

**Title 38 Decision Paper
Department of Veterans Affairs (VA)
Alexandria Veterans Affairs Health Care System (AVAHCS)**

FACTS

This case arises from a demand to bargain and subsequent unfair labor practice (ULP) charge filed by the American Federation of Government Employees (AFGE) Local 1972 (Local 1972 or the Union) arising out of the termination of compressed work schedules (CWS) for four Title 38 personnel by the Medical Center Director (Director), Alexandria VA Health Care System (AVAHCS) as part of the facility's Patient Aligned Care Teams (PACT)¹ implementation process.

On January 20, 2011 AVAHCS began the process to implement the PACT model at the Jennings Community Based Outpatient Clinic (JCBOC). As part of that process, management assessed staffing needs at AVAHCS and concluded that patient care would be impacted unless all members of a teamlet worked the same schedule. Management identified four primary care providers – three Title 38 Physicians (stationed at JCBOC) and one Registered Nurse (stationed at the Alexandria, VA main campus) – who worked CWS and notified them that their CWS was “not conducive to providing [the] patient-centric care” that is a primary goal of PACT. Management asked the providers to articulate why they believed CWS should be continued. (Attachment B).

On February 7, 2011 the Chief, Primary Care, notified the providers that their CWS would be terminated effective February 21, 2011. She specifically stated that “PACT is being designed as we go and it is up to the individual facilities to find ways to make it work. After speaking with providers, clerks, nurses and AOs, it was determined that the compressed work schedule is not in the best interest of patient care and safety.” (Attachment D).

On February 11, 2011, Local 1972 filed a Step 3 Grievance asserting that the unilateral decision to terminate CWS violated the Master Collective Bargaining Agreement and the Federal Employees Flexible and Compressed Work Schedules Act (Work Schedules Act), 5 U.S.C. § 6120 et seq., the statute authorizing alternative work schedules. (Id.)

On February 17, 2011, AVAHCS Management and Union representatives met to discuss the impact of CWS on the implementation of PACT at the facility. (Id.)

¹ The Veterans Health Administration (VHA) has adopted a new model of health care delivery, Patient Aligned Care Teams (PACT), which is designed to improve the quality, safety, and efficiency of primary care provided to Veterans. Under PACT, primary care is delivered by teams of health care professionals called teamlets. Each teamlet generally includes a primary care provider, a registered nurse (RN) care manager, a clinical associate, and an administrative clerk. The goal of PACT is to provide coordinated, comprehensive primary care to Veterans.

On February 18, 2011, AVAHCS management issued a grievance decision agreeing to cease implementing the CWS termination until any bargaining obligation was fulfilled. The response refers to a union and management meeting to discuss the implementation of PACT at AVAHCS and its CBOCs. (Id.)

On April 1, 2011, AVAHCS management again met with Union representatives to discuss PACT implementation. The parties were working together on an implementation plan. Part of the facility PACT Implementation package included a document titled *Compressed Work Schedule (CWS) Impact Statement*. The document states that "CWS at the Community Based Outpatient Clinic is not feasible due to staffing limitations. The Jennings CBOC is currently staffed with 4 providers, 4.8 RNs, 1 AO, 2 PSA's, 1 Security Officer, and 1 Police Officer." It also provides examples of how the CWS would have a negative impact on patient safety and continuity of care. It further states that "PACT daily huddles take place without the full PACT team due to having to stagger staff to cover CWS. Teams lack continuity and valuable input. Ability to meet providers to discuss patient care concerns are limited due to nurses working 8 hours [sic] shifts and consistently caring for patients or addressing patient [sic] during this time." The package includes a document created by [redacted] and provided to [redacted] further explaining the impact of the CWS on the PACT teamlets. Some of the impact described includes, "need for overtime or compensatory time" for nurses because providers on CWS have tours that are two hours longer than the team nurse; staggered nurse tours; longer patient wait times when coming in on a day where the provider on CWS is off; and a negative impact to Team D² nurse who works 0.8 per pay period (part time). (Attachment E).

On September 9, 2011, the Director notified Local 1972 that CWS would be terminated for clinicians in Primary Care Clinics effective October 1. The notice explained that CWS "adversely impacts patient care using [PACT]" and "[t]he continuance of CWS for Primary Care clinicians diminishes the hospital's level of service to the public (38 [sic] U.S.C. § 6131(b)(2)[])." Finally, the notice stated that the elimination of CWS is excluded from collective bargaining by 38 U.S.C. § 7422(b). (Attachment A).

On October 24, 2011, the Union issued a demand to bargain over the termination of CWS. (Attachment F).

On February 13, 2012, the Union filed a ULP asserting that the Agency failed to bargain before terminating CWS in violation of the Work Schedules Act. (Attachment G). On August 1, the Federal Labor Relations Authority (the Authority) informed the Agency that it would pursue the ULP.

On August 7, 2012, the Agency advised the Authority that it was requesting a

² According to a chart of PAC teams, Team D is the teamlet with the provider on CWS at the main facility. (Attachment E)

§ 7422 determination by the Secretary. (Attachment H). The Authority stayed the ULP proceedings pending this decision.

On September 27, 2012, the Director requested a determination by the Secretary that the issues raised in the Union's ULP and demand to bargain were excluded from collective bargaining by 38 U.S.C. § 7422(b) because they concern or arise out of direct patient care. (Attachment 1).

On September 28, 2012, the Agency invited the Union to provide comments regarding the § 7422 determination request by October 15, 2012. (Attachment 2). The Union did not submit any additional information.

AUTHORITY

The Department of Veterans Affairs Labor Relations Act of 1991, 38 U.S.C. § 7422, granted collective bargaining rights to Title 38 employees but expressly excluded from collective bargaining matters concerning or arising out of professional conduct or competence (direct patient care, clinical competence), peer review, and employee compensation. The Secretary has sole authority to determine whether a matter concerns or arises out of direct patient care or clinical competence, peer review, or employee compensation; his determination is not subject to collective bargaining or review by any other agency. 38 U.S.C. § 7422(d).

ISSUE

Whether the demand to bargain and ULP relating to the termination of CWS for four primary care clinicians involves matters that concern or arise out of professional conduct or competence within the meaning of 38 U.S.C. § 7422(b).

DISCUSSION

Pursuant to 38 U.S.C. § 7421(a), the Secretary has prescribed regulations governing the establishment of workweeks, tours of duty, and work schedules for medical professionals. 38 U.S.C. § 7421(a) ("Notwithstanding any law . . . the Secretary shall prescribe by regulation the hours" of Title 38 employees). See VA Directive/Handbook 5011. Under VA policy, facility directors are authorized to approve, disapprove, or discontinue flexible and compressed works schedules for Title 38 employees under their jurisdiction so long as the schedules are "appropriate and necessary for performance of services in the care and treatment of patients," and "consistent with patient care requirements." VA Directive 5011, 3(d), (e); VA Handbook 5011, Part II, Chapter 3, Sections 5(g)(1)(a),(d).

In this case, the Director determined that it would be terminating CWS for all clinicians in Primary Care clinics. (Attachment A and Attachment 1, paragraph 1). The Director explained that the PACT concept "is not normally conducive to individual team members being on various alternative work schedules (AWS) such as compressed work schedule

(CWS) unless all members of a PACT teamlet are on the same schedule.” (Attachment 1, paragraph 9). While there is nothing in VA policy or VHA guidance relating to PACT that prevents facilities from allowing PACT teamlets to be on a CWS, VA has established broad objectives for local facility implementation of PACT and the evidence demonstrates that while implementing PACT at this facility, the Director assessed the local staffing limitations and determined that the continuation of CWS for the four Title 38 employees would have a negative impact on patient safety and continuity of care. The Director stated that “to maintain a continuity of patient care and keep the providers on their CWS would require other teamlet members to work overtime. Allowing individual teamlet members to be on a CWS without the other teamlet members on the same schedule will impact continuity of patient care.” (Attachment 1, paragraph 21).

One component of coordinated care is open and frequent communication among the members of a Veteran’s health care team, or teamlet. After assessing staffing at AVAHCS, the Director concluded that communication is hampered at this facility when the members of a teamlet work different schedules. Another component of coordinated care is continuity of providers. Again, the Director concluded that continuity of care at AVAHCS is affected when only some teamlet members work the same schedule.

The Director provided several examples in the documentation supporting her § 7422 determination request. First, at this facility when a patient’s primary care physician is on CWS, that patient is seen by a provider who is not familiar with his or her medical history; the provider may treat only the acute issue and schedule the patient for another appointment with his or her assigned provider. Similarly, to cover for a nurse on CWS, another nurse must attend patients who are not assigned to that nurse’s team on a regular basis. (Attachment E). In both situations, the Director determined that continuity of patient care at the facility is impacted.

Finally, the Director cited patient safety concerns that could arise at the JCBOC when only one member of the health care team is on CWS. In that circumstance, a provider on CWS works hours at the beginning and end of the work day that fall outside the tours of duty worked by the clinicians and support staff who are not on CWS. The Director explains that this arrangement may hamper the facility’s response in the event of a patient emergency that occurs when only the provider on CWS is at work.

The documentation provided by the Director demonstrates that she considered staffing levels at the facility and based the decision to eliminate CWS for the four providers in this case on considerations arising out of or concerning patient care. For this reason, the termination of CWS for the four impacted employees is excluded from collective bargaining by 38 U.S.C. § 7422(b). Contrary to the Union’s assertions, the Director was under no obligation to engage in bargaining before eliminating CWS for the primary care clinicians in this case. This is true even though the facility engaged in *some* discussions with the Union relating to the impact of CWS on the implementation of PACT. Additionally, to the extent the Work Schedules Act conflicts with § 7422(b) in this circumstance, the provisions of § 7425(b) operate to render the Title 5 provision

inapplicable. 38 U.S.C. § 7425(b) (Notwithstanding any other provision of law, no provision of title 5 . . . which is inconsistent with any provision of . . . this chapter shall be considered to supersede, override, or otherwise modify such provision . . . except to the extent that such provision of title 5 or of such other law specifically provides, by specific reference to a provision of this chapter, or such provision to be superseded, overridden, or otherwise modified.) Stated differently, § 7422(b)'s exclusion from collective bargaining controls over any conflicting requirement to bargain contained in the Work Schedules Act.

This decision is consistent with earlier 38 U.S.C. § 7422 decisions on CWS, *VAMC Cleveland* (July 8, 2008) and *VAMC Palo Alto* (October 11, 2005), where the Under Secretary for Health (USH) stated that "[i]f 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."

RECOMMENDED DECISION

The demand to bargain and ULP filed by AFGE Local 1972 concerning the termination of compressed work schedules for four Title 38 primary care providers at AVAHCS involve issues concerning or arising from professional conduct or competence and therefore, are excluded from collective bargaining by 38 U.S.C. § 7422(b).

APPROVED/DISAPPROVED


Eric K. Shinseki
Secretary

8 / 30 / 2013
Date