

**Title 38 Decision Paper
Department of Veterans Affairs (VA)
Milwaukee, Wisconsin (VAMC)**

FACTS

Since early 2017, the Milwaukee VA Medical Center (Medical Center) had been operating with a substantial and ongoing registered nurse (RN) staffing shortage. (Attachment 1; see Attachment 13). To cover staffing shortages throughout the Medical Center, management utilized mandatory overtime (OT) for nursing staff. (Attachment 2). Between September 2016 and May 2017, RNs at the Medical Center logged approximately 1,010.50 hours to ensure urgent patient care needs were being addressed. (*Id.*; see Attachment 13). The mandatory OT logs show that there was a consistent increase in the number of OT hours worked by employees from late 2016 into 2017. (Attachment 3). The most common reasons reported for the OT hours were “absence” or “short staffed.” (*Id.*). After utilizing the mandatory OT, the Medical Center concluded that it “did not fully address that RN shortage that was impacting patient care.” (Attachment 13; see Attachment 3).

From August to September 2017, the Medical Center determined that the Spinal Cord Injury Division (SCI) “often had enough RNs to cover its patient workload and still had a surplus of RN staff which could be used in other areas of the hospital.” (Attachment 13; see Attachment 4). As a result, a phased plan to implement a Float Pool in the SCI (SCI Float Pool) was developed. (*Id.*)

On November 16, 2017, leadership held a meeting to discuss implementation of and how to incentivize voluntarily participation in the SCI Float Pool. (Attachment 13; see Attachment 5). One proposed incentive considered was specialty pay. (*Id.*)

On February 14, 2018, management at the Medical Center sent an email to staff informing them of the plan to hire more staff, but also implement a float pool at the Medical Center. (Attachment 7). In the email, management sought volunteers for the SCI float pool. (*Id.*)

On April 18, 2018, SCI management who had been tasked by the Medical Center leadership to study pay and benefits provided their findings regarding incentives to be offered in establishing the SCI Float Pool. (Attachment 6; see Attachment 13). The members of the team visited facilities and spoke with management teams that utilized float pools for RNs. (*Id.*). Managers at those facilities reported that employee satisfaction with the float pool at the other facilities had more to do with incentives such as self-scheduling, learning new skills, and working fewer weekends and holidays. (*Id.*)

In July 2018, management issued the standard operating procedure (SOP) for the SCI Nursing Float Pool. (Attachment 8). The SOP notes that the pool would be assigned to SCI, Acute Care, and RECC units, as those units needed the most assistance. (*Id.*)

The SOP also stated that members of the float pool would have the options of a set schedule, working 8, 10, or 12-hour shifts, and working 1 weekend per month, as well as having separate holiday and annual leave rotation schedules. (*Id.*)

In November 2018, SCI management implemented the SCI Float Pool “to address a chronic hospital-wide RN staffing shortage.” (Attachment 13).

On November 17, 2018, the Wisconsin Federation of Nursing and Health Professionals (Union) requested to meet with the Medical Center to discuss and impact and implementation issues related to the Float Pool. (Attachment 9). Management responded in late November by noting that any issues surrounding the SCI float pool were precluded from bargaining or grievances under 38 U.S.C. § 7422. (*Id.*)

On December 17, 2018, the Union filed a Step 1 Grievance. (Attachment 10). In the grievance, the Union claimed that the incentives offered for the SCI float pool were violations of the CBA, Veterans Health Administration (VHA) policies, and staffing memorandum for SCI. (Attachment 11). The Union identified the specific incentives in question as including the following: working only one weekend a month; exemption from off-tour rotations; a holiday rotation for the float pool requiring them to only work a single holiday per holiday grouping; and an annual leave rotation specific to the float pool. (*Id.*). As remedies, the Union requested that the incentives be offered to all staff as well as posting of the weekend, holiday, and off-tour rotation rosters. (*Id.*)

On December 18, 2019, the Medical Center acknowledged and responded to the grievance. (Attachment 10). The Medical Center noted that it had previously advised¹ that the matter of the SCI float pool was excluded from the grievance process under 38 U.S.C. § 7422.

On April 5, 2019, the Union filed an Unfair Labor Practice (ULP) Charge with the Federal Labor Relations Authority (FLRA). (Attachment 12). The ULP asserted that “[T]he establishment of the float pool is a change in working conditions for represented RNs and should have triggered notification and bargaining.” (*Id.*) The Union claimed that the implementation of the SCI float pool caused hardship for non-members of the float pool, as those individuals “have had tour rotations and weekend rotations upset by the fixed schedules of the float pool RNs.” (*Id.*)

On May 13, 2019, the VAMC formally requested a 38 U.S.C. §7422 determination. (Attachment 13). In the request, the Medical Center noted that no response to the ULP was filed. (*Id.*) The Union did not submit a response to the issues raised in the VAMC’s request for determination.

AUTHORITY

¹ The email notes a date of December 10, 2018 for the communication first asserting the subject matter was excluded from bargaining or grievance under § 7422. However, Attachment 9 shows that the actual date of the communication in question is November 17, 2018.

The Secretary has final authority to determine 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). On October 18, 2017, the Secretary delegated his authority to the Under Secretary for Health (USH). (Attachment 14).

ISSUE

Whether a ULP charge concerning the Medical Center's decision to implement an RN float pool 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 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. 38 U.S.C. § 7422(b).

38 U.S.C. § 7421(a) authorizes the Secretary of Veterans Affairs to prescribe by regulation the "hours and conditions of employment" of Title 38 medical professionals. (Attachment 15). The employees covered by this provision are listed in 38 U.S.C. § 7421(b) and includes RNs. (*Id.*)

VA Directive 5011 provides that "duty schedules for title 38 healthcare employees shall be established as appropriate and necessary for performance of services in the care and treatment of patients and other essential activities within the administration of the Under Secretary for Health or designated officials." (Attachment 16, VA Directive 5011, ¶ 2g). In addition, VA Handbook 5011 provides that within the Veterans Health Administration, "the proper care and treatment of patients shall be the primary consideration in scheduling tours of duty under these instructions. Duty schedules shall be established as appropriate and necessary for performance of services in the care and treatment of patients and other essential activities within the administrative discretion of the Under Secretary for Health or designated officials." (Attachment 17, VA Handbook 5011, part II, chapter 1, ¶ 2b; see Attachment 18, VA Handbook 5011, part II, chapter 3, ¶ 2d).

VHA Directive 1351 covers the nationally standardized methods for determining direct care staffing for VA nursing personnel. (Attachment 21). The directive states that one of the changes to the Directive is an "increased emphasis on Veteran access to care." (*Id.* At ¶ 2a). The SCI Staffing Chart from March 2019 indicates that there were 37 RNs,

10 licensed practical nurses (LPN), and 22 nursing assistants. (Attachment 4). Data on full-time equivalent (FTE) positions from April 2019 shows that SCI had the highest FTE out of all the nursing divisions, confirming availability of SCI staff relative to other divisions. (Attachment 1). In comparison, Acute Care appeared to have much lower FTE levels. (*Id.*)

Based on such data, Management determined that patient care needs required the adjustment of RN coverage within the Medical Center. (Attachment 13). This is consistent with the procedures outlined in VHA Directive 1351. (Attachment 21). According to the Medical Center, the change was “necessary to ensure proper staffing levels for patient care needs throughout the VAMC. This occurs when there is a need in another area (or areas) of the hospital and there is excess RN staff in SCI.” (Attachment 13; see Attachment 21). Because the decision to create the SCI float pool was directly related to the Medical Center’s patient care needs, it is exempt from collective bargaining under 38 U.S.C. § 7422(b).

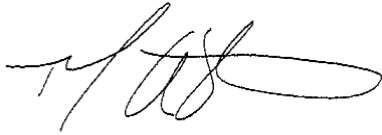
Similar issues have been addressed by the Secretary in previous decisions. In *VAMC Northern California*, the Medical Center determined that “patient care needs required the adjustment of RN coverage within the Medical Center.” (Attachment 19, *VAMC Northern California* (Oct. 30, 2018)). The Medical Center decided to implement a schedule change for the night shift RNs in the Martinez Community Living Center, in order to ensure, “an adequate shift hand-off from the off-going shift for the safety and well-being of” Veterans. (*Id.*) The connection between the schedule change and patient care needs was the basis for determining that the action was exempt from collective bargaining under 38 U.S.C. § 7422(b).

Additionally, in *VAMC Ann Arbor*, the Medical Center decided to temporarily rotate some RNs to different shifts to address nurse staffing imbalances. (Attachment 20, *VAMC Ann Arbor* (Aug. 8, 2015)). Although the union expressed concerns over the schedule changes, management maintained that the “Medical Center reserved the right to schedule RNs based on patient care needs.” (*Id.*) The Medical Center emphasized that the authority to control nursing schedules is directly associated with professional conduct and competency as a facility’s ability to provide direct patient care is impacted without the ability to schedule RNs when needed most. (*Id.*) As in the *VAMC Northern California* decision, 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 held that based upon direct patient care needs, a medical center may set or change title 38 RN schedules and assignments without initiating or completing bargaining with the union.

DECISION

A ULP charge concerning the Medical Center's decision to implement an RN float pool without bargaining 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), and thereby excluded from collective bargaining.



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

3-2-2021
Date