



DEPARTMENT OF VETERANS AFFAIRS  
UNDER SECRETARY FOR HEALTH  
WASHINGTON DC 20420

JAN 18 2005

Director (00)  
1540 Spring Valley Drive  
Huntington, WV 25704

President AFGE 2344  
1540 Spring Valley Drive  
Huntington, WV 25704

Dear Ms.                      and Mr.                      :

I am responding to the issues raised in your memoranda of August 30, 2004 and September 9, 2004, respectively, concerning two grievances filed by AFGE Local 2344 related to the change of nurses' schedules at the VA Medical Center in Huntington, West Virginia.

Pursuant to delegated authority, I have determined, on the basis of the enclosed decision paper, that the issues presented by the subject grievances and a related unfair labor practice (ULP) charge concern or arise out of professional conduct or competence and that the grievances are therefore precluded by 38 U.S.C. 7422(b).

Please provide this decision to your Regional Counsel and Human Resources Officer as soon as possible.

Sincerely yours,

A handwritten signature in cursive script, appearing to read "Jonathan Perlin", is written over the typed name.

Jonathan Perlin, MD, PhD, MSHA, FACP  
Acting Under Secretary for Health

Enclosure

Title 38 Decision Paper  
VAMC Huntington, WV  
VA -04-18

FACTS

On July 13, 2004, management at the Huntington, West Virginia VA Medical Center (VAMC) notified \_\_\_\_\_, RN, a Title 38 nurse assigned to the VAMC's Unit 4-South, that her schedule would be changed for the period beginning on Thursday, July 29, 2004, and ending on Tuesday, August 3, 2004. The VAMC's Associate Director for Patient Care Services, \_\_\_\_\_, RN, described the reasons for this schedule change as follows:

During the week of July 25<sup>th</sup> through July 31, Ms. \_\_\_\_\_ scheduled days off were changed to accommodate another RN's unexpected resignation. Staffing support from other units or intermittent staff was unavailable. ... With the schedule unchanged there would only be one RN available for duty. Other RNs' schedules had also been changed to provide coverage.

Some employees have never had their days off changed and some have had it changed several times. Pre-established staffing patterns [as required by the parties' local supplemental collective bargaining agreement] requiring three-day weekends every third week and no more than six consecutive work days result in difficulty covering Mondays, Fridays and weekends.

Four RNs are scheduled on the 12 pm – 8 am tour of duty to meet the [Unit 4-South] staffing requirements. With only a 17-day notice, the least senior RN [assigned to the unit] transferred to another VA Medical Center within the VISN, leaving a vacancy [on 4-South]. This resignation left 3 RNs [assigned to the unit on the 12 pm – 8 am tour of duty,] with two of them having the same [scheduled] days off requiring a need for a change in the schedule.

Minimum staffing requires at least two RNs [on the unit] for every tour. ... It is impossible to staff a unit without ever changing employees' patterns due to resignations, transfers to other services, annual leave, and education/training issues. Nursing must maintain minimum staffing levels to ensure adequate patient care and safety.<sup>1</sup>

Ms. \_\_\_\_\_ was originally scheduled to be off Saturday, July 31, through Monday, August 2, for a total of three consecutive days off. As a result of the change, Ms. \_\_\_\_\_ was still scheduled to have three days off -- July 29, August 1 and August 3, 2004 – but they were not consecutive. After Ms. \_\_\_\_\_ was notified of the schedule change but before the change took effect, an RN who had been on vacation returned and agreed to work on July 31 and August 2. In addition, the facility filled one RN vacancy. As a result, management was able to reinstate Ms. \_\_\_\_\_ original schedule as of July 27, 2004.

---

<sup>1</sup> See Attachment K, page 2.

On July 19, 2004, American Federation of Government Employees Local 2344 (Union) filed a Third Step grievance over the change in Ms. \_\_\_\_\_ schedule. *Attachment A*. In the grievance, the Union alleged that management had violated Article 16 of the parties' local supplemental collective bargaining agreement, which purported to require that (a) nurse staffing schedules be posted three weeks in advance; (b) nurses be given one three-day weekend off every three weeks; (c) nurses have at least two consecutive days off at least two weeks out of every three; and (d) once a nurse had been scheduled into a "cyclic pattern, the employee's time will not be changed except in emergency situations or by the employee's request. The Union further alleged that management's action in changing Ms. \_\_\_\_\_ schedule violated 5 CFR § 610; 5 USC 7116(a)(1), (2) and (4); and Article 20, sections 1 and 3 of the VA-AFGE master agreement.<sup>2</sup> As a remedy, the Union requested a "written agreement stating there will be no more changes of employee schedules on a routine basis or for non-emergency reasons or in a manner inconsistent with the collective bargaining agreement as appropriate."

On July 28, 2004, the Union filed a second Third Step grievance, this one alleging an ongoing management practice of changing nurses' days. *Attachment C*. In this grievance, the Union alleged that management's conduct violated Article 20, Sections 1 and 3(A)(2), (B), (C), (D), (F) and (J) of the VA-AFGE master agreement; Article 16 of the parties' local supplemental agreement (as amended)<sup>3</sup>; 5 CFR chapter 71 (sic), and 5 USC 7421 (sic).<sup>4</sup>

On August 3, 2004, management responded to both the July 19 and the July 28 grievances, stating that the issues grieved fell within the 38 U.S.C § 7422 exclusions and were therefore non-grievable. *Attachment E*.

The parties held a conference call on August 16, 2004, to discuss the grievances further. At that time, the union insisted that management comply with 5 CFR Part 610 in scheduling nurses' tours of duty. In addition, the union proposed at this time that nurse staffing deficiencies be addressed through overtime or through permanent adjustments of nurses' work schedules rather than occasional rescheduling of days off. Management again stated that nurse scheduling raises issues of direct patient care and is therefore excluded from bargaining and the negotiated grievance procedure under 38 USC § 7422(b). *Attachment F*.

The union invoked arbitration on the July 19 grievance on August 10, 2004, and on the July 28 grievance on August 12, 2004. *Attachments G and H*.

---

<sup>2</sup> The relevant portions of the VA-AFGE master collective bargaining agreement are attached hereto as *Attachment B* and are discussed at page 3 below.

<sup>3</sup> The relevant portions of the local supplemental agreement and amendment thereto are attached hereto as *Attachment D* and are discussed on page 3 below.

<sup>4</sup> As there is no section 7421 in Title 5, we assume the union meant to allege a violation of 38 USC § 7421. See footnotes 5 and 8 and discussion on page 7 below.

By two memoranda dated August 30, 2004, the facility Director requested that the Under Secretary for Health (USH) determine that the issues raised by the July 19 and July 28 grievances involved issues of professional conduct or competence and were therefore exempt from collective bargaining under 38 U.S.C. § 7422. *Attachment I.*

The Union provided its own input to the USH in a memorandum dated September \_\_\_\_, 2004. *Attachment J.* In its memorandum, the Union alleged that management was changing RN schedules without following negotiated procedures; days off were being split; management decisions to change schedules were later reversed, proving there was no need for the change in the first place; nurses were becoming "disgruntled;" and patient care was being negatively impacted. The Union insisted that management must comply with all provisions of 5 CFR 610.121 when scheduling nurses, and further cited 5 USC 7421 and 5 USC 7422 to explain its position.<sup>5</sup>

On November 3, 2004, the Medical Center Director provided to the USH additional information on the events underlying the two grievances. *Attachment K.* This additional information consisted of two memoranda from the Associate Director for Patient Care Services, \_\_\_\_\_. In the first, Ms. \_\_\_\_\_ explained the particular staffing and scheduling issues that had led to the change in Ms. Ward's schedule in July and August 2004. In the second, Ms. \_\_\_\_\_ set forth more general information as to how Nursing Service at the Huntington VAMC posts nurses' schedules and addresses staffing problems through contingency planning. In both memoranda, Ms. \_\_\_\_\_ stressed that "[i]t is impossible to staff a unit without ever changing employees' patterns due to resignations, transfers to other services, annual leave, and education/training issues. Nursing must maintain minimum staffing levels to ensure adequate patient care and safety."

In a memorandum to the USH dated November 5, 2004, the Union re-affirmed its position that the issue presented is grievable, that the provisions of the local agreement are negotiable, and that 38 U.S.C. § 7422 is not applicable. *Attachment L.*

On or about December 21, 2004, the Union filed an unfair labor practice (ULP) charge with the Federal Labor Relations Authority, alleging that management's actions in changes nurses' schedules and holding the grievances in abeyance pending the USH's 38 USC § 7422 decision -- coupled with the long pendency of that decision's request -- constituted an unfair labor practice. *Attachment M.*

---

<sup>5</sup>We assume the Union meant to refer to 38 USC § 7421 and 38 USC § 7422, but has misconstrued the effect of both. 38 USC § 7421 provides that "notwithstanding any law, Executive order, or regulation, the [VA] Secretary shall by regulation the hours and conditions of employment and leaves of absence of" Title 38 medical professionals, including registered nurses. 38 USC § 7422(a) provides that the Secretary's regulatory authority under 38 USC § 7421 is subject to collective bargaining, while 38 USC § 7422(b) excludes from such bargaining issues pertaining to professional conduct or competence (including clinical competence and direct patient care), peer review, and employee compensation. A 1991 note to 38 USC § 7421 preserved "existing collective bargaining arrangements and pending actions" in existence at the time of 38 USC § 7422's enactment. See discussion on page 7 and footnote 8 below.

On or about December 23, 2004, the USH requested further information regarding the frequency of management-initiated nurse schedule changes between June 1, 2004 and the date of the first grievance. On December 28, 2004, VAMC management provided the requested information to the USH. *Attachment N*.

#### APPLICABLE COLLECTIVE BARGAINING PROVISIONS

In its grievance, the Union alleged violations of Article 20, Sections 1 and 3(A)(2), (B), (C), (D), (F) and (J) of the VA-AFGE master agreement and of Article 16 of the parties' local supplemental agreement, as amended. Article 20 of the VA-AFGE master agreement provides definitions and other general statements relating to scheduling and tours of duty. See *Attachment B*. Article 16 of the parties' local supplemental agreement, which was signed in 1978 and amended thereafter,<sup>6</sup> sets forth more specific provisions relating to the same subject. Section 2 of Article 16, as amended, includes the following provisions:

Personnel may be assigned duty in a cycle which repeats itself every three (3) weeks. The cycle will consist of (a) no more than seven (7) consecutive days assigned once in the three week cycle, (b) each period of seven days will be preceded or followed by a 3-day weekend, allowing for one 3-day weekend every three weeks, (c) no more than one (1) episode of split days off in each three week cycles, and (d) rotation of shifts to provide adequate staffing will be reduced to a minimum as employees will be assigned indefinite tours of duty.

\* \* \*

Once an employee is scheduled into the cyclic pattern, the employee's time will not be changed except in emergency situations or at the employee's request. The employee will request such change in writing and will be notified of any action taken in writing.

*Attachment D*, page 1.

#### PROCEDURAL HISTORY

The Secretary of Veterans Affairs (Secretary) delegated to the USH the final authority to decide whether a matter or question concerns or arises out of professional conduct or competence (i.e., direct patient care, clinical competence). When labor and management disagree over such matters or questions and the parties are unable to resolve the dispute, the USH is asked to render a decision.

---

<sup>6</sup> The parties do not identify in any of their various submissions when their local supplemental agreement took effect. However, it was amended in 1978. See *Attachment D*, page 2.

## ISSUES

1. Whether the July 19, 2004 grievance over the Nurse Manager's decision to change the schedule of Donna Ward, RN, is a matter or question concerning or arising out of professional conduct or competence within the meaning of 38 USC § 7422(b).
2. Whether the July 28, 2004 grievance over Huntington VAMC management's practices with respect to changing RNs' schedules is a matter or question concerning or arising out of professional conduct or competence within the meaning of 38 USC § 7422(b).
3. Whether Article XVI of the parties' local supplement agreement (as amended) contains provisions relating to nurse scheduling that impede patient care and are therefore non-negotiable under 38 USC § 7422(b).
4. Whether the Union's December 21, 2004 ULP charge raises issues of professional conduct or competence within the meaning of 38 USC § 7422(b).

## DISCUSSION

The Department of Veterans Affairs Labor Relations Act of 1991, 38 USC § 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, peer review, and employee compensation as determined by the USH.

The workweeks, tours of duty and work schedules for Title 38 health care personnel are fundamental to establishing the level of patient care provided by the Department of Veterans Affairs. Pursuant to 38 USC § 7421(a), the Secretary has prescribed regulations contained in VA Handbook 5011, Part II, Chapters 1 and 3 regarding the establishment of workweeks, tours of duty, and work schedules for medical professional employees. These regulations alone govern work scheduling for Title 38 nurses. Indeed, the government-wide regulations applicable to Title 5 employees, codified at 5 CFR Part 610 and cited by the Union here, expressly exclude Title 38 nurses from their purview. See 5 CFR §§ 610.101 ("[t]his subpart applies to each employee to whom subpart A of part 550 applies"), 550.101(b)(12) (excluding VA physicians and nurses, etc. from coverage of subpart A of part 550). Moreover, to the extent that a Title 5 provision conflicts with the VA Secretary's authority under 38 USC § 7421(a) to "prescribe by regulation the hours and conditions of employment and leaves of absence" of Title 38 nurses, 38 USC § 7425(b) renders the Title 5 provision inapplicable.

The specific provisions of the VA regulations pertaining to nurses' work schedules are as follows:

VA Handbook 5011, Part II, Chapter 1, paragraphs 2(a) and (b) provide:

a. In scheduling hours and tours of duty for VA employees, primary consideration will be given to efficiency in management and conduct of agency functions, and equitable treatment of individual employees. Work schedules will be established in a manner that realistically reflects the actual work requirement.

b. In the Veterans Health Administration (VHA), the proper care and treatment of patients shall be the primary consideration in scheduling tours of duty under these instructions. Duty schedules shall be established as appropriate and necessary for performance of services in the care and treatment of patients and other essential activities within the administrative discretion of the Under Secretary for Health or designated officials. ...

VA Handbook 5011, Part II, Chapter 3, Paragraph 2(d) provides (in pertinent part):

Because of the continuous nature of the services rendered at hospitals, the facility Director, or designee (in no case less than a chief of service), has the authority to prescribe any tour of duty to ensure adequate professional care and treatment to the patient, consistent with these provisions.

The mission of all VA Medical Centers is to provide the proper care and treatment to Veteran patients. In support of this objective, and consistent with the VA regulations cited above, employee work schedules are subject to timely modification, when the need arises and with proper notice to the effected employee(s).

In the events giving rise to the July 19 grievance, staffing exigencies and patient care requirements forced management to change Ms. [redacted] schedule in order to meet patient care needs. Likewise, the management practices alleged in the July 28 grievance involved changing nurses' schedules were necessary to provide adequate staffing and to avoid interruptions in patient care. Management has provided information indicating that the vast majority of the schedule changes in the period leading to the July 28 grievance were required to ensure proper patient care coverage.<sup>7</sup> Where management determines that scheduling changes are required to provide adequate patient care services, the determination is non-negotiable and non-grievable under 38 USC § 7422(b). To the extent that the Union would interpret Article 16, section 2 of the parties' local supplemental agreement (as amended) to preclude management from changing nurses' days off to meet patient care needs, such interpretation is inconsistent with 38 USC § 7422(b) and renders the subject provision(s) unenforceable.

The union has argued in this matter that 38 USC § 7422 is inapplicable to the parties' local supplemental agreement (and, by extension, to the grievances alleging violation of that agreement) because the agreement pre-dates the statute's effective date. The

---

<sup>7</sup> Management indicates that schedule changes on June 8-9 ( [redacted] , RN); June 18-19 ( [redacted] , RN); June 21 ( [redacted] , RN); and July 13, 2004 ( [redacted] , RN) were made at the employees' requests rather than to ensure patient care coverage. See *Attachment N*.

union bases this argument on a provision of Public Law 102-40 that preserved collective bargaining arrangements that were in effect when 38 USC § 7422 was enacted. However, the effect of this provision was not, as the union suggests, to exclude pre-existing collective bargaining *agreements* from the application of 38 USC § 7422(b), but only to preserve collective bargaining *units* recognized prior to May 7, 1991, as well as grievance actions initiated prior to that date. See 38 USC § 7421, Historical and Statutory Notes, Preservation of Existing Collective Bargaining Arrangements and Pending Actions (*citing* P.L. 102-40, Title II, § 205, 105 Stat. 207 (May 7, 1991)).<sup>8</sup> The parties' local agreement is thus subject to the section 7422 bargaining exclusions, and those exclusions render Article 16, Section 2 non-negotiable as discussed above.

The union's ULP involves the same scheduling changes at issue in the grievances and further alleges an "unwarranted delay" in the issuance of this 38 USC § 7422 decision. Substantively, the ULP involves the same patient care related matters as the grievances and is therefore exempted from the collective bargaining process by 38 USC § 7422(b). Furthermore, the grievances were quite properly held in abeyance pending this determination, so the delay in processing this decision – while regrettable – was clearly warranted. See *generally* VAMC Asheville, NC and AFGE Local 446, 57 FLRA No. 137; 57 FLRA 681 (2002) (holding that a 38 USC § 7422 non-negotiability determination on the issues underlying a grievance and related ULP deprive FLRA of jurisdiction in the matter no matter when such determination is issued).

The substance of this decision is consistent with previous similar USH determinations. In a prior case, the USH determined that a change in the tours of duty for nurses, to improve communication during their shift changes, involved professional conduct and competence within the meaning of 38 U.S.C. § 7422. See *San Juan VAMC*, December 17, 2003. See *also* *Brockton VAMC*, August 24, 1994 (changes in nursing tours of duty); *Des Moines VAMC*, November 26, 1993 (rotating nursing shifts).

---

<sup>8</sup> This statutory note reads:

Section 205 of Pub. L. 102-40 provided that:

(a) Existing collective-bargaining arrangements. – Any determination under chapter 71 of title 5, United States Code of a collective bargaining unit within the Veterans Health Administration of the Department of Veterans Affairs, and any recognition under the chapter of an employee labor organization as the exclusive bargaining representative for employees in a collective bargaining unit of the Department of Veterans Affairs, that is in effect on the date of the enactment of this Act [May 7, 1991] shall not be affected by the amendments made by this Act and shall continue in effect in accordance with the terms of such determination or regulation.

(b) Pending cases. – With respect to cases pending on the date of enactment of this Act [May 7, 1991], or those cases which are brought before the establishment of either an administrative grievance procedure pursuant to section 7463 of title 38, United States Code (as added by the amendments made by this title), or a negotiated grievance procedure established under a collective bargaining agreement, such cases shall proceed in the same manner as they would have if this [Pub. L. 102-40] had not been enacted.

DECISION

1. The July 19, 2004 grievance over the decision of Huntington VAMC management to change the schedule of Donna Ward, RN, so as to maintain the required staffing levels and to ensure adequate patient care and safety, involves a matter or question concerning or arising out of professional conduct or competence within the meaning of 38 U.S.C. § 7422(b).

APPROVED ✓

DISAPPROVED \_\_\_\_\_

2. The July 28, 2004 grievance over Huntington VAMC management's general practice of changing nurses' days off where necessary to maintain the required staffing levels and to ensure adequate patient care and safety, involves a matter or question concerning or arising out of professional conduct or competence within the meaning of 38 U.S.C. § 7422(b).

APPROVED ✓

DISAPPROVED \_\_\_\_\_

3. To the extent that the union interprets Article 16, section 2 of the parties' local supplement agreement (as amended) to preclude management-initiated changes in nurses' schedules to meet patient care needs, that provision impedes patient care and is therefore non-negotiable under 38 USC § 7422(b).

APPROVED ✓

DISAPPROVED \_\_\_\_\_

4. The union's December 21, 2004 ULP charge, which is based on the same substantive issues as the July 19 and July 28 grievances as well as management's alleged "unwarranted delay" in responding to those grievances pending the issuance of this decision, raises issues of professional conduct or competence within the meaning of 38 USC § 7422(b).

APPROVED ✓

DISAPPROVED \_\_\_\_\_

Jonathan B. Perlin  
Jonathan B. Perlin, MD, PhD, MSHA, FACP  
Acting Under Secretary for Health

1-18-05  
Date