

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

**FACTS**

On January 10, 2022, the Wilmington Health Care System (Medical Center) determined it was necessary to activate additional medical surgical beds “to meet the growing demand of the [COVID-19] omicron variant,” as well as provide a specific area within the Medical Center “to allow for future COVID positive patients to be separated from the non-COVID positive population.” Attachment A. The surge in COVID positive patients and the need to separate them from others resulted in increased staffing demands. *Id.* These staffing demands coincided with a dramatic increase in staff taking unplanned leave due to their own COVID diagnosis. *Id.* “Although attempts were made to solicit volunteers, both internal and external, to the facility as well as incentives awarded to employees who picked up shifts, the facility could not adequately care for the rising number of COVID-19 positive patients....” *Id.*

On January 12, 2022, the Medical Center Director notified the American Federation of Government Employees, Local 0342 (Union), of the Medical Center’s need to detail Registered Nurses (RN), for a period of up to 90-days, to support the COVID surge and facilitate the separation of COVID positive patients from COVID negative patients. Attachment A. See *also* Attachment B. The 18 (initially, 17 nurses, with one added) RNs selected for the detail were chosen based upon their experience and competencies in Acute Care. Attachment A. See *also* Attachment C.

On January 13, 2022, the Medical Center Director issued a memorandum entitled “Detail to Support COVID Surge,” notifying the RNs selected for the detail that, “[a]s a result of the COVID surge, you have been identified as having the appropriate skillset to support the inpatient units. Effective January 13, 2022, you will be temporarily detailed to support inpatient nursing” for “up to 90 days.” Attachment C.

On January 13, 2022, the Union submitted a cease and desist letter to the Medical Center. Attachment D.

On January 13, 2022, the Medical Center responded to the Union’s cease and desist letter, stating:

These staff members are being temporarily re-aligned in order to provide care to our patients during the COVID surge, to ensure the safety of our veteran population, and necessary to patient care staffing in light of the pandemic. As this issue is directly related to patient care it is not subject to negotiation with labor unions, nor can such matters be grieved under negotiated grievance procedures under 38 U.S.C. § 7422.

Attachment E.

On February 3, 2022, the Union filed an Unfair Labor Practice Charge (ULP) with the Federal Labor Relations Authority (FLRA). Attachment F. See *also* Attachment A. The ULP asserted that Medical Center management “failed and continues to fail to negotiate with the [Union], in good faith prior to changes in conditions of employment.” Attachment F. The Union further asserted the Medical Center “violated the Master Labor Agreement regarding select[ion] of the employees” for the COVID detail. *Id.*

On September 29, 2022, the Medical Center formally requested a 38 U.S.C. § 7422 determination. Attachment A. In its request, the Medical Center asserts the issues in the Union’s February 3, 2022, ULP are outside the scope of collective bargaining as they involve an issue of professional conduct or competence, specifically in relation to direct patient care. *Id.* The Medical Center asserts its decision to change the clinical assignments for the 18 RNs was based on its inability to “adequately care for the rising number of COVID-19 positive patients” in light of the “the growing number of cases of COVID-19” in the Medical Center and within its staff. *Id.* The Union did not file a response to the Medical Center’s request for a § 7422 determination. The RNs temporarily detailed to inpatient units because of the COVID surge have all returned to their respective departments. Attachment M.

## **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 G.

## **ISSUE**

Whether the Union’s February 3, 2022, ULP charge concerning the Medical Center’s decision to detail RNs to support inpatient units for up to 90 days, based upon their Acute Care skillset, 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, therefore, 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(1), the Secretary has 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 the handbook, “primary consideration will be given to the efficient and effective accomplishment of the VA mission.” *Id.* Further, Section B, paragraph 3(b) states, “[e]mployees may be detailed to other assignments at their facility and to other VA facilities.” *Id.* The assignment and placement of Title 38 health care personnel is fundamental to the patient care mission of all VA health care facilities.

Here, Management determined that patient care needs, resulting from the “growing number” of COVID-19 cases at the Medical Center, in tandem with the increase in COVID positive staff using unplanned leave, necessitated the temporary adjustment of RN coverage within the Medical Center. Attachment A. Specifically, Management determined it was necessary to detail 18 RNs, selected for their “experience and competencies in Acute Care,” to the inpatient units for “a duration of up to 90-days.” *Id.* See *also* Attachment C. Prior to detailing the RNs, Management attempted to “solicit for volunteers” but did not get an adequate response. Attachment A. The decision to temporarily detail these RNs was directly related to the Medical Center’s patient care needs and, accordingly, is exempt from collective bargaining under 38 U.S.C. § 7422(b).

Similar issues have been addressed by the Secretary in previous decisions. In Northern California, “Management determined that patient care needs required the adjustment of nurse coverage within the Medical Center’s Emergency Department. Due to a shortage of nurses assigned to the ED at the time, the Nurse Manager canvassed her nurses to cover the identified shortage in the ED.” Attachment I, VAMC Northern California (February 3, 2021). Because there were no volunteers, a nurse was selected for a 60-day detail in the Emergency Department (ED). *Id.* The Secretary concluded the “Medical Center’s decision to detail an RN for sixty days from the ICU to the ED is a matter or question arising out of professional conduct or competence within the meaning of 38 U.S.C. § 7422(b)” and, therefore, was exempt from collective bargaining. *Id.*

In 2011, to address patient care needs and a staffing shortage, Management at the Fargo VAMC had two Grand Forks Community Based Outpatient Clinic (CBOC) providers go to a Bemidji CBOC “a couple of days a week.” Management detailed the two Grand Forks providers after a review of the VAMC’s workload established that the two providers were assigned “too few patients,” while the providers at the Bemidji CBOC were assigned “too many patients.” Attachment J, VAMC Fargo (December 17, 2012). *Id.* The Secretary concluded “the detail of two physicians from the Grand Forks CBOC to the Bemidji CBOC . . . concerns professional conduct or competence . . . within the meaning of 38 U.S.C. § 7422(b)” and, therefore, was excluded from collective bargaining. *Id.*

In 2008, the West Haven VAMC reassigned a nurse from the Homeless Veterans Program to the Mental Health Program, based on the patient care needs of the Mental Health Program. Attachment K, VAMC West Haven (October 9, 2008). Management explained the RN was “moved from a position which did not require nursing skills, to a position that needed a nurse to care for its chronically ill veterans” and that the reassignment was necessary to “meet the specific clinical needs of that new program.” *Id.* The Under Secretary for Health concluded “the reassignment of [a] RN concern[s] issues of professional conduct or competence within the meaning of 38 U.S.C. § 7422(b) and are therefore outside of the scope of collective bargaining within the meaning of 38 U.S.C. § 7422(b).” *Id.*

Finally, in January 2014, to address nurse staffing imbalances at the Ann Arbor VAMC, the “Medical Center decided to temporarily rotate some Registered Nurses to different shifts to ensure the appropriate number of nurses were available for each shift.” Attachment L, VAMC Ann Arbor (August 8, 2015). The Medical Center implemented the RNs’ schedule changes prior to completing bargaining with the Union, maintaining that it “reserved the right to schedule RNs based on patient care needs.” *Id.* The Secretary concluded that “schedule changes for PCS nurses without completing 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).” *Id.*

As illustrated by the above decisions, the Secretary has frequently held that both detailing and reassigning Title 38 providers to address patient care issues related to staffing shortages concerns professional conduct or competence within the meaning of 38 U.S.C. § 7422(b) and, therefore, are excluded from collective bargaining.

### **RECOMMENDED DECISION**

The Union’s February 3, 2022, ULP charge concerning the Medical Center’s decision to temporarily detail RNs to support inpatient units for up to 90 days, based upon their Acute Care skillset, 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 is thereby excluded from collective bargaining.

APPROVE/DISAPPROVE



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

9/27/2023

Date