



DEPARTMENT OF VETERANS AFFAIRS  
UNDER SECRETARY FOR HEALTH  
WASHINGTON DC 20420

AUG 22 2005

Director(00)  
Alaska VA Healthcare System & Regional Office  
2925 Debarr Road, Suite #3700  
Anchorage, Alaska 99508

AFGE, Local 3028  
2925 Debarr Road  
Anchorage, Alaska 99508

Dear Mr. [redacted] and Mr. [redacted]

I am responding to the issues raised in your memoranda of October 25, 2004; November 1, 2004; November 8, 2004; January 31, 2005; April 28, 2005; May 11, 2005; and May 24, 2005, respectively, concerning the Unfair Labor Practice Charge (ULP) filed by the American Federation of Government Employees (AFGE), Local 3028, relating to Compressed Work Schedules for Primary Care Service Title 38 employees at the Alaska VA Healthcare System & Regional Office (AVAHSRO).

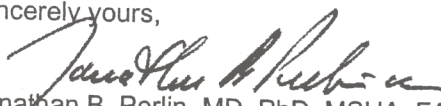
Pursuant to delegated authority, I have determined, on the basis of the enclosed decision paper, that the issues presented are matters concerning or arising out of professional conduct or competence and are thus exempted from collective bargaining by 38 U.S.C. § 7422(b).

It must be noted that the union and management at the AVAHSRO did not meet to discuss and try to resolve the issues that gave rise to the need for a 7422 determination. As a matter of policy I generally will not make a determination unless the parties have met to discuss and attempt to resolve their issues prior to submission. Once the parties have explained their positions, and it is clear that the issues regarding whether the matters in dispute are not negotiable pursuant to 38 U.S.C. § 7422, cannot otherwise be resolved a request for a decision should be submitted. In the instant case, because of the pending ULP and because the extended history of written proposals and responses have clearly framed the parties position, I have made a determination in the absence of evidence of the face-to-face meeting of the parties.

As is the situation in the instant case, I will make a determination based on the facts, the evidence and the explanation provided by the parties. I will not consider a new proposal provided by any of the parties. The procedure provided to submit your information, is not an opportunity to negotiate issues that are excluded by 38 U.S.C. § 7422. For said reasons, I did not consider the new proposed schedule provided by the union.

Please provide this decision to your Regional Counsel as soon as possible.

Sincerely yours,

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

Title 38 Decision Paper  
Alaska VA Healthcare System  
VA – 05-04

FACTS

On August 3, 2004, the President of the American Federation of Government Employees (AFGE) Local 3028, at the VA Alaska VA Healthcare System and Regional Office (AVAHSRO) proposed the implementation of a six-month pilot Compressed Work Schedule (CWS) program for the Primary Care Service Unit Providers. The union's proposal came by way of a demand to bargain over the impact and implementation of the proposed program. Management at the AVAHSRO responded to the union by informing them that such work schedule would affect direct patient care services at the Primary Care unit, and was therefore excluded from collective bargaining under 38 U.S.C. § 7422.

The underlying issue arose on November 17, 2003, when \_\_\_\_\_, NP, a nurse in the AVAHSRO's Primary Care Service unit, requested participation in a CWS. *Exhibit A.* The Chief of Primary Care denied Ms. \_\_\_\_\_ request "due to the complexity of delivery of consistent health care," stating that the requested schedule "would negatively impact patient care." *Exhibit B.* Subsequently, Ms. \_\_\_\_\_ sent a request for a CWS to the Chief of Staff, \_\_\_\_\_, M.D. *Exhibit C.* Dr. \_\_\_\_\_ denied the request on December 15, 2003, "due to the impact on patient care for continuity, access and coordination." *Exhibit D.* On January 12, 2004, Ms. \_\_\_\_\_ sent a final request for a CWS to the AVAHSRO Medical Center Director. *Exhibit E.* This request was also denied.

Subsequently, the union sent a request for the assistance of the Federal Service Impasses Panel (FSIP) in the denial of Ms. Stevenson's CWS. *Exhibit F.* On August 5, 2004, the FSIP sent a letter to the union granting their request for withdrawal. *Exhibit G.*

On August 3, 2004, the union sent a formal demand to bargain over the impact and implementation of a proposed CWS pilot program for the Primary Care Unit Providers<sup>1</sup>. *Exhibit H.* Along with the demand to bargain, the union included a proposed schedule for the Primary Care Unit. The union proposed the following schedule:

---

<sup>1</sup> The requesting Providers were: \_\_\_\_\_ (no longer an employee); \_\_\_\_\_, MD; \_\_\_\_\_, RN; \_\_\_\_\_, DO; \_\_\_\_\_, MD; \_\_\_\_\_, MD (Chief, Primary Care); \_\_\_\_\_, MD; \_\_\_\_\_, MD; Yvonne Stevenson, NP; Ronal Taylor (no longer an employee). Three new providers have joined the primary care staff. These providers are not signatories to the memo. (See, *Exhibit P*).

Working hours; Currently with open access in the primary care clinic, a full time provider will see 14 patients in a day after excluding federally mandate[d] 30 minute breaks and 30 minutes allowed administration time. Consequently, **140** visits are generated in a biweekly period. We propose that the current working hours be changed to a 'compressed work schedule 5-4-9'. This means that we work 9 hours a day for 8 days, 8 hours a day for 1 day and one day off in a biweekly period. In the 9 hours days, we see 16 patients and administration time of up to 60 minutes, plus 1 hour lunch (includes 2-15 minute breaks). In 8 hours days, we will have 15 patients and 30 minutes administration time, plus 1 hour lunch (includes 2-15 minute breaks). As a result, **143** visits will be accomplished in the biweekly period. So if we could open up our current administration time period, we can complete our direct patient care from 8:00-16:30 in weekdays while generating 16 visits in a 9 hour day and 15 patients in our 8 hour day. This would allow us to see more patients biweekly and alleviate some of our present backlog. The implication of the suggestion is that there will be minimum impact to the existing infrastructure of our ancillary services. We, as a provider group, can accomplish this goal. We will discuss our plan with every chief of ancillary services, and we are certain that there would be no additional modification needed to support our plan.

We further suggest that we will have our administration time in place between 07:15 to 07:45 and 15:45-16:45. Under the new suggested schedule, a provider will be in the clinic from 07:15-16:45 except during 8 hour days 07:45-16:15 and off days.

\*\*\*

**9 hour schedule 7:15-16:45**

7:15-7:45: Administration time  
Pt scheduled 7:15-11:15 (PCP sees 1<sup>st</sup> pt 7:45)  
Lunch: 12:15-13:15  
Pt Scheduled 12:45-15:15 (PCP sees last pt 15:45)  
16:15-16:45 Administration time  
16 pt/day

**8 hour schedule 7:45-16:15**

Pt scheduled 7:15-11:15 (PCP sees 1<sup>st</sup> pt 7:45)  
Lunch 12:15-13:15  
Pt scheduled 12:45-14:45 (PCP sees last pt 15:15)  
15 pt/day

Biweekly total= **143**

*Exhibit H.*

Management at the AVAHSRO verbally responded to the demand to bargain by informing the union that CWSs for Title 38 employees is a matter concerning or arising out of professional conduct or competence (i.e., direct patient care and



clinical competence) and was therefore excluded from collective bargaining under 38 U.S.C. § 7422.

On September 28, 2004, the union filed an Unfair Labor Practice Charge with the Federal Labor Relations Authority (FLRA) alleging that "...the agency has failed to communicate with AFGE Local 3028 on the proposal and/or offer any opportunity to negotiate and bargain over the implementation of a pilot program to address the feasibility of the use of CWS in Primary Care." *Exhibit I.*

On October 7, 2004, Management at the AVAHSRO submitted their position to the FLRA, asserting that it was their belief that the issue presented by the Union had been previously ruled to be non-negotiable by the Under Secretary for Health (USH) under 38 U.S.C. § 7422. *Exhibit J.* Management makes the following statement to sustain their argument:

"Since the Primary Care employees in question are doctors, nurses, and other Title 38 professionals, and the Undersecretary [sic] has previously ruled that hours of work are not negotiable issues under section 7422, we have repeatedly informed AFGE that we are not at liberty to negotiate this topic."

Management further argued that the issue was "not within the jurisdiction of the FLRA" and for that reason, requested that the ULP be dismissed.

The Union sent a rebuttal to the FLRA on October 12, 2004. *Exhibit K.* The Union argued, in part, that the Agency's position was flawed because they relied on USH decisions made prior to the implementation of the 1997 Master Agreement (MA) between the VA and AFGE.<sup>2</sup> The union also argued that the one case cited by management that was signed after the current MA, Wilmington, DE VAMC, (December 4, 2001), did not specifically address the implementation of a CWS.

The Union further argued that Management violated Article 20 of the MA, Hours of Work and Overtime, asserting that the article allows for the use of a CWS by all employees who request it, including Title 38 employees. The Union alleged management violated Article 20, section 2.E.2, by failing to negotiate over the presumed adverse impact of the proposed implementation of a CWS for Primary Care Service.<sup>3</sup>

In addition, the Union claimed that H.R. 4231, entitled 'Department of Veterans Affairs Nurse Recruitment and Retention Act of 2004', had amended section 7456 of Title 38 to require Alternative Work Schedules for nurses. The union claimed that "[t]his perspective alone should point out that VA management is on the wrong

---

<sup>2</sup> The prior decisions cited are Leavenworth VAMC (May 13, 1992) and, Des Moines, IA, VAMC, (November 26, 1993).

<sup>3</sup> Article 20, section 2.E.2. states the following:

If a facility experiences adverse impact pursuant to 5 USC 6131 with either the AWS or credit hours, negotiations in accordance with Article 44, Mid-Term Bargaining, will begin immediately to attempt to resolve the impact to both parties' satisfaction.

side when this issue is at hand, especially when the U.S. House of Representatives feels that this legislation is needed to recruit and retain nurses in VA.” The union further noted the passage of S. 2484, entitled ‘Department of Veterans Affairs Health Care Personnel Enhancement Act of 2004.’<sup>4</sup>

As a final argument, the Union stated that the AVAHSRO “has allowed for the implementation of CWS in two other work areas,” the ICU and Integrated Care, commenting that these two areas impact patient care needs and services.

The ULP is currently pending with the FLRA.

On October 25, 2004, the Director of the AVAHSRO submitted a memorandum to the USH requesting a determination that the issues raised in the ULP are outside the scope of collective bargaining pursuant to 38 U.S.C. § 7422. *Exhibit L*. In explaining the reasons why a compressed work schedule is not appropriate for the Primary Care Service unit, the Director stated:

With the exception of ICU and MSU, which operate under joint venture agreements with the Air Force at Elmendorf Air Force Base, the AVAHSRO consists of ambulatory clinic services provided on weekdays. The ICU staff can easily be accommodated to allow CWS as it is a 24/7 operation, and supporting services (laboratory, pharmacy, radiology, emergency, etc.) are available on site 24/7. The Integrated Care service can also be accommodated in some positions, as it does not need to make or keep clinic hours, and does not provide direct patient care. The Primary Care Clinic, however, only sees patients during specific hours, on specific days of the week, and provides direct patient care. The Primary Care Clinic also relies upon support services (pharmacy, lab, radiology, etc.) which are not available during the extended CWS hours [proposed by the union].<sup>5</sup>

On November 1, 2004, the union sent a position paper to the USH, arguing that management’s position was flawed for a number of reasons. *Exhibit M*. The union argued, in part, that

... the implementation of a **pilot** CWS does not involve issues concerning professional conduct or competence, peer review, or the establishment, determination, or adjustment of employee compensation. Working conditions of title 38 employees generally are subject to collective bargaining under 5 U.S.C., chapter 71. Under section [38 U.S.C.] 7422, issues involving direct patient care, clinical competence, peer review, and

---

<sup>4</sup> It must be noted that H.R. 4231 was not, in fact, enacted into law and did not result in any amendment to 38 USC 7456. Rather, S. 2484, which was enacted as Public Law 108-445, amended Title 38 to create a new section 7456A, the substance of which is discussed on page 8 below.

<sup>5</sup> ICU is part of the VA/DOD Joint Venture Hospital at Elmendorf Air Force Base, located in a separate site, several miles from the main VA clinic where the Primary Care physicians work. The ICU uses the Air Force lab and pharmacy, which are available on site 24/7. The Primary Care unit uses the VA lab and pharmacy, which are available only on regular business hours.

establishment, determination, or adjustment of compensation for health care workers are not subject to negotiation with labor unions, nor can such matters be grieved under negotiated grievance procedures. On the other hand, proposals for procedures that are peripheral to an exempted issue may not be subject to the exemptions; the particulars of a given proposals determine whether it falls inside or outside the 7422 exemptions.

\*\*\*

The AKVAHSRO failed to follow established procedure and it is AFGE's belief that the AKVAHSRO failed to followthrough (sic) with required consultation with General Counsel and/or LMR...The AKVAHSRO has never attempted to resolve the issue with AFGE locally.<sup>6</sup>

\*\*\*

The AKVAHSRO never responded to AFGE's proposal [demand to bargain] until after AFGE filed with FLRA for failure to bargain in good faith after waiting for a response until 39 working days had passed.

\*\*\*

Article 20-Hours of Work and Overtime allows for the use of CWS for all employees by request from each employees by request from each employee wishing to participate. There is no language excluding Title 38 from participating in CWS.

\*\*\*

AKVAHSRO management has failed to mention that in the event that the facility experiences adverse impact pursuant to 5 USC 6131 with either AWS or credit hours, negotiations in accordance with Article 44, Mid-Term Bargaining will begin immediately to attempt to resolve the impact to both parties satisfaction.

On November 8, 2004, the union sent a second position paper, emphasizing that its proposal was for a pilot program and "if a bona fide problem exists with AWS for the subject employees, logic will dictate that it will be discovered during the period of the pilot program." *Exhibit N*.

---

<sup>6</sup> Presumably, this is a reference to the Guidance posted on the VA Office of Labor Management Relations website (<http://www1.va.gov/lmr/page.cfm?pg=28>) that states: "The first step in the 7422 decision process should be a consultation with Regional Counsel and/or with a General Counsel (GC) attorney in PSG III who specializes in labor relations law and/or a member of the Central Office LMR group staff. These specialists' names and contact information are listed below. In consultation with the local Regional Counsel attorney handling the matter, GC and LMR specialists will help the facility frame the issue and determine whether it is, in fact, appropriate for USH review."



On January 31, 2005, the union sent a final memorandum arguing that its proposed schedule increases the number of veterans who can be seen by the Primary Care Providers. *Exhibit O*.

On April 28, 2005, the Director of the AVAHSRO sent a supplement to his October 25, 2004 request to the USH, with additional evidence supporting the assertion that the issue of a CWS for the Primary Care unit is excluded from bargaining by 38 U.S.C. § 7422 (b). *Exhibit P*. The Director provided the following reasons to explain why a CWS would affect patient care services in the Primary Care unit:

...[O]n a 5-4-9 compressed schedule, the proposal would yield 134 appointments per provider in a two week period rather than the 143 stated in the memo to the Chief of Staff...

\*\*\*

...[T]he 5-4-9 compressed work schedule proposed by the Primary Care staff would result in a net loss of 6 appointments per provider in every 2-week period, or 156 appointments lost per-provider per-year. Half of the additional hour gained in the 9-hour tour is consumed by additional non-patient care administrative time.

b. Providers will be less available to patients. The proposed schedule takes each provider out of clinic for 26 business days per year, reducing their availability to the veterans on their panel. The proposal states this would be accommodated by cross-coverage. This additional requirement for 26 days of cross-coverage per year would impact the productivity of the covering staff, further exacerbating losses in productivity due to the proposed work schedule.

c. Other employee tours would also require changes. On the current schedule, nursing staff see the patient 30-minutes prior to the provider seeing the patient. This means that for the current 0800 appointment, the nurse staff see the patient at 0730. In order to accommodate the 0745 appointments in the proposal, nurse staff would need to see the first patient of the day at 0715, requiring them to change their tour of duty.

Of the ten primary care providers who signed the memo to the Chief of Staff, eight remain currently employed at the Alaska VA Healthcare System...Of the eight remaining signatories of the memo, five have duties outside of primary care that would be adversely affected by the 5-4-9 compressed work schedule. Jonathan Mueller, MD has since assumed the duties as Chief, Primary Care. It is not in the facility's best interest to have the Chief, Primary Care absent from his duties an additional 26 days per year. Additionally, with the additional duties as Chief above and beyond his primary care panel, it would be unreasonable to expect him to provide an additional 26 days per year of cross coverage for an absent partner.

...Pulling these providers away from primary care for another 26 days per year, in addition to their already significant time spent away from primary care activities, is not in the best interest of the facility and it's (sic) mission. The added strain of an additional 26 days per year of cross coverage would have an adverse effect on availability of care to veterans, as primary care panels are already pushed beyond the limits of capacity.

d. Laboratory and other ancillary services are not available over an expanded day to serve patient care needs. Normal hours of operation for the clinical laboratory [are] 0800-1600 daily which would render laboratory services unavailable for patients scheduled into the last appointment of the day for 9-hour days, and virtually unavailable for the patients scheduled into the last appointment of the day on the 8-hour days. The unavailability of laboratory services would require patients to return to the clinic on another day to have labs drawn, which at the very least is poor customer service, and in many cases would require significant travel and expenses for both the veteran and the Government. The other option would be for that service to operate overtime, which is not in the best [financial] interest of the facility.

A similar condition would exist with regard to radiology, which normally operates between 0800 and 1630 daily. It is very likely that multiple patients finishing their appointments at 1615 would not be able to access radiology services prior to that department closing, requiring them either to return for any studies ordered by their provider, or for that service to operate overtime, which is not in the best interest of the facility.

*Exhibit P.*

On May 11, 2005 and May 24, 2005, the Union submitted to the USH additional information with respect to its position. *Exhibits Q, R.* In these submittals, the union amended the CWS schedule it had originally proposed and argued that such a CWS would provide improved service to Veterans; fairness and equal treatment for the Primary Care providers; enhanced recruitment and retention; no disruption to ancillary services; and no 'direct adverse effect' on patient care. In addition, the union stated that because management had permitted providers in other units to have CWS schedules, and because the facility's non-Title 38 staff could bargain alternative work schedules without "the Section 7422 nonsense with the doctors," *Exhibit Q*, "[d]isallowing CWS for the Primary Care Providers is discriminatory." *Exhibit R.*

## PROCEDURAL HISTORY

The Secretary has delegated to the USH the final authority in the 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 local Union's ULP regarding Compressed Work Schedules for the Primary Care Services Unit 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, 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 of patient care to be provided by the Department of Veterans Affairs. 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 workweeks, tours of duty, and work schedules for medical professional employees. These regulations grant facility directors the discretionary authority to institute flexible and compressed work schedules for registered nurses appointed under the authority of 38 U.S.C. § 7401(1) or 7405(a)(1).

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.

As a general proposition, VA has applied the authority of the compressed work schedule (CWS) statute to all Federal employees, including Title 38 employees. However, if participation of Title 38 employees in a proposed (or ongoing) CWS program adversely impacts on patient care, then the implementation (or continuation) of such 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 the CWS statute, 5 U.S.C. § 6131(c)(2)(A), which provides for the Impasse Panel to rule on the agency's determination that CWS has produced an adverse agency impact. Where, as here, there is such a conflict, 38 U.S.C. § 7425(b) operates to render the Title 5 provision inapplicable. In turn, and in accordance with Article 2, *Governing Laws and Regulations*, section 1, of the MA, 38 U.S.C. 7425(b), renders inapplicable the provisions in Article 20, *Hours of Work and Overtime*, section 2.E.2.<sup>7</sup>

---

<sup>7</sup> See footnote 3.

In the instant case, the union argues that negotiations over the implementation of a CWS for the Primary Care Unit at the AVAHSRO are not contrary to the provisions of 38 U.S.C § 7422. The union's argument centers in part on Congress' recent amendment of Title 38 to provide for alternative work schedules for RNs. The Union claims that by disallowing a CWS for the Primary Care unit, management is acting contrary to this new legislation. This argument misstates both the intent and the affect of the new law. The newly enacted 38 U.S.C. § 7456A does not require VA management to provide alternative work schedules to nurses, and in fact does not address at all the 5-4-9 type of CWS proposed by the union in this case. Rather, the law authorizes the VA Secretary to permit 36 hours/week and 9 months/year work schedules where necessary to retain RNs at a particular VA facility, subject to implementing regulations to be promulgated by VA. Nothing in that law requires that a VA facility grant an employee's or a union's request for a CWS that facility management has determined to be detrimental to patient care.

The issue presented in the instant case is whether the union's proposed CWS would directly affect patient care. The union specifically argues that "... the implementation of a **pilot** CWS does not involve issues concerning professional conduct or competence, peer review, or the establishment, determination, or adjustment of employee compensation" and that their proposal is a procedure "peripheral to an exempted issue" and therefore not subject to the 7422 exemptions.<sup>8</sup> Management has explained that a CWS for the Primary Care Unit would adversely impact patient care services by affecting: the number of patients to be seen by each provider; the tours of duty of other Title 38 employees (nurses); the availability of Primary Care Providers to their already established tours outside this unit; and/or the availability of ancillary services (i.e., laboratory and radiology) for the patients who receive care at the Primary Care Unit. Management specifically analyzed the proposal sent by the union and rearranged it to correctly show how the new CWS would distribute appointments and administrative time for the Primary Care Unit providers. Management determined that the proposal, as described by the union, would have providers losing six appointments in a two week period because "half of the additional hour gained in the 9-hour tour is consumed by additional non-patient care administrative time."<sup>9</sup> The proposed work schedule would also take each provider out of the clinic for one full day in each of the 26 pay periods, "impacting the productivity of the covering staff". See, *Exhibit P*, page 4. The adverse impact identified by management proves that the union's proposal is more than a procedural "peripheral issue", inflicting an adverse direct impact on patient care services in the Primary Care Unit, making this issue non-negotiable under 38 U.S.C. § 7422.

The union theorizes that nurse recruitment and retention at the Primary Care unit would benefit from a CWS. The union specifically claims that "[a]llowing a work schedule that allows for a day off without loss of annual leave is an additional benefit that does not 'cost' the VA and is a benefit that will appeal to providers interested in working for the VA Healthcare System." See, *Exhibit R*. We agree that

---

<sup>8</sup> See, *Exhibit M*.

<sup>9</sup> See, *Exhibit P*, page 4/



finding a way to provide additional benefits to the VA employees is ideal to improve morale and to appeal to those interested in working for the VA Health Care System. However, we must be very careful not to jeopardize the VA's mission of providing the best health care services to our veterans. In the particular situation presented in this case, services to our veterans would be compromised by providing a CWS for the Primary Care Unit providers. In addition, the intent of the Nurse Recruitment and Retention Act is in no way to benefit nurse recruitment and retention at the expense of patient care services. Under the circumstances created by the implementation of a CWS for the Primary Care unit, the proposed schedule involves issues of professional conduct or competence (i.e., direct patient care) and is therefore non-negotiable under 38 U.S.C. § 7422.

The union further argues that disallowing a CWS for the Primary Care unit would be discriminatory, since such schedules have been allowed in other areas of the AVAHSRO. This argument ignores the relevant facts. Facility management has permitted CWS schedules in other units of the AVAHSRO (i.e., ICU) because those units could accommodate alternative schedules without impacting patient care. Management has explained that unlike those other units, the Primary Care Unit "only sees patients during specific hours, on specific days of the week..." and "...relies on support services which are not available during the extended CWS hours." See footnote 5.

In addition, the union argues that its proposal is not barred by 38 U.S.C. § 7422 because it involves "the impact and implementation of a six-month compressed work schedule (CWS) pilot program and to determine the feasibility of this condition of employment."<sup>10</sup> This argument confuses Title 5 collective bargaining concepts with those applicable to the Title 38 employees involved here. Once an issue has been determined to be non-negotiable under the provisions of 38 U.S.C. § 7422, there is no "appropriate arrangements bargaining" or impact and implementation-style bargaining. Unlike the general title 5 labor statute, 38 USC 7422 does not allow for 'appropriate arrangements' or impact and implementation-style bargaining on matters that are substantively excluded from bargaining under 38 USC 7422 (b). Compare 5 USC § 7106(b)(2), (3) with 38 USC § 7422(b).

Finally, the union argues that the Agency's position is flawed because it relied on USH decisions made prior to the implementation of the 1997 Master Agreement.<sup>11</sup> The Union's argument is in error. The 1992 and 1993 cases cited by management both rely on the passage of the Department of Veterans Affairs Labor Relations Act of 1991, specifically, 38 U.S.C. § 7422, and not the provisions of the 1982 or the 1997 Master Agreements between the VA and AFGE. The cases cited are related to the tours of duty and their impact on patient care services. As in the instant case, both cases conclude that in their particular situation, the tours of duty of Title 38 employees directly impact on patient care services making such issue outside the scope of collective bargaining pursuant to 38 U.S.C. § 7422.

---

<sup>10</sup> See *Exhibit H*.

<sup>11</sup> See footnote 2.



AVAHSRO management has demonstrated that the proposed CWS for the Primary Care Unit would adversely impact direct patient care. As a result, the union's ULP charge in case number SF-CA-04-0654, alleging that management failed to bargain in good faith over the implementation of a pilot program for a CWS at the Primary Care Unit in the AVAHSRO, is a matter or question concerning or arising out of professional conduct or competence within the meaning of 38 U.S.C. § 7422(b).

It must be noted that the union and management at the AVAHSRO did not meet to discuss and try to resolve the issues that gave rise to the need for a 7422 determination. Through their April 28, 2005 amended submission, management thoroughly explained for the first time why the union's proposal for a CWS would adversely impact direct patient care at the Primary Care Unit. The union's rebuttal is an amended proposed schedule for the Primary Care Unit providers. Before submitting a request for a 7422 determination, the parties are encouraged to meet, discuss and try to resolve their issues. Once the parties have explained their positions, and it is clear that the dispute regarding whether the issues are not negotiable pursuant to 38 U.S.C. § 7422 cannot otherwise be resolved, a request to the USH can be submitted. As is the situation in the instant case, the USH makes a determination based on the facts, the evidence and the explanation provided by the parties. The USH will not consider a new proposal provided by any of the parties. The procedure provided to submit information to the USH is not an opportunity to negotiate issues that are excluded by 38 U.S.C. § 7422. For said reasons, the USH will not consider the new proposed schedule provided by the union.


This decision is consistent with prior USH determination in which the USH determined that the elimination of compressed work schedules 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 West Palm Beach, (April 19, 2005); VAMC Indianapolis, IN, (February 14, 2004); VAMC Alexandria, LA, (October 16, 2003); and VAMC Biloxi, (October 16, 2003).

RECOMMENDED DECISION:

That the decision made by management at the AVAHSRO to not implement a CWS for the Primary Care Services Unit involves issues concerning or arising out of professional conduct or competence within the meaning of 38 U.S.C. 7422(b).

APPROVED  \_\_\_\_\_

DISAPPROVED  \_\_\_\_\_

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

8-22-05  
Date