DEPARTMENT OF VETERANS AFFAIRS
UNDER SECRETARY FOR HEALTH
WASHINGTON DC 20420

MAR 15 2005

Medical Center Director
West Palm Beach VA Medical Center
7305 N. Military Trail
West Palm Beach, FL 33410-6410

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

Dear Mr. and Ms.

I am responding to the issues raised in your memoranda of November 12, 2004 and December 21, 2004, respectively, regarding an unfair labor practice charge relating to the termination of a pilot compressed work schedules program for hospitalists.

As explained in the attached decision paper, the issues raised by the subject ULP concern or arise out of professional conduct or competence and are therefore non-grievable under 38 U.S.C. § 7422(b).

Sincerely yours,

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

Enclosure

Title 38 Decision Paper – VAMC West Palm Beach
VA – 05-03

FACTS

On December 30, 2003, the American Federation of Government Employees (AFGE or Union) at the VA Medical Center in West Palm Beach, Florida (VAMC) and the VAMC's Chief of Medicine Service, Dr. , signed a Memorandum of Understanding (MOU) for a three month pilot program on scheduling for Acute Care Medicine Service Physicians. *Attachment A.* The MOU stated, in pertinent part, that "Alternative work schedules (AWS) will be negotiated on request of AFGE and in accordance with the Master Agreement and applicable regulations and directives."

In March 2004, Management at the VAMC notified the Union that in order to meet current standards for patient care, Medicine Service had to eliminate compressed work schedules (CWS) for physicians. In response, president of AFGE, sent a memorandum to the Chief of Medicine Service, dated March 19, 2004, with a proposal for CWS in which in-patient physicians known as hospitalists would work eight 10-hour days per pay period. *Attachment B.*

In a memorandum dated March 26, 2004, Dr. responded to Ms. that her proposal for a 10-hour schedule was unacceptable. *Attachment C.* More specifically, Dr. explained that the proposed 10-hour schedule did not allow for proper overlap in schedules, thereby compromising continuity of care, and that the proposed schedule would cause some periods to be overstaffed while other periods were understaffed. In addition, Dr. noted a December 2003 pilot program in which hospitalists were permitted to make their own schedules led to a number of problems, including communication failures, lack of clarity as to which provider was responsible for which patient, and physicians working less than 80 hours per pay period. Based on the problems noted during the pilot program, Dr. stated, hospitalists "will therefore revert to 8-hour shifts effective 4/4/04 which is at the end of the 90-day trial period."

Thereafter, Management and AFGE held several meetings to discuss acceptable work schedules for the hospitalists that would provide sufficient staff coverage. A number of schedules were proposed by both parties and on April 2, 2004, Management proposed that the union sign a MOU agreeing to participate in a 60-day pilot program for the CWS. *Attachment D.* The MOU provided for eight ten-hour shifts each pay period for the physicians. The MOU also contained the following provisions:

> "a. …It is understood that all Hospitalist staff members must work the CWS in order for the schedule to be acceptable. If a staff member chooses not to work the CWS, the CWS will be terminated and all

employees will revert to an eight (8) hour tour of duty. The CWS is also contingent upon the availability of residents."

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"c. Any incident affecting the safety of patients at this Medical Center that results from the implementation of this CWS will result in immediate termination of the CWS. Employees will then revert back to an 8-hour schedule."

AFGE refused to sign the MOU, arguing that it was inconsistent with the Master Agreement between the VA and AFGE, with VA regulations, and with applicable law. AFGE also alleged that it would be giving up its appeal rights by signing the document.[1]

On April 2, 2004, Dr. notified the Union that because no agreement had been reached on the proposed 10-hour tours of duty, hospitalist tours would revert to the 8-hour days in place prior to December 2003. *Attachment E.* On April 8, 2004, the Union informed the Chief of Medicine Service that the 8-hour schedule provided was unacceptable. *Attachment F.* The Union President argued that Dr. had "failed to provide any evidence or reasoning that compressed tours for hospitalists would have adverse impact pursuant to 5 USC 6131." She further informed Management that if the parties were not successful in resolving the issue, she would refer the matter to the Federal Services Impasse Panel (FSIP).

On April 9, 2004, the union filed a step 2 grievance alleging the following violations:

- Violation of Article 20, Section 3.J of the Master Agreement by failing to post acute care physician schedules 14 days in advance and by scheduling employees for less than two consecutive days off;
- Violation of Article 20, Section 3.B of the Master Agreement by scheduling physicians to work more than five days in a row;
- Violations of VA Handbook 5011, Part II, Chapter 3, paragraph 2.e. (unspecified);

and

- Violations of Article 20, Section 3.G of the Master Agreement by providing insufficient notice to the union prior to discontinuing the compressed work schedules

Attachment G.

Dr. denied the grievance in a memorandum dated April 22, 2004. *Attachment H.* On April 29, 2004, AFGE advanced the grievance to Step 3

[1] See Attachment S, Summary, paragraph h.

Attachment I. The VAMC Director denied the grievance at Step 3. *Attachment J.* In the Step 3 grievance response, the Director explained that "efforts were made to allow employees to have a weekend off which caused the split days off and workweeks that exceeded five (5) days. Those accommodations will not be made in the future, and employees will normally be scheduled for two (2) consecutive days off." The union did not pursue the grievance to arbitration.

On May 5, 2004, AFGE requested that the Federal Service Impasses Panel (FSIP) consider the parties to be at impasse as a result of the VAMC's determination not to establish a compressed work schedule for hospitalists. *Attachment K.*

On May 6, 2004, Dr. sent a letter to the Union stating that the hospitalist staff had informed him that "the current mixed schedule of eight and ten-hour tours is 'severely impeding quality and continuity of care.' *Attachment L.* In that letter, Dr. stated that management remained willing to implement a ten-hour CWS "upon AFGE's signing of management's proposed MOU" requiring all hospitalists to participate in the ten-hour shifts, but that "the combination of eight and ten-hour shifts is detrimental to optimal patient care."

In August 2004, AFGE requested the assistance of a mediator from the Federal Mediation and Conciliation Service. *Attachment M.* Management asked that mediation be delayed because it believed that bargaining on compressed work schedules for physicians was inconsistent with 38 U.S.C. § 7422. *Attachment N.*

On September 24, 2004, the union filed an unfair labor practice charge (ULP), FLRA Case No.AT-CA-04-0610, which alleged that management failed to negotiate in good faith on the proposed CWS for hospitalists. *Attachment O.*

On October 7, 2004, the FSIP declined to assert jurisdiction over the matter because the parties had not received prior assistance from a mediator. *Attachment P.*

On October 12, 2004, AFGE filed a second ULP charge, FLRA Case No. AT-CA-05-0016, alleging that management failed to bargain in good faith when it unilaterally terminated the pilot CWS in May 2004. *Attachment Q.*

In a memorandum dated November 12, 2004, the Director of the VAMC requested a determination from the Under Secretary for Health (USH) that the issues raised in the two ULP charges were excluded from collective bargaining pursuant to 38 U.S.C. § 7422. *Attachment R.*

On December 21, 2004, the Union sent its position paper to the USH, expressing its concern with management's representation of events and providing additional documents and information to support its own position. *Attachment S.* More specifically, the Union stated:

> Granting a 38 USC § 7422 (b) exclusion is grossly inappropriate in this case. The issues involved do not involve direct patient care. The thrust of the Medical Center director's argument is found in paragraph 6, 'However if the CWS program applicable to a Title 38 employee has a direct adverse impact on patient care, then it is non-negotiable under 38 USC 7422 (b) and not subject to third party review...'. The Director, however, refused to provide a similar written statement, i.e., that the compressed work tours would adversely impact patient care, to the Federal Services Impasse Panel. If he had done so, with some supporting evidence, the Panel would have surely determined that compressed work tours (CWS) were inappropriate. As a matter of fact, if there was any credible evidence at all that the CWS would adversely impact ou[r] patients, the Union would not have pursued the issue. The route that management decided to take then, was to pursue 7422, where possibly evidence would not be requested, and erroneous, misleading statements would hopefully be taken at face value. Management did not expect a Union response, since notification of the request was not provided until the Union contacted HR at VACO to learn if there were any local § 7422 requests pending.

Attachment S at page 2, paragraph 6 (emphasis in the original).

On February 22, 2005, the FLRA approved the Union's request to withdraw its ULP charge in Case No. AT-CA-04-0610. *Attachment T.*

On February 23, 2005, the Union President sent an electronic communication to management inquiring about mediation and the status of the request for a 7422 determination from the USH. *Attachment U.*

On February 28, 2005, the FLRA notified the Union in writing that it would not issue a complaint on the ULP charge in Case No. AT-CA-05-0016. *Attachment V.* In that notice, the FLRA concluded that "the evidence [was] insufficient to establish that the Activity violated section 7116 (a)(1) and (5) of the Statute as alleged," and further noted that

> In this matter, the Union and the Activity were engaged in active negotiations until the point the Activity decided to seek a § 7422 (b) determination. The Activity is fully within its right to make this request, and it would not effectuate the policies of the Statute to require on-going negotiations over a matter that could be removed from bargaining. See 5 U.S.C. § 7101 (a); U.S. Dep't of Veterans Affairs, Veterans Affairs Medical Ctr., Asheville, NC, 57 FLRA 681 (2002) (the Authority found that once the Secretary or designee has made a § 7422 (d) determination concerning a matter, there is no duty to bargain over such a matters).

Attachment V, page 4.

On or about March 23, 2005, the Union requested a 30 day extension to appeal the FLRA's decision not to issue a complaint in Case No. AT-CA-05-0016. *Attachment W.*

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 (i.e., 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 charge in Case No. AT-CA-05-0016, regarding management's termination of a pilot Compressed Work Schedule for hospitalists, 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 authority to institute flexible and compressed work schedules for physicians appointed under the authority of 38 U.S.C. § 7401(1) or 7405(a)(1). More specifically, 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 the 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 it is non-negotiable under 38 U.S.C. § 7422(b) and not subject to third party review. In such a case, there is a direct conflict between 38 U.S.C. § 7422 and the CWS statute (i.e., 5 U.S.C. § 6131(c)(2)(A), which provides for the FSIP to rule on an 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 to Title 38 employees.

In the instant case, the parties endeavored for some time to develop a CWS schedule for hospitalists that would not adversely impact on patient care. Management agreed to pilot a program under which these providers were permitted to develop their own schedules and to work a 10-hour CWS. The evidence shows that the pilot CWS was not successful and that patient care suffered as a result of the mix of 8- and 10-hour shifts. Thereafter, the parties attempted to develop an alternative plan that would permit the hospitalists to work 10-hour shifts without creating adverse impact on patient care. In the course of that effort, management proposed a 60-day pilot program wherein all hospitalists would work eight 10-hour shifts per pay period. Management conditioned this proposal on the requirement that all hospitalists participate because the prior pilot showed that a mixed schedule of eight and ten-hour shifts severely impeded quality and continuity of care. Management also insisted that the 60-day pilot program be terminated if any adverse impact on patient care resulted. The Union refused to agree to these terms. Under these circumstances, the Union's proposed 10-hour CWS involved issues of professional conduct or competence and is therefore non-negotiable under 38 U.S.C. § 7422 (b).

It must be noted that the union's position paper in this matter accuses the VAMC Director of distorting the facts and misstating the supporting documentation. In addition, the union has offered considerable discussion of the relative merits of its proposed 10-hour CWS and of the deficiencies it perceived in management's proposal. Most pointedly, the union takes the Director to task for his refusal to permit FSIP to determine adverse agency impact, alleging that management chose to take the matter to the USH instead so that "possibly evidence would not be requested, and erroneous, misleading statements would hopefully be taken at face value." *Attachment S.* This allegation misstates the intent and effect of the 38 USC 7422 determination process. As noted above, where management determines that Title 38 providers' participation in an actual or proposed CWS arrangement would adversely impact patient care, the FSIP process for resolving CWS impasses under 5 USC 6131 does not apply. For that reason, the facility Director's only proper avenue here was to present the matter to the USH for a 38 USC 7422 determination. If the USH were to determine the matter to fall outside the 38 USC 7422(b) exclusions, then FSIP would have jurisdiction to resolve the impasse pursuant to 5 USC 6131. If, however, the USH were to determine the matter to be excluded from bargaining under 38 USC 7422(b), then FSIP would

have no jurisdiction to resolve the issue as a matter of law. The facility Director's decision to refer the matter to the USH was thus not improper, but in fact mandated by the statutes that govern collective bargaining for these parties.

Based upon all of the facts and documents presented by the parties, I find that management's decision to terminate the December 2003 pilot CWS program was grounded in that program's adverse impact on patient care. Management notified the union of that adverse impact – which included communication issues and lack of clarity as to which provider was responsible for which patients – before the pilot CWS program ended. When the parties met to discuss other CWS arrangements in March and April 2004, management was not unwilling to consider a new CWS, but stressed that patient safety must not be compromised. As a result, the union's ULP charge in Case No. AT-CA-05-0016, alleging that management failed to bargain in good faith when it unilaterally terminated the pilot CWS in May 2004, is a matter or question concerning or arising out of professional conduct or competence within the meaning of 38 USC 7422(b).

This decision is consistent with prior USH determinations in which the USH determined that the elimination of compressed work schedules 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, (October 16, 2003); VAMC Biloxi, (October 16, 2003); and VAMC Indianapolis, IN, (February 14, 2004).

DECISION

That the Union's ULP charge in Case No. AT-CA-05-0016, regarding management's termination of a pilot Compressed Work Schedule for hospitalists, 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, M.D., PhD, MSHA, FACP
Acting Under Secretary for Health

Date 4.15.05