

Title 38 Decision Paper
Department of Veterans Affairs (VA)
Eastern Colorado VA Health Care System (VAMC)

FACTS

Due to COVID-19 preparedness and to provide additional patient care coverage, the Nurse Manager in the Intensive Care Unit (ICU) modified the tours of duty of sixty-three (63) Registered Nurses (RNs) from their “varied work schedules to a standard dual-shift schedule consisting of 12-hour tours.” Attachment A.

On June 12, 2020, the National Nurses United, Mid-Atlantic Regional Office (Union) filed a Step 3 Grievance stating that the ICU RNs at the Medical Center “were put on a modified schedule during the COVID-19 pandemic in order to facilitate an influx of newly reassigned RNs to their unit,” however, subsequently during a staff meeting, management informed the RNs “that they would never be going back to their old schedules and that management had made the unilateral decision to permanently change the ICU department’s schedules.” Attachment B.

On June 26, 2020, management responded to the grievance stating that

The change in ICU RN schedules is best for patient care given more consistency with RN coverage, reduction of handoff which increases risk of error, and less overtime necessary. As such, the change in schedules would be covered under the 7422 statute and excluded from collective bargaining. You failed to provide new information regarding why you believe the ICU schedules would be outside the 7422 statute, and thus, bargainable. Attachment C.

The Union invoked arbitration on July 9, 2020. Attachment D.

On November 10, 2020, the Medical Center formally requested a 38 U.S.C. §7422 determination. Attachment A. The Union did not submit a response to the issues raised in the VAMCs request for determination.

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 E

ISSUE

Whether a grievance concerning the Medical Center's decision to permanently implement what had been a temporary schedule change for the ICU RNs at the Medical 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 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).

Pursuant to 38 U.S.C. § 7421(a), the Secretary has prescribed regulations regarding the establishment of workweeks, tours of duty, and work schedules for medical professional employees. The Secretary has established VA-wide employment policies by promulgating comprehensive handbooks and directives. VA Handbook 5011, Part II, Chapter 1, ¶ 2(b) provides in relevant part: "In Veterans Health Administration (VHA), the proper care and treatment of patients shall be the primary consideration in scheduling tours of duty under these instructions" Attachment J, VA Handbook 5011, Part II, Chapter 1. Medical center directors have the discretionary authority to "prescribe any tour of duty to ensure adequate professional care and treatment to the patient[.]" Attachment F, VA Handbook 5011, Part II, Chapter 3, ¶ 2(d). In addition, medical center directors are authorized to approve flexible and Compressed Work Schedules for employees under their jurisdiction and they are also "responsible for ensuring that approved flexible and compressed work schedules are consistent with the criteria contained herein." Attachment F, VA Handbook 5011, Part II, Chapter 3, ¶ 6 (f)(1).

In this case, the Medical Center's decision to refuse to negotiate the permanent change in work schedules from varied work schedules to a standard dual-shift schedule consisting of 12-hour tours is consistent with established VA policy and based on patient care criteria. The ICU Nursing leadership recognized that the four ICU shifts prior to the pre COVID-19 preparedness "created unstable staffing numbers throughout the day." Attachment A. Additionally, implementing 12-hour shifts "increase[s] patient safety by decreasing the number of handoffs per patient and the changes improve continuity of care for veterans. Decreasing the number of shift times also decreases the risk of delirium for veterans because it decreases the amount of time RNs are in and out of the room due to shift changes and equipment checks during sleep times. The veteran also becomes familiar with the shift time changes and they become familiar with their

assigned RN vs. having a nurse for 4 hours.” *Id.*

While some VA medical centers allow twelve-hour shifts and other compressed work schedules for some or all of their nursing staff, others do not. It is entirely up to local management to assess the relative risks and determine the appropriate mix of schedules and tours of duty that ensure quality patient care at their facilities. In past decisions, the Secretary has consistently concluded that scheduling proposals involving Title 38 employees that impact direct patient care are excluded from collective bargaining under 38 U.S.C. § 7422. For example, in *Ann Arbor*, in order to address nurse staffing imbalances, the “Medical Center decided to temporarily rotate Registered Nurses to different shifts to ensure the appropriate number of nurses were available for each shift.” Attachment G, *VAMC Ann Arbor* (Aug. 5, 2015). The Secretary concluded that the scheduling of RNs 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 the rotation of RNs to different shifts “goes to the core of professional conduct or competency because the [Medical Center’s] ability to provide direct patient care would be severely impacted without the ability to schedule RNs when their services are needed most.” *Id.*

In *Iron Mountain*, although the RNs in the ICU proposed a 12-hour CWS, it was determined by management that “for a small facility like the Iron Mountain VAMC, with a limited number of qualified registered nurses, a 12-hour Compressed Work Schedule would compromise the level and degree of patient care in ICU/ED.” Attachment H, *VAMC Iron Mountain* (Dec 6, 2013). The Secretary decided that the matter was excluded from collective bargaining under 38 U.S.C. § 7422. *Id.*

In *Cleveland*, the Under Secretary for Health concluded that the unilateral “decision made by management at the VAMC to eliminate CWS for RNs assigned to the SSU involves issues concerning or arising out of professional conduct or competence within the meaning of 38 U.S.C. § 7422(b)”. Attachment I, *VAMC Cleveland* (July 9, 2008). The rationale for the change from ten-hour tours to 8-hour tours was the need to “have every staff member here each day throughout the week and will be able to safely care for patients with this schedule.” *Id.*

This decision is consistent with prior determinations that RN schedules directly impact patient care and frequently are matters involving professional conduct and competence within the meaning of 38 U.S.C. § 7422, and therefore excluded from collective bargaining.

DECISION

Whether a grievance concerning the Medical Center's decision to permanently implement what had been a temporary schedule change for the ICU RNs at the Medical 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 is thereby excluded from collective bargaining.

APPROVED/DISAPPROVED



9-15-2022

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

Date