UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C. 20424-0001

MEMORANDUM DATE: September 14, 2006

TO: The Federal Labor Relations Authority

FROM: CHARLES R. CENTER
Chief Administrative Law Judge

SUBJECT: U.S. DEPARTMENT OF VETERANS AFFAIRS
MEDICAL CENTER
DAYTON, OHIO

Respondent

and Case No. CH-CA-05-0522

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 2209, AFL-CIO

Charging Party

Pursuant to section 2423.34(b) of the Rules and Regulations 5 C.F.R. §2423.34(b), I am hereby transferring t he above case to the Authority. Enclosed are copies of my Decision, the service sheet, and the transmittal form sent to the parties. Also enclosed are the transcript, exhibits and any briefs filed by the parties.

Enclosures

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
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U.S. DEPARTMENT OF VETERANS AFFAIRS MEDICAL CENTER DAYTON, OHIO Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 2209, AFL-CIO Charging Party	Case No. CH-CA-05-0522

NOTICE OF TRANSMITTAL OF DECISION

The above-entitled case having been heard before the undersigned Chief Administrative Law Judge pursuant to the Statute and the Rules and Regulations of the Authority, the undersigned herein serves his Decision, a copy of which is attached hereto, on all parties to the proceeding on this date and this case is hereby transferred to the Federal Labor Relations Authority pursuant to 5 C.F.R. §2423.34(b).

PLEASE BE ADVISED that the filing of exceptions to the attached Decision is governed by 5 C.F.R. §§2423.40-41, 2429.12, 2429.21-2429.22, 2429.24-2429.25, and 2429.27.

Any such exceptions must be filed on or before **OCTOBER 16, 2006**, and addressed to:

Office of Case Control
Federal Labor Relations Authority
1400 K Street, NW, 2nd Floor
Washington, DC 20005

CHARLES R. CENTER
Chief Administrative Law Judge

Dated: September 14, 2006
Washington, DC

FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C.

U.S. DEPARTMENT OF VETERANS AFFAIRS MEDICAL CENTER DAYTON, OHIO Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 2209, AFL-CIO Charging Party	Case No. CH-CA-05-0522

Kenneth Woodberry, Esquire
For the General Counsel

Dennis McGuire, Esquire
For the Respondent

Before: CHARLES R. CENTER
Chief Administrative Law Judge

DECISION

Statement of the Case

This case arose under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the United States Code, 5 U.S.C. §7101, *et seq.* (the Statute), and the Rules and Regulations of the Federal Labor Relations Authority (hereinafter FLRA or Authority), 5 C.F.R. Part 2423.

Based upon an unfair labor practice charge filed by the American Federation of Government Employees, Local 2209 (Union or Charging Party), a complaint and notice of hearing was issued by the Regional Director of the Chicago Regional Office of the Authority. The complaint alleges that the U.S. Department of Veterans Affairs Medical Center, Dayton, Ohio (Respondent or VA) violated section 7116(a)(1) and (5) of the Statute when it failed and refused to bargain with the Union prior to terminating the 11AM to 7PM and 2PM to

10:30PM tours of duty.[1] (GC Ex. 1(b)) The Respondent timely filed an Answer denying the allegations of the complaint. (GC Ex. 1(d))

A hearing was held in Dayton, Ohio, on May 22, 2006, at which time the parties were afforded a full opportunity to be represented, be heard, examine and cross-examine witnesses, introduce evidence and make oral argument. The General Counsel and the Respondent filed timely post-hearing briefs that have been fully considered.

Based upon the entire record, including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions and recommendations.

Findings of Fact

The U.S. Department of Veterans Affairs Medical Center, Dayton, Ohio, is an agency within the meaning of 5 U.S.C. §7103(a)(3). (GC Exs. 1(b) and 1(d))

The American Federation of Government Employees, AFL-CIO, (AFGE) is a labor organization within the meaning of section 7103(a)(4) and holds exclusive recognition for nationwide consolidated bargaining units of employees within the U.S. Department of Veterans Affairs. (GC Exs. 1(b) and 1(d)) The American Federation of Government Employees, Local 2209, is an agent of AFGE for the purpose of representing the bargaining unit employees employed by the Respondent. (GC Exs. 1(b) and 1(d))

Among the Respondent's facilities are several nursing home units that provide short-term and long-term care for a variety of patients. (Tr. 32, 103) The average daily census of the nursing home units is about 176 and includes rehabilitation, geriatric, palliative care and hospice patients. (Tr. 103) The staff assigned includes nursing assistants who perform direct patient care tasks such as feeding, bathing, dressing and changing the patients as well as turning them to prevent bedsores and supervising patients who are prone to wandering. (Tr. 33, 104)

The nursing home units, which operate around the clock, have three basic shifts – day, evening and night. (Tr. 105) Within that shift structure, the "regular" tours of duty are

[1] It became clear during the course of the hearing that the complaint misidentified one of the tours of duty that was the focus of the dispute. That is, what was really at issue was an 11PM to 7AM tour of duty rather than an 11AM to 7PM tour of duty. (*E.g.*, Tr. 135)

considered to be: 7:30AM to 4PM (day); 3:30PM to 12AM (evening) and 12AM to 8AM (night). (Tr. 109) There are, however, a wide variety of approved tours of duty having different hours that exist in addition to those regular tours of duty. (Tr. 78, 109, 128, Resp. Ex. 5) Witnesses testified that the purpose of having designated tours of duty that differ from the standard pattern is to provide flexibility to augment staffing levels at times when there are increased needs for care delivery, such as, covering the morning activities of getting patients up, fed, bathed and to their morning appointments. (Tr. 109-10, 130) Another purpose cited by witnesses is to accommodate personal needs of employees to the extent that such accommodation is compatible with patient care. (Tr. 78, 112, 117, 144)

Witnesses who testified on the matter were uniformly in agreement that employees assigned to the day shift are subject to rotation to the evening and night shifts. (Tr. 35-36, 81-82, 109, 128, 145) There was some difference in perception with respect to whether tenure is guaranteed those employees who opt for assignment to the evening and night shifts, which afford employees the opportunity to earn a pay differential of 10 percent that applies to work between the hours of 6PM and 6AM. Some witnesses characterized employee assignments to the evening and night shifts as "permanent." (Tr. 35-36, 128) Other witnesses described those assignments as "indefinite." (Tr. 109, 120, 136) From the record, it is evident that the principle factor that determines which shift an employee is assigned to is the employee's preference. (Tr. 109, 145) Employees are not required to stay on evening or night shift if they do not want to remain on it. (Tr. 90) If more employees than are needed request the day shift, employees seeking that shift are placed on it and rotated to the evening and night shift. (Tr. 145) If, however, more employees request the evening or night shift than are needed, they have to wait until a vacancy occurs on the shift to be assigned to it. (Tr. 146) Connie Shiverdecker, the Clinical Coordinator for the nursing home, testified that she never forces employees to change shifts and employees could work the same shift for 10 to 20 years. (Tr. 136-39) Shiverdecker also stated that she rarely changes posted schedules and that is usually done at the employee's request. (Tr. 138) What emerged from the various testimony is that employees opting for the day shift rotate to the evening and night shifts to cover staffing shortfalls there. Employees who opt for the evening or night shift are generally allowed to remain there indefinitely and are not normally subject to rotation to the other two shifts. Moreover, reassigning an employee to a different **shift** involuntarily is rarely, if ever, done.

As previously indicated, there are numerous tours of duty within the basic three-shift pattern. It is the VA's actions in reassigning employees from irregular tours of duty to a regular tour of duty that is at issue here.

One of the irregular tours of duty available had hours of 2PM to 10:30PM. In March 2003, Nursing Assistant Erica Johnson was reassigned to that tour from the regular evening shift hours of 3:30PM to 12AM. (Tr. 63) Johnson requested the 2PM to 10:30 PM tour of duty to accommodate child-care needs. (Tr. 63) In her testimony, Johnson characterized the 2PM to 10:30PM tour of duty as an "odd tour" and acknowledged that the "regular tour" was 3:30PM to 12AM. (Tr. 54) By memorandum dated June 16, 2005, Shiverdecker notified Johnson that due to patient care needs, the 2PM to 10:30PM tour of duty would not be used any more on a regular basis effective July 10, 2005. (GC Ex. 2) Johnson was placed on the 3:30PM to 12AM tour of duty. (Tr. 65, 88) Johnson filed a grievance, which Shiverdecker denied, requesting that she be restored to the 2PM to 10:30PM tour of duty. (GC Ex. 4) As an alternative, Johnson requested that she be placed on the day shift. (Tr. 44, 57-58, 65, 89-90, GC Ex. 4) That request was granted and a couple of months later Johnson was assigned to a tour of duty of 7:30AM to 4PM, with occasional assignment to a tour of 6AM to 2:30PM and rotation to the evening and night shifts. (Tr. 57, 65, 81)

According to Johnson, the 3:30PM to 12AM tour of duty was incompatible with her child care responsibilities and resulted in the child involved being left alone for a period spanning 10:15PM to 12:15AM. (GC Ex. 4) Being on the day shift, however, resulted in Johnson losing shift differential and exhausting her sick leave on appointments related to treatment for a pre-existing medical condition. (Tr. 58-61) Johnson estimated her loss of differential as at least $150 biweekly. (Tr. 62) As there is no information in the record establishing what Johnson's pay rate is or what a 10 percent differential would amount to, I have no basis on which to judge the accuracy of her estimate. Based on the information available, it is safe to conclude that although Johnson would have gained 1½ hours of differential per day had she stayed on the 3:30PM to 12AM shift, her move to the day shift cost her between 4½ to 6 hours of differential per day, depending on the point of comparison. It is significant, however, that her placement on the day shift was at Johnson's request.

Another witness, Nicole Houston, is a nursing assistant in the nursing home who works on the night shift. (Tr. 69) For approximately a year prior to the hearing in this case, Houston worked the 12AM to 8AM tour of duty. (Tr. 69) For a year prior to that, Houston worked the 11PM to 7AM tour of duty. (Tr. 70) Houston requested that particular tour of duty because it allowed her to be at home when her children left for school in the morning. (Tr. 70-71) In her testimony, Houston stated that, historically, her schedule changed regularly in terms of days off and acknowledged there were several tours of duty, including the 11PM to 7AM tour, that were considered to be "irregular." (Tr. 74-75) In approximately June 2005, Shiverdecker stopped using the 11PM to 7AM tour of duty on a regular basis.[2] (Tr. 135) Houston stated that she was told there would be no more irregular tours of duty because they were no longer needed for patient care. (Tr. 74-75) As a consequence of her change in tour of duty, Houston was no longer able to be at home when her children left for school and she lost 1 hour of differential per day. (Tr. 71-72) At the hearing, Houston estimated her monetary loss at between $200 and $300 per month. (Tr. 72) Again, there is no evidence in the record as to what Houston's pay rate or 10 percent differential amounted to. Although I am highly skeptical that a loss of one hour of differential per day resulted in a monthly figure as high as Houston's estimate, it is clear that Houston did lose the 1 hour of differential per day.

The 2PM to 10:30PM and the 11PM to 7AM tours of duty remain available as approved tours of duty for use in isolated instances where employee and patient care needs warrant their use. (Tr. 78, 80, 129-30, 134-35.)

Shiverdecker, who initiated the decision to reduce use of the two tours of duty, explained her reasons for ceasing regular use of the 2PM to 10:30PM tour of duty as being that she was receiving complaints from the evening and night shift supervisors that employee departures at 10:30PM left a period between then and midnight when patient care was diminished. (Tr. 79, 83-84, 148) Shiverdecker also stated that the 7AM departures left units under-staffed at breakfast. (Tr. 80) Another reason for reducing the use of

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[2] Although the evidence indicates that there were multiple employees assigned to the 2PM to 10:30PM and 11PM to 7AM tours of duty at the time, the exact number was not established in the record. (Tr. 23, 79, 90) According to Shiverdecker, there was only one employee, Pat Armstrong, who had been on the 11PM to 7AM tour of duty for an extended period of time – meaning 2 to 3 years. (Tr. 80)

the 2PM to 10:30PM tour of duty Shiverdecker identified was that too many employees wanted it. (Tr. 78)

The Respondent did not provide notice to the Charging Party regarding the reassignment of the nursing assistants on the 2PM to 10:30PM and 11PM to 7AM tours of duty. (Tr. 85, 92) The Union, however, learned of the reassignments from employees and by memorandum dated June 17, 2005, requested to bargain over the matter. (GC Ex. 3)

AFGE and the Department of Veterans Affairs are parties to a collective bargaining agreement that covers the nationwide, consolidated bargaining units. Article 20 of that collective bargaining agreement, which is entitled "Hours of Work and Overtime," sets forth a number of provisions that address the subject of work schedule assignments. Pertinent provisions are as follows:

> **Section 1 - General**
>
> A. A change in the administrative workweek and changes in the regularly scheduled administrative workweek are considered changes in conditions of employment for purposes of the notice requirement of Article 46, Rights and Responsibilities. . . .
>
> . . .

Section 3 - Tours of Duty/Scheduling

J. Shift schedules and areas of assignment will be posted at least fourteen (14) days in advance. Every effort will be made to assure that work schedules will not be for more than six (6) consecutive days for eight hour tours, three (3) consecutive days for twelve (12) hour tours, and four (4) consecutive days for ten hour tours with no less than two (2) consecutive days off. Changes in the above procedures will not be made without consultation with the Union.

Other articles that are relied on by the parties in arguing this case are Article 44, which is titled "Mid-Term Bargaining," and Article 46, which is titled "Rights and Responsibilities."

Article 44, provides, in part:

Section 1 - General

C. Recognizing that the Master Agreement cannot cover all aspects or provide definitive language on each subject addressed, it is understood that mid-term agreements at all levels may include substantive bargaining on all subjects covered in the Master Agreement, so long as they do not conflict, interfere with, or impair implementation of the Master Agreement. However, matters that are excluded from mid-term bargaining will be identified within each Article.

Article 46 provides, in part:

Section 4 - Notification of Changes in Conditions of Employment

The Department shall provide reasonable advance notice to the appropriate Union official(s) prior to changing conditions of employment of bargaining unit employees. The Department agrees to forward, along with the notice, a copy of any and all information/material relied upon to propose the change(s) in conditions of employment. All notifications shall be in writing to the appropriate Union official, with sufficient information to the Union for the purpose of exercising its full rights to bargain.

POSITIONS OF THE PARTIES

General Counsel

The General Counsel alleges that Respondent violated the Statute by changing tours of duty of bargaining unit employees without providing the Union notice and an opportunity to bargain. Specifically, the General Counsel asserts that Respondent's action in removing employees from the 2PM to 10:30PM and 11PM to 7AM tours of duty constituted a change in the conditions of employment of those employees. In support of the claim that the Respondent's action constituted a change, the General Counsel argues the record shows Respondent did not have a previous practice of reassigning employees to different shifts. Rather, according to the General Counsel, testimony showed some employees have remained on the same shift for 10 to 20 years and points to Shiverdecker's testimony that it characterizes as stating she never forces employees to change shifts and rarely changes schedules. The General Counsel contends that in view of the effects the change had on the employees' ability to earn premium pay and provide child care, the change was more than *de minimis*.

Insofar as the question of whether the matter at issue is "covered by" the collective bargaining agreement, the General Counsel asserts that the VA waived its right to assert a "covered by" defense in regard to tour of duty changes. In support of this claim, the General Counsel cites an Administrative Law Judge's (ALJ) decision, specifically, *U.S. Department of Veterans Affairs, Benefits Delivery Center, Philadelphia, Pennsylvania*, Case No. BN-CA-90301 (April 26, 2000) (*VA, Philadelphia*), in which the ALJ found to that effect.3 The General Counsel contends that Article 44, Section 1 expressly provides the Union with the right to negotiate over tour of duty changes and nothing in Article 20 removes tour of duty changes from matters that can be bargained mid-term. Moreover, the General Counsel argues Respondent has provided no evidence that undermines the ALJ's findings in *VA, Philadelphia*. The General Counsel maintains in view of the previous litigation of the "covered

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3 There were no exceptions filed to this decision and pursuant to section 2423.41 of the Authority's regulations, it lacks precedential significance.

by" question, the doctrine of *res judicata*[4] serves to preclude that argument in this case.

As remedy, the General Counsel argues that under the criteria articulated in *Federal Correctional Institution*, 8 FLRA 604 (1982) (*FCI*) restoration of the *status quo ante* is appropriate. Applying those criteria, the General Counsel asserts that although the Respondent failed to provide the Union with notice of the change, the Union promptly requested bargaining once it learned of the change. The General Counsel contends the Respondent's failure to bargain was willful and the nature and extent of the impact of the change on employees were significant. As to the question of whether a *status quo ante* remedy would disrupt the Respondent's operations, the General Counsel avers the record shows Respondent would be able, as it has done in the past, to meet any patient care needs resulting from reinstatement of the *status quo* by using overtime.

As to other remedial action, the General Counsel asserts backpay is warranted and requests it be ordered. The General Counsel also proposes a notice to employees to be signed by the Medical Center Director.

Respondent

The Respondent denies the alleged violation and contends there was no change made in either the administrative workweek or the conditions of employment of the nursing assistants. In this latter regard, the Respondent asserts nursing assistants are advised upon hire that they are not guaranteed a permanent assignment to a particular shift and while they may be assigned indefinitely to one of the three shifts, that does not assure them of any particular tour of duty within the three-shift framework.

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[4] *Res judicata* prevents the second litigation of the same issue of fact or law even in connection with a different claim or cause of action. *See, e.g., U.S. Department of the Air Force, Scott Air Force Base, Illinois*, 35 FLRA 978, 983 (1990). In view of the fact that the ALJ decision on which the General Counsel bases its *res judicata* argument lacks precedential significance – see section 2423.41(a) of the Authority's regulations, I find that *res judicata* does not apply in this case. *Cf. U.S. Department of Energy, Western Area Power Administration, Golden, Colorado*, 56 FLRA 9, 11 n.4 (2000) (In finding that a judge was not collaterally estopped by an arbitrator's award, the Authority noted that it was unclear whether the collateral estoppel doctrine had any application in view of the fact that arbitrator's awards are not precedential).

The Respondent claims the reality is that nursing assistants are subject to assignment to a multiplicity of shifts based on patient care needs and are so advised when they are hired. The Respondent notes the two tours of duty in question continue to exist and maintains the adjustment that occurred in the shift assignment of several employees did not constitute a change in the conditions of employment of the nursing assistants.

The Respondent argues that even assuming there was a change in conditions of employment, the matter is "covered by" the collective bargaining agreement between AFGE and the Department of Veterans Affairs. Specifically, the Respondent avers Article 20 contains a number of provisions establishing terms governing shift assignments and tours of duty and in view of those provisions, it strains credulity that the parties contemplated bargaining every time an employee shift is adjusted in response to workload needs.

Further, the Respondent contends any change that occurred in shift assignments was *de minimis* in nature. In support of this contention, the Respondent cites *United States Department of Veterans Affairs Medical Center, Leavenworth, Kansas*, 60 FLRA 315 (2004) (*VA, Leavenworth*), in which it asserts that the Authority rejected arguments that loss of shift differential and impact on the medical condition of an employee made a change more than *de minimis*.[5] The Respondent argues that like the situation in *VA, Leavenworth*, the original change in shift assignments in this case did not alter basic pay or benefits. The Respondent contends also the initial change did not alter the employees' commute or job duties and involved only a minimal difference in their starting and quitting times. Additionally, the Respondent suggests any effect on the employees' child care responsibilities was minimal because in one case the child in question was not that of the employee and in the other case, the children were being left at home for some hours prior to leaving for school.

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[5] The findings regarding *de minimis* that Respondent attributes to the Authority in *VA, Leavenworth*, were actually those of the ALJ who issued the initial decision in that case. In fact, the Authority reversed as error the ALJ's finding that the change was no more than *de minimis*. 60 FLRA at 315, 318. In reversing, the Authority relied on the fact that one of the employees involved lost the opportunity to earn shift differential and overtime and specifically did not address other arguments made by the General Counsel challenging the ALJ's *de minimis* findings. 60 FLRA at 318.

In an effort to rebut testimony given at the hearing by the Union president to the effect that the Respondent had previously negotiated with the Charging Party regarding issues of shift assignment, the Respondent submits with its brief a copy of a "Charge Against Agency," which it claims is relevant to the alleged bargaining that occurred. As this document was not submitted into evidence at the hearing where it could be authenticated and subject to questioning and examination, I am disregarding it as well as Respondent's arguments that rely on it. Although reopening a record to accept new evidentiary material after the close of a hearing is within my discretion, such action is disfavored. *See U.S. Small Business Administration, Washington, D.C.*, 54 FLRA 837, 850 (1998). Respondent has not shown, or even asserted, that it was prevented at the hearing from introducing this document or making a request to hold the record open to allow for its submission subsequent to the hearing.

ANALYSIS AND CONCLUSION

The scope of the complaint

Initially, I note the conduct alleged to violate the Statute was set forth in the complaint as follows:

> On or about July 16, 2005[,] Respondent, by Shiverdecker, advised [unit] employees that the 11:00 A.M. to 7:00 P.M. and the 2:00 P.M. to 10:30 P.M. tours of duty would be terminated in July 2005.

(GC Ex. 1(b))

During the course of the litigation, it became clear this statement did not accurately reflect the case the General Counsel was presenting. The issue the General Counsel litigated centered on Respondent's actions in ***reassigning*** employees from those tours of duty to different ones as contrasted with ***terminating*** the tours of duty.

The Authority does not judge a complaint based on rigid pleading requirements. *E.g., OLAM Southwest Air Defense Sector (TAC), Point Arena Air Force Station, Point Arena, California*, 51 FLRA 797, 807 (1996) (*Point Arena Air Force Station*). Thus, the Authority will consider matters that are fully and fairly litigated between the parties even though such matters are not specified in the complaint or where the complaint is ambiguous. *E.g., Bureau of Prisons, Office of Internal Affairs, Washington, D.C. and Phoenix, Arizona* and Federal Correctional Institution, El Reno, Oklahoma, 52 FLRA 421, 429 (1996) (*Bureau of Prisons*); *Point*

Arena Air Force Station, 51 FLRA at 807. The test of full and fair litigation is whether the respondent knew what conduct was at issue and had a fair opportunity to present a defense. *E.g., Bureau of Prisons*, 52 FLRA at 429.

There is ample evidence in the record that both parties recognized the issue of the reassignment of employees from two tours of duty to other tours of duty was being litigated either in lieu of or in addition to the issue of the termination of the two tours of duty. For example, in their opening statements, counsels for both the General Counsel and the Respondent focused on the reassignment of employees to a different tour of duty rather than the elimination of t he tours of duty. Although evidence was submitted concerning the continued existence of the two tours of duty from which the employees were reassigned, there was also considerable evidence focused on practices and policies relating to reassigning employees to different tours of duty. In its post-hearing brief, other than stating as a fact that the two tours of duty continue to exist, the Respondent does not address the question of whether termination of tours of duty constitutes a violation of the Statute. Rather, Respondent's arguments are directed at the question of whether the reassignment of employees to different shifts constituted a more than *de minimis* change in conditions of employment or was a matter that was "covered by" the collective bargaining agreement.

I find that despite the manner in which the complaint was framed, the question of whether the reassignment of nursing assistants from the 2PM to 10:30PM and 11PM to 7AM tours of duty constituted a violation of the Statute was fully and fairly litigated and is appropriately before me for consideration.

Whether the reassignment to different tours of duty constituted a change in conditions of employment

The determination of whether a change in the conditions of employment of bargaining unit employees has occurred depends on a case-by-case analysis and an examination of the facts and circumstances regarding the Respondent's conduct and employees' conditions of employment. *E.g. United States Department of Homeland Security, Border and Transportation Security Directorate, U.S. Customs and Border Protection, Border Patrol, Tucson Sector, Tucson, Arizona*, 60 FLRA 169, 173 (2004).

In this case, the evidence shows the Respondent maintained a basic pattern of work schedules that consisted of three shifts. The predominant tours of duty within that

pattern were 7:30AM to 4PM, 3:30PM to 12AM, and 12AM to 8AM. Within the shift structure, however, there were a multitude of other tours of duty that were approved and available for use to meet patient care needs and employees' personal and other needs. It is clear from the record that the former was the paramount consideration in determining when and to what extent the various approved tours of duty would be staffed.

The record also shows that although the shift, meaning day with rotation to the other shifts, evening, or night, to which nursing assistants were assigned remained static, their tours of duty were regularly changed. For example, their days off changed regularly and often nursing assistants assigned to the day shift would be assigned to work 6:00AM to 2:30PM rather than 7:30AM to 4PM. The fact that work schedule assignments are subject to flux is borne out by both witness testimony and by Article 20, Section 3 (J), which requires that shift schedules and areas of assignment be posted at least 14 days in advance. Also, such flux is consistent with the nature of a facility that must provide round-the-clock care to patients that have varying needs as well as meet employee demands for things such as weekends or holidays off and work schedule adjustments to minimize use of leave to accommodate various activities.

Here, the evidence establishes that the Respondent did not terminate any tour of duty. Rather, it discontinued the assignment of several employees to two of the tours of duty associated with the evening shift in order to provide effective and efficient care to its patients. Moving employees among the different tours of duty based on patient care and employee needs was nothing different than what the record shows has been done in the past. Significantly, the two nursing assistants who testified at the hearing in this case had themselves previously moved to the 2PM to 10:30AM and 11PM to 7AM tours of duty from other tours of duty and one of the two is periodically assigned to work a 6AM to 2:30PM tour of duty in lieu of the normal day-shift tour (7:30AM to 4PM).

Although the witnesses testifying all agreed the practice generally was to allow employees to remain on the shift, *i.e.*, day with rotation, evening or night, of their choice; none provided any evidence that there was any assurance given employees either explicitly or tacitly that they could expect to remain on a particular tour of duty within that shift structure as long as they liked. Rather, the evidence points to a practice in which the Respondent used the irregular tours of duty to meet patient care needs

or to accommodate employee needs as long as such action was compatible with patient care. The record shows the consideration driving the reassignment of the nursing assistants from the two irregular tours of duty in question in this case was patient care needs. Hence, the Respondent's action was consistent with its prior practice of changing assignments to tours of duty based on its desire to balance employee and patient care needs. *See U.S. Immigration and Naturalization Service, Houston District, Houston, Texas*, 50 FLRA 140, 143-44 (1995). Moreover, similar to the circumstances present in *U.S. Immigration and Naturalization Service, New York, New York*, 52 FLRA 582, 587 (1996) the record here shows that the fact that some employees were allowed to remain on the two tours of duty for an extended period of time does not establish that there was a commitment to leave them there permanently or even indefinitely but only that the Respondent was willing to accommodate their needs as long as it did not exact too high a cost in terms of patient care. Once the Respondent determined that leaving the employees on those tours of duty was placing too great a toll on patient care, it reassigned the employees from the irregular tours of duty consistent with its practice of giving priority to patient care.

I find that the reassignment of the employees from the 2PM to 10:30PM and 11PM to 7AM tours of duty did not constitute a change in conditions of employment. In view of this finding, it is unnecessary to, and I do not, make any determinations regarding the other arguments presented by the parties to this case regarding backpay, *de minimis* and the "covered by" doctrine. I also do not address whether Johnson's reassignment to the day shift would constitute a change in conditions of employment if it had been initiated by the Respondent rather than Johnson. As it was, that reassignment was consistent with the Respondent's practice of not requiring employees to remain on the evening or night shift involuntarily.

Having found that the evidence does not support the allegation that the Respondent violated the Statute, it is therefore recommended that the Authority adopt the following Order:

ORDER

It is ordered that the complaint be, and hereby, is dismissed.

Issued, Washington, DC, September 14, 2006.

CHARLES R. CENTER
Chief Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that copies of the **DECISION** issued by CHARLES R. CENTER, Chief Administrative Law Judge, in Case No. CH-CA-05-0522, were sent to the following parties:

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CERTIFIED MAIL & RETURN RECEIPT **CERTIFIED NOS:**

Kenneth Woodberry, Esquire **7004 2510 0004 2351 1917**
Federal Labor Relations Authority
55 West Monroe, Suite 1150
Chicago, IL 60603-9729

Dennis M. McGuire, Esquire **7004 2510 0004 2351 1924**
Office of Regional Counsel
Dayton VA Medical Center
4100 W. Third Street, Bldg. 408
Dayton, OH 45428

Loretta Lewis **7004 2510 0004 2351 1931**
Chief Steward
AFGE, Local 2209
P.O. Box 306
Dayton, OH 45417

REGULAR MAIL:

President
AFGE
80 F Street, NW
Washington, DC 20001

DATED: September 14, 2006

Washington, DC