

Title 38 Decision Paper
Department of Veterans Affairs (VA)
VA Fayetteville Coastal Health Care System (VAFCHCS)

FACTS

On July 29, 2021, the Associate Director, Patient Care Services, at the VA Fayetteville Coastal Health Care System (Medical Center) notified the American Federation of Government Employees, Local 1738 (Union) via Memorandum (entitled "Impact and Implementation of Tour of Duty Change for Patient Care Services within the Behavioral Health Service Line") that, effective August 15, 2021, Nursing Service was modifying the work schedules of health care professionals to 12-hour tours based upon operational needs during an emergency "to ensure adequate patient care coverage." Attachment A.

On July 30, 2021, the Union requested a briefing and demand to bargain regarding the Medical Center's July 29th Memorandum. Attachment B.

On August 3, 2021, the Union and Medical Center met to discuss the proposed changes and the Union's concerns. Attachment C.

On August 9, 2021, the Union provided the Medical Center a list of "Concerns" regarding the modified work schedules. Attachment D, *see also* Attachment C.

On August 9, 2021, the Medical Center drafted a written response to the Union's concerns and verbally shared its response with the Union during an August 11, 2021, meeting. Attachment E, *see also* Attachment C.

On August 12, 2021, the Medical Center responded to the Union's concerns via Memorandum, which identified the impacted health care professionals (including the one RN) and stated that the changes in the tours of duty were necessitated by "the COVID-19 pandemic, current surge in cases, and the need to change work hours for nursing staff in the Behavioral Health Service in order to meet the operational needs of the unit and the safety of both the Veterans and employees." Attachment F.

On August 26, 2021, the Union filed a Step 3 Grievance indicating "the negative impact the tour changes would have on the employees and their families," and that "management failed to acknowledge that the critical needs of the unit are due to a staffing shortage and not based on the COVID 19 pandemic or surge in cases." Attachment G.

On August 27, 2021, the Associate Director, Patient Care Services (Associate Director PCS), notified the Union that effective August 30, 2021, Nursing Service was "temporarily detailing Outpatient RNs" and other health care professionals "to inpatient units due to the Covid-19 pandemic." Attachment H. The Associate Director PCS also

notified the Union that VA would “also be temporarily changing employee’s tours of duty to meet the staffing needs of inpatient units . . . due to the need to increase bed availability for patient care needs and to properly staff the additional beds.” *Id.* The notification further stated that “[a]ll temporary shifts will be 12 hours and volunteers for specific duty hours (day shift/night shift) will be sought initially for the above changes, and if needed, we will then move to seniority in identifying those employees for the temporary changes.” *Id.*

On September 14, 2021, the Medical Center Director denied the Step 3 grievance stating that, after several meetings with union reps regarding the current surge in patients resulting in staffing needs, “[t]he temporary realignment of the tours is necessary due to the critical needs of the unit” and “the union fails to acknowledge that there is a surge of patients and unit 5C is not able to maximize its capacity of available beds due to the current staffing imbalance . . . Management has detailed staff from outpatient units to meet the needs of unit 5C.” Attachment I.

The Union invoked arbitration on October 4, 2021. Attachment C.

On January 20, 2022, the Medical Center formally requested a 38 U.S.C. § 7422 determination. Attachment C. The Union submitted a response on January 26, 2022, asserting that the Medical Center “has not established sufficient evidence that changing RN’s tours of duty from 8-hours to 12-hours has to do with professional competence or conduct. The Agency locally has not identified any reason why the nurse’s practice, competence or conduct changes with the shift changes other than asserting some buzz words that don’t make any apparent sense.” Attachment J.

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 K.

ISSUE

Whether the Medical Center’s decision to implement a tour change from 8-hour to 12-hour 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, podiatrist, optometrist, registered nurses, physician 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 contained in VA Handbook 5011, Part II, Chapter 3 regarding the establishment of workweeks, tours of duty, and work schedules for medical professional employees. Medical Center Directors have the discretionary authority to “prescribe any tour of duty to ensure adequate professional care and treatment to the patient[.]” Attachment L, VA Handbook 5011, Part II, Chapter 3, Paragraph 2(d). In addition, Medical Center Directors are authorized to approve flexible and Compressed Work Schedules for employees under their jurisdiction. Attachment L, VA Handbook 5011, Part II, Chapter 3, Paragraph 6(f) (1).

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 *Houston*, in order to “achieve better patient care through a 20% reduction in overtime used to staff the inpatient units, decrease RN staff turnover, and improve RN recruitment as well as staff and patient satisfaction,” the Medical Center decided to implement a 12-hour Compressed Work Schedule (CWS) for the inpatient Spinal Cord Injury (SCI) RNs. Attachment M, VAMC Houston (Jan. 27, 2021). The Secretary concluded 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.” *Id.*

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 N, 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 O, 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 P, 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.*

In this case, the Medical Center’s decision to implement the 12-hour tour impacted direct patient care, as it was necessary to meet the surge in patients due to the COVID-19 pandemic emergency, a fact that Medical Center leadership articulated to employees and the Union on several occasions. Attachment I. Further, leadership agreed to work with any staff that may have experienced hardship as a result of the schedule change and gave impacted staff “options . . . to be temporarily reassigned to other units that have better fitting schedules.” *Id.* Additionally, the schedule changes were made pursuant to the authority given to Medical Center leadership within VA policy. See Attachment L, VA Handbook 5011, Part II, Chapter 3, Paragraph 2(d); 6(f)(1). Similar to *VAMC Houston* and other prior decisions, “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.” Attachment M, VAMC Houston (Jan. 27, 2021).

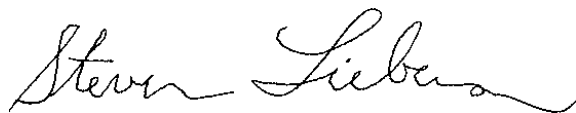
This decision is consistent with prior determinations wherein the Secretary has concluded that RN schedules directly impact patient care and that such matters involve professional conduct and competence within the meaning of 38 U.S.C. § 7422 and are therefore excluded from collective bargaining.

DECISION

The Medical Center’s decision to implement a tour change from 8-hour to 12-hour shifts 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.

APPROVED **X**

DISAPPROVED _____



May 16, 2022

Steven L. Lieberman, M.D.
Deputy Under Secretary for Health,

Date

Performing the Delegable Duties of the
Under Secretary for Health