utilization review, and risk management. Compressed tours would create the additional impact on patient care coverage by allowing nurses to be off duty on more days.

On October 23, 2009, American Federation of Government Employees Local 507 (AFGE or union), submitted a demand to bargain on CWS and requested that management support its denial by providing an adverse agency impact. (Attachment C) Management and AFGE met on November 16, 2009, to discuss CWS for QMS nurses.<sup>2</sup> (Attachment D) During the meeting, management explained that the limited staff number in QMS is not sufficient to cover patient care needs during the days some of the staff would be off due to CWS. Management further explained that patient problems have to be addressed immediately and cannot wait until a nurse returns to duty. Although the nurses try to cover for each other when they are on leave, it is very difficult because their knowledge is so specialized. It is also difficult for a nurse to adequately perform his or her own job when covering for someone else. There is only one risk manager to cover peer reviews, one patient safety representative, one methicillin-resistant staphylococcus aureus (MRSA) nurse, and two infection control RNs who are responsible for the medical center and the nursing home. QMS nurses must be available from 8:00 a.m. to 4:30 p.m. to respond to patient precertification calls from physicians. These RNs are not needed during the additional hours they would be on duty during CWS. During the meeting, AFGE requested CWS be implemented on a trial basis. Management agreed to discuss the request with the VAMC Director.

In a response dated December 9, 2009, VAMC Director, denied the union's request for CWS for QMS RNs because it would have an adverse impact on the medical center. (Attachment E) She specifically explained that QMS is comprised of several units: infection control; MRSA; utilization management; accreditation; performance measure; peer review; VA surgical quality improvement; and patient

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<sup>1</sup> One of the RNs has left QMS due to a promotion as a nurse manager.

<sup>2</sup> Even though the request came from four RNs, the discussions between the union and management included the entire QMS since management did not think it was equitable to allow some QMS staff to select a CWS schedule while others did not.

safety. Coverage for absent employees is a particular problem because they work in specialized areas and have specialized training, certification, and knowledge that are not easily adapted to other areas. The QMS nurses are represented on more than 50 medical center committees. These committees directly relate to patient care because they address patient safety and infection control. The committees also evaluate surgical patient care, Joint Commission accreditation, and patient behavior and management. Increased absences due to CWS interfere with consistency in representation on the committees, which is important for continuity.

On January 11, 2010, AFGE notified management that it would request assistance from the Federal Service Impasses Panel (FSIP). (Attachment F) The union subsequently requested the assistance of a mediator from the Federal Mediation and Conciliation Service (FMCS). (Attachment G)

On June 29, 2010, representatives from the union, FMCS, and management met to discuss the CWS issue. (Attachment H) \_\_\_\_\_, the QMS representative at the meeting, explained why management was unable to implement CWS. She explained the following:

- The utilization management nurses review all patients every day to determine if they need to be in the hospital or a specialized unit such as acute care or intensive care;
- QMS nurses must review records to determine if patients have to be moved to different beds, which is an important aspect in the continuum of patient care. This requirement makes it necessary for the nurses to work the regular 8:00 a.m. to 4:30 p.m. medical center administrative tour of duty, which is also when the physicians normally work;
- Additional days off for CWS create a shortage of nurses when they are most needed. The nurses are needed on duty during normal administrative hours (8:00 a.m. – 4:30 p.m.), rather than the extra 2 hours in a CWS day;
- In addition, only one nurse is available to cover MRSA issues, and there is only one risk manager to conduct peer reviews of other nurse's clinical care when there is concern about care provided to a particular patient. These are specialized duties that cannot be performed by other staff members;
- Days off would create staff shortages during critical administrative work hours and nurses would be on duty an additional 2 hours when they are not needed; and
- The highest volume of patient care activity occurs during the normal 8-hour shift.

The meeting with the mediator was concluded without an agreement being reached.

On July 7, 2010, \_\_\_\_\_ Human Resources Service, further explained to \_\_\_\_\_, President, AFGE Local 507, the reasons why management was unable to implement CWS. (Attachment I) \_\_\_\_\_ asked \_\_\_\_\_ to review several decisions where the Under Secretary for Health (USH) determined that

bargaining CWS was contrary to 38 U.S.C. § 7422 and to advise him if AFGE wanted to proceed with negotiations in light of the decisions.

In a memorandum dated July 26, 2010, \_\_\_\_\_ responded that the union decided to continue with CWS negotiations for QMS nurses.

In a memorandum dated September 9, 2010, the VAMC Director requested that the USH determine that the establishment or elimination of CWS for nurses is covered by 38 U.S.C. § 7422(b). (Attachment J)

On September 16, 2010, the union submitted its opposition to management's request for a decision by the USH under 38 U.S.C. § 7422(b). (Attachment K) The union argued that there is no clinical basis for the denial of CWS because the QMS nurses are involved with direct patient care 24 hours a day, 7 days a week. In addition, the union stated that working 10-hour shifts would not adversely impact patient care and safety. Staff members in QMS frequently cover for each other, and the continued growth of the staff has allowed more coverage flexibility.

### AUTHORITY

The Secretary has the final authority in VA to decide whether a matter or question concerns or arises out of professional conduct or competence (direct patient care, clinical competence), peer review, or employee compensation within the meaning of 38 U.S.C. § 7422(b).

### ISSUE

Whether the union's demand to bargain and request for assistance from the FSIP regarding management's decision not to establish CWS for RNs assigned to QMS involves issues concerning or arising out of professional conduct or competence within the meaning of 38 U.S.C. § 7422(b).

### DISCUSSION

The Department of Veterans Affairs Labor Relations Act of 1991, 38 U.S.C. § 7422, granted collective bargaining rights to Title 38 employees in accordance with Title 5 provisions, but specifically excluded from the collective bargaining process matters or questions concerning or arising out of professional conduct or competence (direct patient care or clinic competence), peer review, and employee compensation as determined by the USH.

The tours of duty for Title 38 health care personnel are fundamental to establishing the level and quality of patient care to be provided by VA. Pursuant to 38 U.S.C. § 7421(a), the Secretary has prescribed regulations contained in VA Directive/Handbook 5011, Part II, Chapter 3 regarding the establishment of work weeks, tours of duty, and work schedules for medical professional employees. These regulations grant facility directors

the discretionary authority to institute flexible and CWS for RNs appointed under the authority of 38 U.S.C. § 7401(1) or 7405(a)(1). VA Handbook 5011, Part II, Chapter 3, Section 5g(1)(a) provides the following:

Compressed work schedules shall be consistent with patient care requirements. For example, compressed work schedules may be adopted to expand clinic service hours, staff mobile clinics, or otherwise improve service to veterans.

In accordance with 5 U.S.C. § 6122, an agency may establish programs which allow CWS. VA has established a program allowing CWS for all of its employees, including Title 38 employees. However, if participation of Title 38 employees in a proposed or ongoing CWS program adversely impacts patient care, then the implementation or continuation of a CWS program is non-negotiable under 38 U.S.C. § 7422(b) and not subject to third party review. In such a case, there is a conflict between 38 U.S.C. § 7422 and 5 U.S.C. § 6131(c)(2)(A), which provides for the FSIP to rule on the agency's determination that CWS has produced an adverse agency impact. Where there is such a conflict, 38 U.S.C. § 7425(b) operates to render the Title 5 provision inapplicable.

In the instant case, the union asserts that implementation of CWS would not adversely impact patient care because the QMS nurses take care of patients 24 hours a day, 7 days a week. The union further contends that the nurses are able to cover for each other during absences, especially with the recent addition of staff in QMS. VAMC management asserts that QMS is a small service with a number of specialized areas. VAMC management acknowledges that RNs sometimes must cover for the absence of their peers. However, such instances are limited to critical issues requiring immediate attention that cannot wait until the RN returns. RNs cannot be expected to perform two full-time jobs simultaneously if a CWS program is implemented. Under a CWS program, the regular absence of available RNs in QMS would significantly burden the covering staff and adversely affect patient care. In risk management, patient safety, and peer review, there is only one nurse available to address patient care issues. There are only two infection control nurses who are both needed to cover the medical center and the nursing home. (Attachment L) In utilization management, although there are five nurses, CWS would adversely impact patient care as coverage is needed for the precertification hours of 8 a.m. to 4:30 p.m. Therefore, CWS days off would create nursing shortages during a period when QMS nurses are most necessary for patient care. Finally, patient incidents must be investigated and addressed immediately when they occur and cannot be delayed until a nurse returns to duty.

The adverse impact on patient care demonstrated by VAMC management supports a determination that bargaining over the establishment of CWS for nurses in QMS involves issues of professional conduct and competence and is, therefore, non-negotiable under 38 U.S.C. § 7422.

This decision is consistent with prior USH determinations in which the USH determined that the elimination of or changes to CWS due to patient care needs was a matter

involving professional conduct and competence within the meaning of 38 U.S.C. § 7422 and, therefore, non-negotiable. See e.g., VAMC Cleveland (July 9, 2008); Anchorage VA Healthcare System and Regional Office (August 22, 2005); VAMC West Palm Beach (March 15, 2005); VAMC Indianapolis (February 24, 2004); VAMC Alexandria (October 16, 2003); and VA Gulf Coast Healthcare System (October 16, 2003).

RECOMMENDED DECISION

That the union's demand to bargain and request for FSIP assistance regarding management's decision not to establish CWS for QMS nurses involves issues concerning or arising out of professional conduct and competence within the meaning of 38 U.S.C. § 7422(b).

APPROVED/DISAPPROVED

  
Eric K. Shinseki  
Secretary

5/29/2013  
Date