



DEPARTMENT OF VETERANS AFFAIRS
UNDER SECRETARY FOR HEALTH
WASHINGTON DC 20420

FEB 24 2004

Director, VA Medical Center
1481 West Tenth Street
Indianapolis, IN 46202

President, AFGE Local 609
1481 West Tenth Street, Room C-6092
Indianapolis, IN 46202

Dear Mr. and Ms.

I am responding to the issues raised in your respective memoranda of December 10 and December 24, 2003 concerning a grievance filed by the American Federation of Government Employees (AFGE) Local 609. The issue pertains to AFGE's dissatisfaction over management's use of flexible compressed work schedules for registered nurses.

Pursuant to delegated authority, I have decided on the basis of the enclosed decision paper that the issue presented is a matter concerning or arising out of professional conduct or competence and thus exempted from collective bargaining by 38 U.S.C. section 7422(b).

Sincerely yours,

A handwritten signature in cursive script, which appears to read "Robert H. Roswell", is written over a horizontal line.

Robert H. Roswell, M.D.
Under Secretary for Health

Enclosure

**Title 38 Decision Paper – VAMC Indianapolis, Indiana
VA – 04-01**

FACTS

For at least the last thirteen years, management at VAMC Indianapolis has used compressed work schedules for registered nurses as a means of balancing the care needs of patients with the job satisfaction and personal needs of nursing staff. On patient care units, management uses a flexible combination of 12-hour and 8-hour shifts, allowing nurses to choose among these shifts (to a total of 80 hours per pay period for a full-time nurse or less than 80 hours per pay period for a part-time nurse), so long as patient care needs are met. The benefits of this flexible scheduling system are two-fold. First, it allows managers to ensure that staffing numbers and staff mix are appropriate on each shift, where a more rigid scheduling system would result in too many nurses on some shifts and not enough (or the wrong mix of) nurses on others. Second, the flexible system maximizes management's ability to take individual nurses' personal scheduling preferences into account – allowing one nurse, for example, to choose to work her shifts on consecutive days; another nurse to space his hours out over the entire pay period; and a third nurse to group her hours together over the weekend when child care is readily available. This self-scheduling flexibility provides a valuable recruitment and retention incentive in a difficult nurse labor market.

By email dated October 14, 2003, _____, President of the American Federation of Government Employees Local 609 (Union) at VAMC Indianapolis, notified management of the union's objection to this flexible self-scheduling process. *Attachment A*. More specifically, Ms. _____ stated that the only authorized compressed tours of duty were those set forth in Article 20 of the Master Agreement between the VA and the AFGE National Veterans Affairs Council of Locals (the Master Agreement), and demanded that management discontinue its use of compressed tours other than those listed in the Master Agreement. Article 20 provides (in pertinent part):

Section 2 – Work Schedule Options (AWS and Credit Hours)

A. General

This section sets forth the procedures to be followed for Alternative Work Schedules (AWS) including flextime, compressed work schedules, and credit hours. This section also provides a menu of options for local bargaining/partnership for employees to participate in these plans. AWS means a schedule other than the traditional eight (8) hours fixed shift. Flexible work schedules and compressed work schedules are included within the definition of alternative work schedule. Other variations of

AWS may be negotiated locally to expand opportunities for bargaining unit employees.

* * *

C. Compressed Work Schedule (CWS)

"Compressed Work Schedule" (CWS) means, in the case of a full time employee, an eighty- (80) hour biweekly basic work requirement that is scheduled for less than 10 workdays; and, in the case of a part-time employee, a biweekly basic work requirement of less than eighty (80) hours that is scheduled for less than ten (10) workdays and that may required the employee to work more than eight (8) hours in a day.

a. "5-4-9" is a work schedule that includes eight (8) workdays of nine (9) hours each plus one (1) workday of eight (8) hours within the biweekly pay period.

b. "4-10" is a work schedule that includes eight (8) workdays of then (10) hours in each biweekly pay period.

c. "6-12-8" is an eighty (80) hour bi-weekly basic work schedule that includes six (6) twelve hour workdays and one (1) eight (8) [hour] workdays.

Attachment B (inapplicable provisions omitted)¹.

Management responded to the Union's October 14, 2003 email in a memorandum dated October 23, 2003. *Attachment C*. In that memorandum, RN, VAMC Indianapolis' Associate Director for Patient Services, disagreed with the union's assertion that the only permissible CWS

tours of duty were those set forth in Article 20 of the Master Agreement. Ms. stated that the tours described in Article 20, Section 2.C.a.-c. "are [merely] examples, and to [interpret them] otherwise would conflict with management's right to determine staffing." Ms. noted that the union's interpretation of Article 20, Section 2 "would also exclude all part-time employees from having shifts in excess of eight hours," since the schedules set forth in subparagraphs a. through c. each refer to full-time work schedules totaling eighty hours per bi-weekly pay period. In addition, Ms. noted that the Under Secretary for Health has previously determined that certain issues pertaining to

¹ In her October 14, 2003 email message, Ms. stated that "[i]n regards to the issue of Compressed Work Schedules (page 63 [of the Master Agreement]): 1. These [the tours of duty listed in section 2.C.] are not examples ... these are definitions. 2. The 5-4-9, 4-10, [and] 6-12-8 [schedules] are the agreed upon CWS for AFGE bargaining unit members. 3. No other type of CWS has been agreed upon."

compressed work schedules for RNs were excluded from collective bargaining under 38 U.S.C. 7422.

On October 23, 2003, the Union filed a Step 3 grievance, alleging that management had violated Article 20 of the Master Agreement and requesting as a remedy that management "comply with the Master Agreement definitions of CWS." *Attachment D*. In a memorandum dated October 27, 2003, Director of VAMC Indianapolis, responded to the Step 3 grievance, stating that "the use of compressed schedules in addition to those in Article 20 is entirely within management's right to assign work and provide patient care."

In a memorandum dated November 14, 2003, the Union invoked arbitration on the compressed work schedules issue. *Attachment E*. The Union requested a list of arbitrators from the Federal Mediation and Conciliation Service on November 17, 2003. *Attachment F*.

By memorandum dated December 10, 2003, Mr. [redacted] requested that the Under Secretary for Health (USH) determine the issue raised in the Union's grievance to be excluded from collective bargaining and the negotiated grievance procedure under 38 U.S.C. § 7422(b). *Attachment G*. In that request, Mr. [redacted] noted that "[t]he current combination of compressed work schedules has evolved over 13 years . . . [and] has involved tracking a number of factors ... among them being patient acuity, length of stays, reviewing medication errors and other incidents, level of expertise of the staff, number of staff available, skill level of staff, and review of staffing requirements by an expert panel of nursing." More specifically, Mr. [redacted] stated that

If management were to force professional nurses to work a schedule of six 12 hour shifts and one 8 hour shift per pay period, with no flexible options, they would most definitely have nurses resign, seeking flexible shift options elsewhere in the community. The Medical Center would also incur additional costs to provide staffing coverage, sometimes having too many people on a shift and other times too few, in addition to increased overtime, recruitment, staffing and retention costs due to the resignations that would inevitably occur as well as the necessary use of agency nurses. ...

Each patient care unit has an overall staffing plan for its area. It involves all classifications of personnel, RNs, LPNs, Nursing Assistants, and Techs, as appropriate. The staffing pattern utilized on the nursing units is based upon a minimum number of nursing personnel for a typical patient census. Nurses are scheduled based upon the staffing plan in each unit. Shift to shift adjustments are made by management as patient census and acuity dictate, but in general the overall staffing plan guides

the nurse manager in advance scheduling of nurses. . . . Given all of these factors that must be taken into consideration when planning work schedules, if not enough staff is available for scheduling, patient care suffers

Attachment G, ¶¶ 4-5.

By memorandum dated December 24, 2003, the Union responded to management's request for determination under 38 U.S.C. § 7422. *Attachment H*. In its response, the Union questioned the veracity of many statements in management's December 10 decision request. More specifically, the Union cited a report of the National Academy of Science entitled "Keeping the Patients Safe: Transforming the Work Environment of Nurses," which made recommendations regarding the length of nurses' shifts, the number of shifts a nurse should work per week, staff to patient ratios, and the involvement of direct-care nursing staff in determining appropriate unit staffing levels for each shift. The Union stated that staffing practices at VAMC Indianapolis were not consistent with the recommendations in the report and that patient safety was therefore compromised. The Union further averred that management violated the AFGE Master Agreement in altering CWS schedules to meet patient care needs; that management's self-scheduling process provides too few 12 hour shifts, "thus 'forcing' the RNs to work extra 8 hour tours, which they did not agree to." The Union also stated that the medical center is understaffed and cannot meet patient care needs, but that management's CWS scheduling procedures did not remedy that issue.

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 grievance relating to VAMC Indianapolis management's utilization of compressed work schedules for registered nurses 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 of Title 38 health care personnel may directly dictate the level of patient care 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). VA Handbook 5011, Part II, Chapter 3, Section 5g(1)(a) provides that “[c]ompressed 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 the instant case, the Union filed a grievance questioning management’s right to establish compressed work schedules for nurses other than the schedules specifically listed in Article 20, Section 2 of the AFGE Master Agreement. The Union’s interpretation would not allow management to adjust nurses’ schedules to provide the staffing levels or staff mix required to care for patients. Also, under the Union’s interpretation, part-time nurses could not work a compressed schedule, which means that full-time nurses may be required to cover the schedules of part-time nurses. Indianapolis VAMC management has indicated that such restrictions on its ability to schedule nurses would directly and adversely impact patient care. The matter is therefore not subject to third party review under 38 U.S.C. § 7422(d).

This decision is consistent with prior USH determinations in which the USH determined that the elimination of compressed work schedules for nurses due to patient care requirements was a matter involving professional competence or conduct within the meaning of 38 U.S.C. § 7422. See, e.g., VAMC Alexandria, LA, Number 03-07; VAMC Biloxi, MS, Number 03-09.

It must be noted that in this case the Union insisted that the only compressed schedules available for nurses were those specifically stated in the AFGE Master Agreement. Had the Union adopted a less rigid interpretation of the Master Agreement or proposed a compressed work schedule that did not prevent management from adjusting nurses’ schedules to meet patient care needs, such interpretation or proposal might not have fallen within the bargaining exclusions of 38 U.S.C. § 7422.

RECOMMENDED DECISION

That a grievance alleging that management may not establish compressed work schedules for registered nurses other than the schedules listed in Article 20, Section 2 of the AFGE Master Agreement is a matter that concerns or arises out of professional conduct or competence (direct patient care or clinical competence) under 38 U.S.C. § 7422.

APPROVED _____

DISAPPROVED _____



Robert H. Roswell, M.D.
Under Secretary for Health

2-24-04

Date