

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

**FACTS**

On or about August 20, 2020, the National Association of Government Employees, Local R1-32 (Union) filed a grievance stating the Bedford VA Healthcare System (Medical Center) has been “engaging in an ongoing violation of Article 16 of the Master Agreement entitled ‘Overtime’ by failing to disseminate Overtime in a manner consistent with the provisions of the contract to ensure that it is fair and equitable.” Attachment A.

On March 5, 2021, the Medical Center Director denied the Step 3 grievance stating that, “[D]uring our meeting you did not present any new evidence for review. Nor did you point to any specific events where overtime process was not followed.” Attachment B. Thus, the Director was unable to respond to “an ambiguous complaint.” *Id.*

The Union invoked arbitration, and on September 2, 2021, the parties arbitrated. Attachment C.

On December 21, 2021, the arbitrator issued an award in favor of the Union, ordering the Medical Center to conduct an audit of all employees, including Title 38 registered nurses, to determine which employees should be paid overtime when the facility violated the overtime provisions outlined in Article 16 of the Union’s Master Agreement. Attachment D, *see also* Attachment C. The Medical Center was then to compensate those employees identified in accordance with the Back Pay Act, 5 U.S.C. § 5596. *Id.*

On March 16, 2022, the Medical Center formally requested a 38 U.S.C. § 7422 determination. Attachment C. The Union did not submit a response.

**AUTHORITY**

The VA Secretary 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). This authority is delegated within VA policy. Attachment E.

**ISSUE**

Whether the Union’s grievance regarding failure to administer and disseminate overtime in a manner consistent with the Master Agreement involves issues concerning or arising out of the establishment, determination, or adjustment of employee compensation 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, physician assistants, expanded-duty function dental auxiliaries, and chiropractors. *Id.*; see 38 U.S.C. 7401(1).

Subchapter IV of Chapter 74 of Title 38 addresses pay for nurses and other health-care personnel. 38 U.S.C. §§ 7451-7459. The procedures by which VA officials establish, determine, or adjust Title 38 nurses' pay are set forth in 38 U.S.C. § 7451. Additional pay authorities for Title 38 nurses are found in 38 U.S.C. § 7453. The statute covers nurse pay matters including pay on weekends (38 U.S.C. § 7453(c)), pay during Federal holidays (38 U.S.C. § 7453(d)), overtime (38 U.S.C. § 7453(e)(1)), compensatory time (38 U.S.C. § 7453(e)(3)), and on-call duty (38 U.S.C. § 7453(h)). Notably, with regard to overtime, § 7453(e)(1) indicates that a nurse shall receive overtime pay for "*officially ordered or approved hours of service* in excess of 40 hours in an administrative workweek..." (emphasis added).

Pursuant to 38 U.S.C. § 7421(a), the VA Secretary has the authority to prescribe by regulation the hours and conditions of employment and leaves of absence of personnel appointed under Chapter 74 of Title 38 for the positions listed in 38 U.S.C. 7421(b), which includes nurses. VA Directive and Handbook 5011 states, that tours of duty will be established by facility directors (or designees) as needed to ensure patient care needs are met. Attachments F, G, and H. VA Handbook and Directive 5007, entitled "Pay Administration", specifically addresses nurses' pay in Section X. Attachment I.

The Medical Center's request sets forth that "[T]he RNs at the facility were offered voluntary overtime and mandated overtime to meet the clinical needs of the Department; especially during the COVID pandemic. The facility has 274 active RN's. There are 14 inpatient units. Each unit requires RNs for 3 shifts. Management needs to cover 294 shifts per week just for regular shifts on the inpatient units (not including outpatient and other departments). Management filled voluntary shifts by placing a book with all the available shifts at the front desk. Any RN could sign up for the shift and any RN with more seniority could take the shift from an RN with less seniority. However, in most cases during this time period[,] the need for RNs to work OT was greater than the demand. When the facility needed a RN to cover a shift, Management would mandate the next on the seniority list (from least to most seniority) as per the NAGE Master Agreement. Sometimes, Management would mandate an RN who was already at the facility to extend their shift." Attachment C.

The Secretary has determined in prior cases that the assignment of nurse overtime is excluded from collective bargaining by § 7422. In VAMC Connecticut, the Secretary determined that a grievance filed regarding the Medical Center's decision to require Psychiatric Emergency Room (PER) RNs to self-schedule on the weekends resulting in the loss of potential voluntary overtime compensation is a matter or question concerning or arising out of the establishment, determination, or adjustment of employee compensation within the meaning of 38 U.S.C. § 7422(b), and thus, excluded from collective bargaining and review by any other agency pursuant to 38 U.S.C. § 7422(d). Attachment J, *VAMC Connecticut*, February 25, 2021. Similarly, in Louisville VAMC, the Secretary determined that a grievance filed regarding overtime compensation for nurses in the Geriatric Extended Care Facility involved issues concerning or arising out of the establishment, determination, or adjustment of employee compensation. Attachment K, *VAMC Louisville*, May 20, 2008. The decision noted that the term "compensation" in 38 U.S.C. § 7422(b) covered all aspects of compensation, including overtime compensation as covered by 38 U.S.C. § 7453(e)(1).

As illustrated by the above decisions, the Secretary has determined that the assignment of nurse overtime is excluded from collective bargaining by 38 U.S.C. § 7422.

### **DECISION**

The Union's grievance regarding failure to administer and disseminate overtime in a manner consistent with the Master Agreement involves issues concerning or arising out of the establishment, determination, or adjustment of employee compensation within the meaning of 38 U.S.C. § 7422(b) and is thereby excluded from collective bargaining.

**APPROVED/DISAPPROVED**



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

9-30-2022

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Date