

**Title 38 Decision Paper  
Department of Veterans Affairs (VA)  
Northern California Health Care System (VAMC)**

**FACTS**

On February 1, 2016, the Nurse Manager in the Community Living Center (CLC) sent an email to the Registered Nurses (RNs) in the CLC stating, “[e]ffective March 6, 2016, in an effort to provide an adequate shift hand-off for the safety and well-being of the Veterans, the night shift RNs will report to duty at 11:30PM and work until 8:00AM.” Attachment 1. Further, “[t]his 8 ½ hour tour entitles the night shift RNs to a 30 minute lunch break in addition to the two 15 minute breaks. When there is only one RN on the night shift, the RN will contact the Off-Tour Supervisor to provide relief for the RN and coverage of the neighborhood during the 30 minute lunch break.” *Id.*

On February 11, 2016, the American Federation of Government Employees, Local 1206 (Union) filed a demand to bargain stating the Medical Center “directly contacted the Night Shift Registered Nurses (RNs, LVNs) bargaining unit employees (BUEs) situated at the Community Living Center (CLC), and declared your intent to unilaterally change their working conditions by changing their duty hours.” Attachment 2.

On March 2, 2016, the Chief of Employee and Labor Relations (HRMS) emailed the Union and explained that the purpose of the proposed change was to “provide a safe and adequate hand off of Veteran Patients,” and that the “30 minute change in hours will only effect the Title 38 Registered Nurses.” Attachment 3. The HRMS further stated that the change involves direct patient care and “we believe this is a non-negotiable issue under 7422.” *Id.*

On May 25, 2016, the Union filed an Unfair Labor Practice Charge (ULP) with the Federal Labor Relations Authority (FLRA). Attachment 4. The ULP asserted that Medical Center management “bypassed the Union by directly contacting Registered Nurses (RNs) bargaining unit employees (BUEs), at the Community Living Center (CLC), Martinez regarding a change of working conditions (change in duty hours).” *Id.*

On June 22, 2016, the Medical Center provided a response to the Union’s ULP stating “[w]e believe the issue raised in this ULP, involves direct patient care with Registered Nurses appointed under Title 38 and is a matter of professional conduct or competence covered under Title 38, Section 7422” and requested that the ULP be held in abeyance pending the outcome of the 38 U.S.C. § 7422 request. Attachment 5.

On January 26, 2017, the VAMC formally requested a 38 U.S.C. §7422 determination. Attachment 6. The Union did not submit a response to the issues raised in the VAMCs request for determination.

## **AUTHORITY**

The Secretary has final authority to determine whether a matter or question concerns or arises out of professional competence (i.e., direct patient care or clinical competence), peer review, or employee compensation within the meaning of 38 U.S.C. § 7422(b). On October 18, 2017, the Secretary delegated his authority to the Under Secretary for Health (USH). Attachment 7.

## **ISSUE**

Whether a ULP charge concerning the Medical Center's decision to implement a schedule change for the night shift RNs in the Martinez Community Living Center without bargaining is a matter or question concerning or arising out of professional conduct or competence within the meaning of 38 U.S.C. § 7422(b), and is thereby excluded from collective bargaining.

## **DISCUSSION**

The Department of Veterans Affairs Labor Relations Improvement Act of 1991, codified in part at 38 U.S.C. § 7422, granted limited collective bargaining rights to Title 38 employees, and specifically excluded from the collective bargaining process matters or questions concerning or arising out of professional conduct or competence, peer review, or employee compensation, as determined by the Secretary.

38 U.S.C. § 7421(a) authorizes the Secretary of Veterans Affairs to prescribe by regulation the "hours and conditions of employment" of Title 38 medical professionals. Attachment 8.

VA Directive 5011 provides that "duty schedules for title 38 healthcare employees shall be established as appropriate and necessary for performance of services in the care and treatment of patients and other essential activities within the administration of the Under Secretary for Health or designated officials." Attachment 9, VA Directive 5011, ¶ 2g. In addition, VA Handbook 5011 provides that within the Veterans Health Administration, "the proper care and treatment of patients shall be the primary consideration in scheduling tours of duty under these instructions. Duty schedules shall be established as appropriate and necessary for performance of services in the care and treatment of patients and other essential activities within the administrative discretion of the Under Secretary for Health or designated officials." Attachment 10, VA Handbook 5011, part II, chapter 1, ¶ 2b; see Attachment 11, VA Handbook 5011, part II,

chapter 3, ¶ 2d.

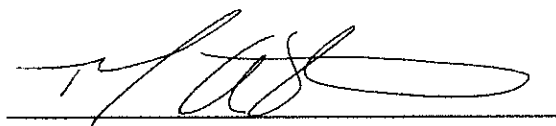
In this case, management determined that patient care needs required the adjustment of RN coverage within the Medical Center. Attachment 1. According to the Medical Center, the change was “was needed to provide an adequate shift hand-off from the off-going shift for the safety and well-being of” Veterans. Attachment 6. Because the decision to make a shift change was directly related to the Medical Center’s patient care needs, it is exempt from collective bargaining under 38 U.S.C. § 7422(b).

Similar issues have been addressed by the Secretary in previous decisions. In *VAMC Ann Arbor*, the Medical Center decided to temporarily rotate some RNs to different shifts to address nurse staffing imbalances. Attachment 12, *VAMC Ann Arbor* (Aug. 8, 2015). In *VAMC Ann Arbor*, although the union expressed scheduling concerns, management maintained that the “Medical Center reserved the right to schedule RNs based on patient care needs.” *Id.* The Secretary concluded that “schedule changes for PCS nurses without completing bargaining is a matter or question concerning or arising out of professional conduct or competence within the meaning of 38 U.S.C. § 7422(b).” *Id.*

As illustrated by the above decision, the Secretary has held that based upon direct patient care needs, a medical center may set or change title 38 RN schedules without initiating or completing bargaining with the union.

### **DECISION**

A ULP charge concerning the Medical Center’s decision to implement a schedule change for the night shift RNs in the Martinez Community Living Center without bargaining involves a matter or question concerning or arising out of professional conduct or competence within the meaning of 38 U.S.C. § 7422(b), and thereby excluded from collective bargaining.



Richard A. Stone, M.D.  
Executive in Charge  
Veterans Health Administration

10/30/18  
Date



DEPARTMENT OF VETERANS AFFAIRS  
Under Secretary for Health  
Washington DC 20420  
October 30, 2018

Mr. David Stockwell  
Director  
VA Northern California Health Care System  
10535 Hospital Way  
Mather, CA 95655

Dear Mr. Stockwell:

I am responding to the January 26, 2017, request for a 38 U.S.C. § 7422 decision regarding an American Federation of Government Employees, Local 1206, (Union) Unfair Labor Practice charge alleging that the Department of Veterans Affairs (VA) Northern California Health Care System (Medical Center) failed to bargain with the Union over the implementation of a schedule change for the night shift registered nurses (RN) in the Martinez Community Living Center.

Under 38 U.S.C. § 7422, matters or questions concerning or arising out of professional conduct or competence, peer review, or employee compensation, as determined by the Secretary, are excluded from the collective bargaining process and the parties' negotiated grievance procedure. 38 U.S.C. § 7422(b). "[P]rofessional conduct or competence" is defined as direct patient care or clinical competence. 38 U.S.C. § 7422(c). The Secretary has delegated his authority to determine whether a matter falls under one of these categories to me.

I have determined, on the basis of the enclosed decision paper, that the medical center did establish a connection between the implementation of a schedule change for the night shift RNs in the Martinez Community Living Center and the professional conduct or competence of these clinical providers, as those terms are defined under 38 U.S.C. § 7422(c).

Sincerely,

A handwritten signature in black ink, appearing to read "Richard A. Stone", is positioned above the typed name.

Richard A. Stone, M.D.  
Executive in Charge

Enclosure



DEPARTMENT OF VETERANS AFFAIRS  
Under Secretary for Health  
Washington DC 20420  
October 30, 2018

Mr. John Moore  
Chief Steward  
American Federation of Government Employees  
Local 1206  
P.O. Box 1873  
Rancho Cordova, CA 95741

Dear Mr. Moore:

I am responding to the January 26, 2017, request for a 38 U.S.C. § 7422 decision from the Director of the Department of Veteran Affairs (VA) Northern California Health Care System (Medical Center) regarding an American Federation of Government Employees, Local 1206, (Union) Unfair Labor Practice charge alleging that the Medical Center failed to bargain with the Union over the implementation of a schedule change for the night shift registered nurses (RN) in the Martinez Community Living Center.

Under 38 U.S.C. § 7422, matters or questions concerning or arising out of professional conduct or competence, peer review, or employee compensation, as determined by the Secretary, are excluded from the collective bargaining process and the parties' negotiated grievance procedure. 38 U.S.C. § 7422(b). "[P]rofessional conduct or competence" is defined as direct patient care or clinical competence. 38 U.S.C. § 7422(c). The Secretary has delegated his authority to determine whether a matter falls under one of these categories to me.

I have determined, on the basis of the enclosed decision paper, that the medical center did establish a connection between the implementation of a schedule change for the night shift RNs in the Martinez Community Living Center and the professional conduct or competence of these clinical providers, as those terms are defined under 38 U.S.C. § 7422(c).

Sincerely,

A handwritten signature in black ink, appearing to read "Richard A. Stone", is written over a horizontal line.

Richard A. Stone, M.D.  
Executive in Charge

Enclosure