

**Title 38 Decision Paper  
Department of Veterans Affairs (VA)  
Alaska VA Healthcare System (Medical Center)**

**FACTS**

On or about November 26, 2019, a Nurse Manager at the Alaska VA Healthcare System Domiciliary (Medical Center) requested that a registered nurse (RN) be immediately detailed “to a non-patient care area until such a time” that a Professional Standards Board (PSB) reviewed the matter. (Attachment A). The Nurse Manager had identified multiple patient safety and ethical concerns, including medication administration and dosing errors and behavior and performance that was “disruptive to the milieu.” *Id.*

On November 27, 2019, the Nurse Manager notified the RN that effective Thursday, November 28, 2019 she would be detailed to Integrated Care Service until further notice. (Attachment B). The notification also advised that the “change will not result in a change to grade or status; any prior approved leave requests will be honored.” *Id.*

On December 2, 2019, American Federation of Government Employees, Local 3028 (Union) filed an Unfair Labor Practice (ULP) with the Federal Labor Relations Authority (FLRA), alleging that the Nurse Manager “[R]emoved employee from regular work station without notification to AFGE Local 3028 and arbitrarily invoked 7422 without a decision from the Under Secretary for Health – Veterans Administration per proper procedures.” (Attachment C).

On December 18, 2019, the RN was notified that the Medical Center was convening a PSB on January 9, 2020 to conduct a summary review of her probationary employment and to make recommendations concerning retention or separation. (Attachment D).

On January 3, 2020, the Medical Center responded to the ULP. (Attachment E).

On January 7, 2020, the Medical Center submitted a request for a 38 U.S.C. § 7422 determination. (Attachment F). The Union did not submit a response to the Medical Center’s request.

**AUTHORITY**

The Secretary of Veterans Affairs has the final authority to decide 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). On October 18, 2017, the Secretary delegated his authority to the Under Secretary for Health (USH). (Attachment G).

## **ISSUE**

Whether the ULP charge concerning the Medical Center's decision to detail an RN involves a matter or question concerning or arising out of professional conduct or competence (i.e., direct patient care or clinical competence) within the meaning of 38 U.S.C. § 7422(b).

## **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 (i.e., direct patient care or clinical competence), peer review, or employee compensation, as determined by the Secretary. "Professional conduct or competence" is defined to mean "direct patient care" and "clinical competence." 38 U.S.C. § 7422(c).

Pursuant to 38 U.S.C. § 7421(1), the Secretary prescribed regulations contained in VA Directive/Handbook 5005, Part IV, Chapter 3, Sections A and B to implement assignments, reassignments, and details (Attachment H). Section A, paragraph 4(b) provides that, in exercising the authorities covered in this handbook, "primary consideration will be given to the efficient and effective accomplishment of the VA mission." *Id.* Further, Section B, paragraph 3(b) states that, "[e]mployees may be detailed to other assignments at their facility and to other VA facilities." *Id.* The assignment and placement of Title 38 healthcare personnel is fundamental to the patient care mission of all VA health care facilities.

In this case, the RN was alleged to have engaged in behavior and performance that was counter to the VA's mission. Specifically, the PSB was convened to review the following alleged deficiencies in her performance and conduct:

- i. Miscalculations of medication dosages used in multiple safe medication management assessments.
- ii. Medication errors to include filling a mediset with a Veteran with multiple medications placed incorrectly and failure to administer a medication based on the written order.
- iii. Failure to complete corrections to safe medication management notes after being prompted by management.
- iv. Inability to complete work in a timely fashion.
- v. Late communication to include addendums to safe medication management notes 72 hours later and a patient exhibiting disruptive/inappropriate boundaries.

(Attachment D).

The Secretary has determined in prior decisions involving similar issues that such matters arise out of professional conduct or competence within the meaning of 38 U.S.C. § 7422(b), and thus, excluded from collective bargaining. For example, in 2014, at the VA Northern California Health Care System, an anesthesiologist failed to monitor or record the blood pressure readings for a surgery patient under general anesthesia for over an hour. (Attachment I, VAMC Northern California, (May 11, 2015.)) The anesthesiologist was “placed on float duties and preoperative care pending an investigation into the lapse in monitoring.” *Id.* The Secretary concluded “questions about the adequacy of an anesthesiologist’s responsibilities to monitor a patient during surgery certainly qualify as matters concerning both direct patient care and anesthesiologist’s clinical competence and fall within the 38 U.S.C. § 7422 exclusions.” *Id.*

In Richmond VAMC, due to an RN’s frequent absences from duty, she was detailed and eventually reassigned from the Cardiac Catherization Lab (CCL) to the Emergency Service Area (ESA). (Attachment J, VAMC Richmond, (October 11, 2006.)). The RN’s frequent absences made it “increasingly more difficult to accommodate without detriment to patient care in the CCL.” *Id.* The Secretary concluded that the Medical Center’s decision to reassign the RN involves issues concerning or arising out of professional conduct or competence within the meaning of 38 U.S.C. §7422(b).” *Id.*

Similar to the above decisions, in this case, the Medical Center determined that a detail was warranted due to significant patient care and ethical concerns. Such a determination involves matters arising out of professional conduct or competence within the meaning of 38 U.S.C. 7422, and thus, excluded from collective bargaining.

**RECOMMENDED DECISION**

The ULP charge concerning the Medical Center’s decision to detail an RN concerns or arises out of professional conduct or competence (i.e. direct patient care or clinical competence) within the meaning of 38 U.S.C. § 7422(b).



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Richard A. Stone, M.D.  
Acting Under Secretary for Health

January 26, 2021

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Date