

Title 38 Decision Paper
Department of Veterans Affairs
St. Cloud VA Health Care System
St. Cloud, Minnesota

FACTS:

Between September 1, 2014, and September 15, 2014, approximately ninety-five employees, including approximately 32 Registered Nurses, working in the Community Living Center (CLC) at the St. Cloud VA Health Care System (Medical Center) were denied their individual requests to work a compressed work schedule. Exhibit 1.¹

On October 22, 2014, the American Federation of Government Employees, Local 390 (Union) filed a Step 2 grievance, in lieu of a Step 1 grievance, on behalf of its bargaining unit employees who requested a compressed work schedule. Exhibit 2. The Union alleged that the Medical Center violated Article 21 of the Master Agreement between the Department of Veterans Affairs and the Union and other statutory provisions relating to alternative work schedules. Id. The Union demanded that the Medical Center approve the requests and maintain the alternative work schedules “until such time as [t]he agency can demonstrate and not just speculate an adverse agency impact.” Id.

On October 31, 2014, the Medical Center's management met with the Union to discuss the grievance. Exhibit 3. On November 5, 2014, the Medical Center's Extended Care Service Line Director (Service Line Director) denied the grievance.² Id.

On November 12, 2014, the Union filed a Step 3 grievance reiterating the claims set forth in its Step 2 grievance. Exhibit 4. On November 19, 2014, the Medical Center's Associate Director of Patient Care Services (Associate Director) met with the Union. On December 2, 2014, the Associate Director issued a response denying the Union's grievance.³ Exhibit 5. On December 3, 2014, the Union invoked arbitration on its grievance. Exhibit 7.

On January 28, 2015, the Medical Center requested a meeting with the Union in an attempt to resolve the matter and to discuss the application of 38 U.S.C. § 7422 to the pending grievance. Exhibit 8. On January 30, 2015, the Union expressed that a meeting would be futile as the 38 U.S.C. § 7422 issue had already been discussed and that the Medical Center had not substantiated its objections to providing the alternative work schedules. Exhibit 9.

¹ The other employees who requested compressed work schedules included licensed practical nurses and certified nursing assistants. Exhibit 6.

² The Medical Center denied the grievance based upon the following: (1) the issue had been previously addressed and resolved and, therefore, was non-grievable and non-arbitrable; (2) the issue was non-negotiable as it concerned professional conduct or competence under 39 U.S.C. § 7422(b); and (3) the decision to deny the requests for an alternative work schedule was based upon valid operational needs. Exhibit 3.

³ The Medical Center's denial was based upon the same rationale outlined in its response to the Union's Step 2 grievance. Exhibit 5.

On February 2, 2015, the Union filed a ULP with the Federal Labor Relations Authority. Exhibit 10. The Union claimed that the Medical Center “clearly and patently breached the collective bargaining agreement” by refusing to strike arbitrators, as “mandated by Article 44 of the parties’ Master Agreement” thereby preventing the grievance/arbitration process from moving forward. Id. The Medical Center responded to the ULP on April 10, 2015. Exhibit 11.

On May 5, 2015, the Medical Center filed a request for a 38 U.S.C. § 7422 determination.⁴ Exhibit 1. The Union filed a response to the request on June 17, 2015. Exhibit 12.

AUTHORITY:

The Secretary has the final authority to determine whether a matter or question concerns or arises out of professional conduct or competence (i.e., direct patient care or clinical competence), peer review, or employee compensation within the meaning of 38 U.S.C. § 7422(b).

ISSUE:

Whether the Union’s grievance claiming that the Medical Center improperly denied requests for alternative work schedules for Title 38 Registered Nurses involves a matter or question concerning or arising out of professional conduct or competence within the meaning of 38 U.S.C. § 7422(b).⁵

DISCUSSION:

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

Here, Medical Center management denied requests from Title 38 Registered Nurses working in the CLC for approval of alternative work schedules. The denials were based on concerns that “negative safety patient consequences related to longer shifts” and past experience that “there is a better continuity of care and change of shift reports with all staff serving 8 hour tours.”⁶ Exhibit 12. Id.

The Secretary has established standard employment policies by promulgating comprehensive handbooks and directives. In particular, VA Handbook 5011, Part II, Chapter 1, ¶ 2(a) provides in relevant part that “[w]ork schedules will be established in a

⁴ The request is dated April 23, 2015. Exhibit 1.

⁵ “Professional conduct or competence” is more fully defined as “direct patient care” or “clinical competence.” 38 U.S.C. § 7422(c).

⁶ The Medical Center referenced a report by the Institute of Medicine, which suggested that extended length shifts increased the risk of nursing errors and close calls. Exhibit 12.

manner that realistically reflects the actual work requirement.” Chapter 1, ¶ 2(b) provides that “[i]n Veterans Health Administration (VHA), the proper care and treatment of patients shall be the primary consideration in scheduling tours of duty under these instructions.” Exhibit 13. Pursuant to VA Handbook 5011, Part II, Chapter 3, ¶ 2(d), Medical Center directors are authorized to “prescribe any tour of duty to ensure adequate professional care and treatment” to patients. Exhibit 14. In addition, VA policy, pursuant to VA Handbook 5011, Part II, Chapter 3, ¶ 5(g)(1)(d), provides that “[c]ompressed work schedules shall be consistent with patient care requirements,” and may [be] restrict[ed] ... to meet patient care needs.” Exhibit 15.

Further, in prior 38 U.S.C. § 7422 decisions, the Secretary has considered the negotiability of alternative work schedules for registered nurses. For example, in VAMC Iron Mountain (December 6, 2013), the Secretary considered a situation where registered nurses in the facility’s Emergency Department and Intensive Care Unit demanded a 12-hour compressed work schedule. Exhibit 16. The Secretary management’s determined that the decision to refrain from implementing a 12-hour compressed work schedule twelve-hour shifts was excluded from bargaining by application of section 7422. Id. Also, in VAMC Anchorage (August 22, 2005) the Union proposed implementing a six-month compressed work schedule (5-4-9) for doctors and nurses in the facility’s Primary Care Service. Exhibit 17. The Under Secretary for Health decided that, “if participation of Title 38 employees in a proposed (or ongoing) [compressed work schedule] program adversely impacts on patient care, then the implementation (or continuation) of such [compressed work schedule] program is non-negotiable under 38 U.S.C. § 7422(b) and is not subject to third party review.” Id.

Here, the Union, argues that the evidence relied upon by Medical Center management “in support of its decision to deny” compressed work schedules to CLC nurses is inadequate “because it is generalized evidence with little-to-no relevance to patient care at the” Medical Center. Exhibit 18. Indeed, the Medical Center Director’s memorandum requesting a section 7422 determination is the only written basis the medical facility provided to support management’s conclusion that twelve-hour shifts at the CLC were not the best approach to “provid[ing] uninterrupted, high quality of care for our patients in a 24 hour a day, seven day a week care setting.” Exhibit 12. Further, the Medical Center’s reliance on studies and reports that highlighted “negative patient safety consequences related to longer [nursing] shifts” is speculative without any additional factual basis or supporting documentation that alternative work schedules adversely impacted patient care at the facility. Id.

While the underlying management decision to determine alternative work schedules normally involves issues concerning or arising out of professional conduct or competence within the meaning of 38 U.S.C. § 7422(b), because there is no supporting documentation, there is no factual basis for determining that the issue presented here is based on patient care needs, and is therefore excluded by section 7422. This decision is consistent with prior precedent where management failed to provide sufficient information to support a determination under 38 U.S.C. § 7422. See VAMC Baltimore (6/30/08).

CONCLUSION

Because management has failed to provide sufficient information, a determination cannot be made whether 38 U.S.C. § 7422 applies to the issue presented.

RECOMMENDED DECISION

That there is insufficient information to make a determination that the denied requests for alternative work schedules for Title 38 Registered Nurses involves a matter or question concerning or arising out of professional conduct or competence within the meaning of 38 U.S.C. § 7422(b).

APPROVED

DISAPPROVED

David J. Shulkin, M.D.

David J. Shulkin, M.D.
Under Secretary for Health

11/10/15
Date