

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

FACTS

On or about April 2018, the Northern California Health Care System (Medical Center) “increased the number of full-time nurses and reduced the work hours and changed clinic assignments of intermittent and part-time nurses.” Attachment A.

On April 27, 2018, the American Federation of Government Employees, Local 1206 (Union) filed a Step 3 grievance alleging the Medical Center failed to convert an intermittent registered nurse (RN) “to a permanent part time benefitted position in accordance with VA Handbook 5005/70 relating to probationary periods for part time or intermittent registered nurse (RN) appointed under 38 U.S.C. 7405.” Attachment B. In terms of relief, the Union requested that the intermittent RN be converted to “Part Time Permanent Benefitted status effective May 20, 2014,” and be reimbursed “for all lost wages, to include but not limited to: 4 years lost AL/SL/holiday pay/health benefits/credit toward pension eligibility.” *Id.*

On July 18, 2018, the Union presented for the scheduled 3rd step grievance meeting with the Director, but the Director was not available at the time scheduled. Attachment C. Instead, the Union met with the Chief of Employee and Labor Relations (HRMS) to resolve the grievance. *Id.*

On August 7, 2018, the Medical Center provided a response to the RN, confirming that she was “appointed under 38 USC 7405(a)(1) as an intermittent employee.” Attachment C. The response clarified that Section 7405 of Title 38 of the United States Code (U.S.C.) applies to intermittent employees and the RN was covered under subsection (g). *Id.* Given she started her service on May 20, 2012, she would not have been considered temporary for the purposes of her probationary period as of May 2014. *Id.* Thus, the intermittent RN was advised that she would “no longer have a time limit” on her appointment and that she would “have all of the rights and responsibilities of other intermittent RNs.” *Id.* The response noted that whether time limited or not, intermittent employees do not receive or earn benefits except health benefits. *Id.*

On September 6, 2018, the Union invoked arbitration. Attachment D.

On November 28, 2018, the Union filed an Unfair Labor Practice Charge (ULP) with the Federal Labor Relations Authority (FLRA). Attachment E. The ULP asserted that Medical Center management had been ordered not to schedule the RN after the month of May, taking away the RN’s job assignment of 6 years. *Id.* The ULP included a note stating that a “June 1 entry said ‘pay suspended; temporary appointment expired.’” *Id.* The entry was characterized as a “secret order” that was “clearly a hostile retaliation for the April 27 grievance.” *Id.* The ULP included a statement from the RN: “I do not have a

workplace I can go to and am no longer working.” *Id.* The document also included the following note: “VA has conceded 38 USC 7405(g) is applicable but refuses to give benefits.” *Id.*

On January 29, 2019, the Medical Center provided a response to the Union’s ULP, denying an unfair labor practice had been committed. Attachment F. The response again confirmed that the employee was appointed under 38 U.S.C. § 7405(a)(1) as an intermittent employee. *Id.* The Medical Center included a copy of the response the Chief of HRMS had provided to the RN on August 7, 2018. *Id.* The response further noted that the RN had been scheduled to work at the Medical Center as of August 10, 2018, with her appointment expiring on May 18, 2019. *Id.*

On April 6, 2021, the FLRA contacted the Medical Center “to see if the Agency would be open to settlement” with regards to the ULP and attached a proposed settlement agreement. Attachment G. On the same day, the Medical Center informed the FLRA of its intent to file for a 38 U.S.C. § 7422 determination. Attachment H.

On May 24, 2021, the Medical Center formally requested a 38 U.S.C. § 7422 determination. Attachment A. In the request, the Medical Center asserted that the issues in the ULP were outside the scope of collective bargaining as they involved an issue of professional conduct or competence, specifically in relation to direct patient care. *Id.* The decision to change staffing ratios and clinical assignments for nurses at the Medical Center was “done to cover direct patient care.” *Id.* On August 10, 2021, the Medical Center submitted an Addendum to the request for a 7422 determination. Attachment H. The Medical Center provided further information on the events surrounding the ULP regarding the RN, including that fact that as permanent positions were made available, the need for intermittent RNs decreased. *Id.* The Medical Center reasserted its position that the right to hire and use intermittent RNs fell under the authority of 38 U.S.C. § 7422. *Id.*

On September 22, 2021, the Union filed a response to the Medical Center’s request for 38 U.S.C. § 7422 determination. Attachment M. The Union asserted that the Medical Center’s request for a 38 U.S.C. § 7422 determination was untimely, and that the matter was a “contractual issue which the Agency should have pre-decisionally involved the Union and bargained.” *Id.* The Union also stated that the Medical Center failed to consider the RN’s requested conversion from “intermittent” to “full-time.” *Id.* Finally, the Union noted that the intermittent employee is no longer an employee of the Medical Center which made the “request for a determination void.” *Id.*

AUTHORITY

The VA Secretary has the final authority to decide 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). This authority is delegated within VA policy. Attachment I.

ISSUE

Whether a ULP charge claiming that the Medical Center was required to convert an intermittent RN to permanent, part time status without the intermittent RN applying for a vacancy, concerns direct patient care and 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 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 collective bargaining rights to Title 38 employees under 38 U.S.C. § 7422(a). However, for Title 38 employees described in 38 U.S.C. 7421(b), collective bargaining may not cover any matter or question concerning or arising out of professional conduct or competence (i.e., direct patient care or clinical competence), peer review, or any matter or question concerning or arising from employee compensation, as determined by the Secretary. 38 U.S.C. § 7422(b). The following employees are described in 38 U.S.C. 7421(b)—physicians, dentists, podiatrists, optometrists, registered nurses, physicians assistants, expanded-duty function dental auxiliaries, and chiropractors. *Id.*; see 38 U.S.C. 7401(1).

The Secretary has prescribed regulations contained in VA Handbook 5005, part II, chapter 3, section G, ¶¶ 2a to implement the use of part-time and intermittent personnel appointed under 38 U.S.C. § 7405(a)(1). Attachment J. In accordance with paragraph 2a(1), “[I]t is VHA policy to use the services of qualified individuals on a part-time or intermittent basis when necessary to alleviate recruitment difficulties and in all cases where VHA work requirements do not support employment on a full-time basis.

Decisions concerning utilization of part-time intermittent employees must be related to patient care and other VA work requirements and supported by relevant staffing guidelines (emphasis added).” *Id.*; VA Handbook 5005, part II, chapter 3, section G, ¶¶ 2a(1). In accordance with paragraph 2a(2), “[A]n intermittent appointment shall be used when the need for services is of such a nature that it is not possible or desirable to establish a regular and prearranged schedule.” *Id.*; VA Handbook 5005, part II, chapter 3, section G, ¶¶ 2a(2). Further, the policy notes that intermittent appointments are to be reviewed on a periodic basis and when vacancies occur to determine whether the use of such appointments “meets the objectives of the organization unit’s staffing plan.” *Id.*; VA Handbook 5005, part II, chapter 3, section G, ¶¶ 2a(4).

In the initial request for a § 7422 decision, the Medical Center noted that around May 2018, the facility had increased the number of full-time nurses and reduced the work hours and changed clinic assignments for intermittent nurses. Attachment A. No specific reasoning was given for the increase in the number of permanent positions aside from citing the need to “cover direct patient care.” *Id.* However, as a result of the increase in the number of permanent positions, changes were made to the schedules for intermittent RNs. If the Medical Center were not able to establish permanent positions,

intermittent positions would have to have been maintained according to VA Handbook 5005.

Not long after the Medical Center moved forward with the changes for intermittent positions, the Union filed the Step 3 grievance, asserting that the RN should have been converted to “permanent benefitted status.” Attachment B. In the response to the Step 3 grievance, the RN was informed that she was appointed under 38 U.S.C. § 7405(a)(1) as an intermittent employee, meaning the policies in VA Handbook 5005 on intermittent employees were directly applicable. Attachment C. The RN was further informed that her initial appointment as an intermittent employee started on May 20, 2012, with her probationary period ending on or around May 2014. *Id.* The RN would no longer have a time limit on her appointment and would have the same rights and responsibilities as other intermittent RNs without time limit, which were limited to additional grievance rights if she were to be terminated. *Id.* Of note, in providing this information to the employee, the Medical Center appears to have fully adopted one of the remedies requested by the Union on behalf of the employee – “Convert Employee to Part Time Permanent Benefitted status.” Attachment A. In the grievance response, the Medical Center clarified that intermittent employees, regardless of whether time limited or not, do not earn benefits other than health benefits. Attachment C.

The Union filed the ULP in November 2018, which included claims that the Medical Center had not scheduled the RN and had “taken away [the RN] job assignment of 6 y[ea]rs.” Attachment E. However, the Medical Center clarified that the RN was utilized less due to lack of availability and an increase of hiring of full time RNs at the facility. Attachment H. Although the intermittent RN “was not needed as much as hiring increased,” there were instances in which the intermittent RN was asked for her availability to support the clinic’s daily operations but she never turned in her availability or articulated that she was unavailable to work. Attachments G and K. For example, on March 18, 2020, the RN was asked when she was available to work, to which she responded on March 19, 2020, “I am caring for my elderly immunocompromised parents and cannot afford to jeopardize their health right now so I won’t be able to pick up any shifts right now.” Attachment K. Additionally, on May 5, 2021, the RN was asked “[C]an you let me know if you are still interested in working for NCHCS?” to which she replied on May 10, 2021, “I have been suffering from severe pain condition which makes working a full schedule impossible. I am currently on temporary disability. I would love to maintain my position at the Va as I anticipate feeling better in the new future, at which point I could cover additional shifts. In the meantime I can offer to cover a couple of shifts a month?” *Id.* Finally, on June 17, 2021, the RN communicated, “my dad is having another surgery so I won’t be available July 6 for a couple of weeks as it is a two-day back surgery and I will be his primary caretaker for the weeks of recovery in his home.” *Id.*

In providing information to respond to the ULP and settlement offer, the Chief RN for Primary Care at the Medical Center noted, “[W]e do not automatically convert anyone to full-time status as one has to apply and be hired for the position.” Attachment G. The Chief RN further confirmed that while the RN had been informed of the availability of

permanent positions, the RN did not apply for any of the available positions. *Id.*

A similar issue has been addressed by the Secretary in a previous § 7422 decision. In 2003, the union filed a grievance at the Asheville Medical Center over the Medical Center's re-appointment of a fee basis retired nurse to fill in as an evening coordinator on four evenings in June 2003. Attachment L, VAMC Asheville, (October 10, 2003). The decision concluded, "[P]ursuant to 38 U.S.C. § 7421(a) the Secretary has prescribed regulations contained in VA Directive/Handbook 5005, Part II, Chapter 3, regarding the appointment and placement of medical professional employees. These regulations govern staffing of registered nurses appointed under 38 U.S.C. § 7401(a), as well as those employed on a fee basis under 38 U.S.C. § 7405(a)(2). The regulations reflect (in Part II, Chapter 3, section 3(a)(1) that '[t]he primary consideration in making appointments of...nurses under 38 U.S.C., chapter 73 or 74, will be the professional needs of VHA.'" *Id.*

As illustrated by the above-described decision, the Secretary has held that staffing of Title 38 medical professionals at the Medical Center is part and parcel of the Secretary's inherent authority to appoint personnel under 38 U.S.C. § 7405 to deliver health care to Veterans, and is excluded from bargaining by the application of 38 U.S.C. § 7422.

RECOMMENDED DECISION

A ULP charge concerning the Medical Center decision not to convert an intermittent RN to permanent, part time status without the intermittent RN applying for a vacancy, concerns direct patient care and 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 thereby excluded from collective bargaining.

APPROVED/DISAPPROVED



Shereef Elnahal, M.D., MBA
Under Secretary for Health

9-7-2022

Date