

Title 38 Decision Paper
Department of Veterans Affairs (VA)

FACTS

On March 4, 2020, the National Veterans Affairs Council (NVAC), American Federation of Government Employees, AFL-CIO (Union) filed a national grievance NG 03-04-20 alleging the Department of Veterans Affairs (VA) failed to notify and bargain with the Union over a change in conditions of employment regarding Psychiatric Emergency Room (PER) nurses self-scheduling, leave, and overtime policies for VA Connecticut Healthcare System employees (Medical Center). (Attachment A). The Union alleges that the Medical Center has a policy that requires certain clinicians to work 26 weekends in a calendar year and now requires these clinicians to find their own coverage for any days they wish to take off on weekend workdays. (*Id.*) Although these employees must submit annual leave (“AL”) requests in advance, the Agency never previously required them to find their own coverage for their days off. (*Id.*) However, the Union alleges that the Department now mandates that these employees must, on their own, seek available employees to cover their requested leave days, i.e. – “swap” their weekend workdays with someone else. (*Id.*) If employees are unable to find someone to swap with, their leave is denied. (*Id.*) Additionally, the Union alleges a second, but related violation concerning the restriction of overtime. (*Id.*) Previously clinicians could cover the shift of anyone who was on leave by working voluntary overtime,” but the current “swap method” denies employees the ability to work overtime. (*Id.*) The Union asserts the changes are violations of the Master Agreement. (*Id.*)

On May 14, 2020, VA responded to the grievance. (Attachment B). The response addresses the alleged contract violations, as well as the concerns regarding pure Title 38 employees’ work schedules and overtime procedures as outside the scope of collective bargaining and the negotiated grievance procedure. (*Id.*) The response clarifies that the “alleged self-schedule changes” applied to PER nurses at the Medical Center and explained that the number of PER nurses was capped at 12 full-time employees meaning that the minimum number of employees needed for the weekend shift was two registered nurses (RN). (*Id.*) In order to minimize the impact of employees’ ability to request annual leave an ensure patient care needs are met, self-scheduling was implemented. (*Id.*) The response notes that work schedules and overtime procedures for Title 38 employees were outside of the collective bargaining and grievance processes under 38 U.S.C. § 7421 given that both subjects relate directly to direct patient care. (*Id.*)

On December 21, 2020, the VA’s Office of Labor Management Relations (LMR) formally requested a 38 U.S.C. §7422 determination. (Attachment C). On January 29, 2021, LMR submitted a supplemental § 7422 request seeking a determination regarding the restriction on overtime for PER nurses. (Attachment D).

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). On October 18, 2017, the Secretary delegated his authority to the Under Secretary for Health (USH). (Attachment E).

ISSUES

- (1) Whether a grievance concerning the Medical Center's decision to require PER RNs to self-schedule on the weekends is 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 thus, is excluded from collective bargaining and review by any other agency pursuant to 38 U.S.C. § 7422(d).
- (2) Whether a grievance concerning the Medical Center's decision to require 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, is excluded from collective bargaining and review by any other agency pursuant to 38 U.S.C. § 7422(d).

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 under 38 U.S.C. § 7422(a) 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 any matter or question concerning or arising from employee compensation, as determined by the Secretary. 38 U.S.C. § 7422(b). "Professional conduct or competence" is defined to mean "direct patient care" and "clinical competence." 38 U.S.C. § 7422(c).

Professional Conduct or Competence

38 U.S.C. § 7421(a) authorizes the Secretary of the Veterans Affairs to prescribe by regulation the "hours and conditions of employment" of Title 38 medical professionals. (Attachment F). Subsection (b) lists the medical professional covered by the statutes, which includes RNs. (*Id.*)

VA policies on hours of duty and leave are found in VA Directive 5011 and VA Handbook 5005. (Attachments G, H, and I.) VA Directive 5011 provides that "duty

schedules for Title 38 health care 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 G, VA Directive 5011, ¶ 2g). In addition, VA Handbook 5011 specifies 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 H, VA Handbook 5011, Part II, Chapter 1, ¶ 2b) VA Handbook 5011 further states that for Title 38 employees, due to the “continuous nature of the services rendered at hospitals,” facility Directors (or designees) have the authority to “prescribe any tour of duty to ensure adequate professional care and treatment to the patient...” (Attachment I, VA Handbook 5011, Part II, Chapter 3, ¶ 2d).

In this case, according to Medical Center policy, PER nurses are required to work 26 weekends in a calendar year. (Attachment B). Given the available number of full-time equivalents (FTE) for the unit, the facility determined that at least two RNs needed to be available for the weekend shifts. (*Id.*) Self-scheduling was implemented several years ago in order to minimize the impact of employees taking leave and ensure patient care needs were met. (*Id.*) Under the policy, the schedules are posted in advance, with the employees aware of their schedules in advance. (*Id.*) These policies are in line with VA policies on leave and hours of duty for Title 38 employees and are connected to direct patient care.

Similar scheduling issues have been addressed by the Secretary in previous determinations under 38 U.S.C. § 7422. In VAMC Northern California, the Medical Center’s Nurse Manager in the Community Living Center (CLC) sent an email to the RNs stating, “[e]ffective March 6, 2016, in an effort to provide an adequate shift hand-off for the safety and well-being of the Veterans, the night shift RNs will report to duty at 11:30PM and work until 8:00AM.” (Attachment J, VAMC Northern California (Oct. 30, 2018)). The Union filed a ULP asserting the Medical Center management bypassed the Union by directly contacting RNs bargaining unit employees (BUE) regarding a change in duty hours without bargaining the change in duty hours. (*Id.*) The Secretary concluded that based upon direct patient care needs, a medical center may set or change title 38 RN schedules without initiating or completing bargaining with the union. (*Id.*) Also, in VAMC Ann Arbor, the Medical Center decided to temporarily rotate some RNs to different shifts to address nurse staffing imbalances. (Attachment K, VAMC Ann Arbor (Aug. 5, 2015) VAMC Ann Arbor (Aug. 5, 2015). In VAMC Ann Arbor, 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.*)

The Establishment, Determination, or Adjustment of Employee Compensation

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. (Attachment L). Additional pay authorities for Title 38 nurses are found in 38 U.S.C. § 7453. (Attachment M). 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)). (*Id.*) Notably, with regards 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). (*Id.*) The statute makes clear that the overtime will be allowed only for hours officially approved or ordered. As noted above, VA Directive and Handbook 5011 clearly states that tours of duty will be established by facility Directors (or designees) as needed to ensure patient care needs are met. (Attachments G, H, and I).

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 in the positions listed in 38 U.S.C. 7421(b), which includes nurses. 38 U.S.C. § 7421. VA Handbook and Directive 5007, entitled "Pay Administration", addresses nurse pay in Section X. (Attachment N). As previously noted, VA Directive and Handbook 5011, covers VA policies on hours of work and leave for title 38 employees. (Attachments G, H, and I). While 38 U.S.C. § 7422(a) states: "the authority of the Secretary to prescribe regulations under section 7421 of [title 38] is subject to the right of Federal employees to engage in collective bargaining with respect to conditions of employment through representatives chosen by them in accordance with chapter 71 of title 5 (relating to labor-management relations)", 38 U.S.C. § 7422(b) specifically prohibits collective bargaining over matters that concern or arise out of the establishment, determination, or adjustment of employee compensation for such employees. 38 U.S.C. § 7422(b)(3).

The Secretary has determined that the adjustment of nurse overtime and reduction in nurse pay are excluded from collective bargaining by 38 U.S.C. § 7422. 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 O, (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). In Buffalo VAMC, United American Nurses (UAN) filed a grievance arguing that three nurse practitioners were entitled to Saturday premium pay for Saturday work at a CBOC in addition to the overtime pay they received for working on Saturdays. (Attachment P, (Buffalo VAMC, February 22, 2008)). The Secretary determined that the grievance concerning the three nurse practitioners' entitlement to Saturday premium pay for Saturday work at a CBOC having no established Saturday

tour of duty involved a matter concerning or arising out of the establishment, determination, or adjustment of employee compensation under 38 U.S.C § 7422. (*Id.*)

Determining RN's scheduling to cover annual leave to ensure proper staffing levels for patients goes to the heart of professional conduct and competence. Determining schedules for RNs is fundamental to ensuring the level and quality of care VA provides for its veterans. VA policies on leave and hours of duty make clear that management has the authority to establish and adjust work schedules for Title 38 employees as appropriate and necessary to provide adequate professional care and treatment for patient. 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 without initiating or completing bargaining with the union. Additionally, there is no inherent entitlement to the opportunity for overtime hours resulting in overtime pay. The Secretary has determined that the adjustment of nurse overtime and reduction in nurse pay are excluded from collective bargaining by 38 U.S.C. § 7422.

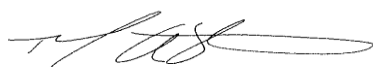
RECOMMENDED DECISION

- (1) A grievance concerning the Medical Center's decision to require PER RNs to self-schedule on the weekends is 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 thus, is excluded from collective bargaining and review by any other agency pursuant to 38 U.S.C. § 7422(d).

- (2) A grievance concerning the Medical Center's decision to require PER Registered Nurses 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, is excluded from collective bargaining and review by any other agency pursuant to 38 U.S.C. § 7422(d).

 X
Approved

Disapproved



2-25-2021

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

Date