

**Title 38 Decision Paper**  
**Department of Veterans Affairs (VA)**  
**Northern California Health Care System (VAMC)**

**FACTS**

On or about February 2, 2015, a Registered Nurse was detailed for a period of sixty days from the Intensive Care Unit (ICU) to the Emergency Department (ED) “where there was a need for Registered Nurses for patient care.” (Exhibit 1; Exhibit 13).

On February 13, 2015<sup>1</sup>, the American Federation Government Employees, AFL-CIO, Local 1206 (Union) filed an Unfair Labor Practice Charge (ULP) with the Federal Labor Relations Authority (FLRA)<sup>2</sup> (Exhibit 2). The ULP alleged that Medical Center management bypassed the Union by directly contacting the nurse, and unilaterally changing both his tour of duty and his duty station. The nurse’s tour of duty was changed from 6:00 p.m. through 6:30 a.m. to 8:00 p.m. through 8:30 a.m., and his duty station was changed from the ICU to the ED.” *Id.* The Union further alleged that Management did not notify the Union of these changes or provide the Union an opportunity to bargain over these changes. *Id.*

On February 26, 2015, the Chief of Employee and Labor Relations (HRMS) provided the Union with a summary of what actually occurred regarding the nurse. (Exhibit 3). He specified that the hours worked in the ED during the nurse’s detail would remain the same as they had been in the ICU, and explained that the nurse was guaranteed to return to his shift and position in the ICU at the end of his sixty day detail *Id.*

On March 13, 2015, HRMS provided the FLRA a copy of the February 26, 2015, email sent to the Union to which the Union did not respond (Exhibit 4).

On July 27, 2015, the Medical Center responded to the ULP. (Exhibit 5; Exhibit 6). The Medical Center stated that the nurse “was detailed to the Emergency Department from his work center in the ICU. This detail was for direct patient care in the Emergency Department during a severe staffing shortage. Additionally, to reduce the impact of this temporary detail, [the nurse] remained on his tour of duty. The ULP states the Agency changed his duty hours to 8:00 p.m. to 8:30 a.m. This statement is inaccurate.” *Id.*

On August 7, 2015, the FLRA notified the Medical Center and Union that the ULP was being held in abeyance pending the outcome of the 38 U.S.C. § 7422 request (Exhibit 7).

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<sup>1</sup> The ULP is signed and dated Feb 13, 2014; however, the ULP fax sheet transmittal indicates the actual date the ULP was filed “02-13-2015.”

<sup>2</sup> The FLRA designated the ULP as SF-CA-15-0364.

On September 5, 2015, the nurse resigned from his position at the Medical Center (Exhibit 15).

On January 29, 2016, the Medical Center formally requested a 38 U.S.C. § 7422 determination. (Exhibit 13; see also Exhibit 8). The Union did not submit a response to the issues raised in the Medical Center's request for determination.

## **AUTHORITY**

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 August 23, 2015, the Secretary delegated his authority to the Under Secretary for Health (USH) (Exhibit 12).

## **ISSUE**

Whether the Union's ULP charge concerning the Medical Center's decision to detail an RN for sixty days from the ICU to the ED 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 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, peer review, or employee compensation, as determined by the Secretary.

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. (Exhibit 14). 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, Management determined that patient care needs required the adjustment of nurse coverage within the Medical Center. 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. (Exhibit 3). Since there were no volunteers, she detailed the particular nurse to the ED for sixty days. Since this nurse currently worked the same shift, 6:00 p.m. through 6:30 a.m., there was no change to the hours he regularly

worked or impact to his pay during the detail to the ED *Id.* The nurse's January 28, 2015, detail ended on March 29, 2015. *Id.* He returned to the ICU and to the same shift that he held there in the past, 6:00 p.m. through 6:30 a.m. *Id.* The decision to detail the nurse was directly related to the Medical Center's patient care needs and, as a consequence, is exempt from collective bargaining under 38 U.S.C. § 7422(b).

Similar issues have been addressed by the Secretary in previous decisions. In 2011, Management's review of the Fargo VAMC's Community Based Outpatient Clinics (CBOCs) workload determined that two providers at the Grand Forks CBOC were assigned "too few patients" while the providers at the Bemidji CBOC were assigned "too many patients." (Exhibit 11, VAMC Fargo (December 17, 2012)). As a result, Management had the two providers of the Grand Forks CBOC go to the Bemidji CBOC "a couple of days a week" to respond to patient needs during the staffing shortage. *Id.* The Secretary concluded that "the detail of two physicians from the Grand Forks CBOC to the Bemidji CBOC, as well as request for overtime compensation, concerns professional conduct or competence and employee compensation within the meaning of 38 U.S.C. § 7422(b)" and therefore, was excluded from collective bargaining. *Id.*

In response to the expanding mental health initiative, in 2008, the West Haven VAMC reassigned a nurse from the Homeless Veterans Program to the Mental Health Program based upon patient care needs to provide nursing assessments of clients and to administer medications and assess response to these medications. (Exhibit 9, VAMC West Haven (October 9, 2008)). The USH concluded that "the reassignment of [an] RN concern 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.*

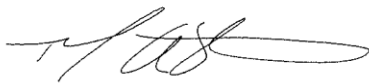
In January 2014, in order to address nurse staffing imbalances at the Ann Arbor VAMC, the "Medical Center decided to temporarily rotate some Registered Nurses to different shifts to ensure the appropriate number of nurses were available for each shift." (Exhibit 10, VAMC Ann Arbor (August 8, 2015)). Although the Union expressed scheduling concerns, Management maintained that the "Medical Center 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-described decisions, the Secretary has held that both detailing and reassigning Title 38 providers to address patient care issues related to staffing shortages frequently concerns professional conduct or competence within the meaning of 38 U.S.C. § 7422(b) and, therefore are excluded from collective bargaining.

## RECOMMENDED DECISION

A ULP charge concerning the Medical Center's decision to detail an RN for sixty days from the ICU to the ED 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 thereby excluded from collective bargaining.

**APPROVED**/DISAPPROVED



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

2-3-2021

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Date