

**Title 38 Decision Paper  
VA Central Western Massachusetts Healthcare System  
Leeds, Massachusetts**

**FACTS**

On July 16, 2021, the National Association of Government Employees (NAGE), Local R1-105 (Local R1-105) sent an email entitled “Assignment Despite Objection” to the Chief, Outpatient Mental Health at the VA Central Western Massachusetts Healthcare System (Medical Center) purportedly raising staffing concerns on behalf of Local R1-105<sup>1</sup> and the National Association of Government Employees, Local R1-107 (Local R1-107)<sup>2</sup>. (Attachment A & Attachment B). The email explained, “VA CWM Mental Health Service Line staff have been given assignments which we believe, in our professional judgment, are potentially unsafe for Veterans.” *Id.*

The email also explained that the Union deems it “necessary” that the Medical Center:

1. “Immediately hire locum tenens psychiatrists<sup>3</sup> sufficient to bring us up to full staffing.
2. Have MHSL administrative personnel explain to Veterans, without delay, what is happening and how their needs will be met at this time and going forward.
3. Thoroughly analyze how the situation came about with eye to preventing future crises.” (Attachment A & Attachment B).

On, August 9, 2021, Local R1-105 and Local R1-107 (Unions) filed a joint Step 3 grievance entitled “Understaffing Grievance”. (Attachment C). The grievance asserts “unsafe staffing level of [the] mental health Service line both outpatient and inpatient. The shortage of psychiatrist[s] has created an unsafe work environment for both title five employees and title 38 nurses.” *Id.* The Unions reiterated the demands referenced in the July 16<sup>th</sup> email and made additional requests. *Id.*

On August 17, 2021, the Unions met with the Chief of Mental Health and Associate Nurse Executive. (Attachment D & Attachment B).

On September 7, 2021, the Medical Center responded to the Step 3 Grievance. (Attachment E). The grievance was denied explaining, “...we are actively recruiting for vacancies for the Mental Health Service Line. A new employee has recently come on board, as well as others that are waiting to clear credentialing.” *Id.* Additionally, per VHA Directive 1351, “the current staffing profile for the inpatient staff is much higher than what is required for the current census numbers.” *Id.*

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<sup>1</sup> National Association of Government Employees, Local R1-105 (Union) represents Title 38 nursing staff. Attachment B.

<sup>2</sup> National Association of Government Employees, Local R1-107 (Union) represents hybrid Title 38 Nursing Assistants and Title 5 employees. Attachment B.

<sup>3</sup> American Federation of Government Employees, Local 218 represents physicians (which include psychiatrists) and physician assistants at the Medical Center. Attachment B.

On September 17, 2021, the Union invoked arbitration. (Attachment F).

On January 10, 2022, the Medical Center submitted a request for a 38 U.S.C. § 7422 determination. (Attachment B). On January 31, 2022, the Union submitted a response to the issues raised in the VAMCs request asserting, “[T]he grievance filed by the NAGE does not mention any matter, which arises out of professional conduct or competence of any Title 38 employees” and “[T]here are no claims in the underlying grievance about direct patient care or clinical competence, thus, the grievance is not in violation of 38 U.S.C. § 7422(b).” (Attachment G).

## **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 H).

## **ISSUE**

Whether a Union grievance requesting that the Medical Center hire locum tenens psychiatrists involves a matter or question concerning or arising out of professional conduct or competence within the meaning of 38 U.S.C. § 7422(b), and thus, is 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, physicians assistants, expanded-duty function dental auxiliaries, and chiropractors. *Id.*; see 38 U.S.C. § 7401(1).

Pursuant to 38 U.S.C. § 7401, “[T]here may be appointed by the Secretary such personnel as the Secretary may find necessary for the health care of veterans.” Additionally, 38 U.S.C. § 7402 sets forth the requisite qualifications for appointment to these positions. VA Handbook 5005, Part I, Chapter 1, addresses the recruitment process as it pertains to certain VA employees. (Attachment I). Most notably, the Secretary retains exclusive authority over VA’s recruitment process as it relates to title 38 employees. *Id.* For example, it provides that “[f]or positions which are included in exclusively recognized units, facility management *may* consider seeking the assistance of the labor organization which holds exclusive recognition for that unit in the facility’s

recruiting effort.” *Id.* (emphasis added). The Handbook also contains permissive language that VA management *may* seek assistance of the unions in recruiting, but ultimately retains authority regarding the recruitment process for title 38 employees. In this situation, neither Unions requesting the hire of locum tenens in the Mental Health Service Line, hold exclusive recognition for that unit in the facility.

Title 38 staffing ratios go straight to the heart of direct patient care and have been determined to be excluded from collective bargaining by 38 U.S.C. § 7422. In *VAMC Minneapolis*, the USH held that contract proposals that would establish staffing ratios for telemetry units in the Medical Center were exempt from collective bargaining. Attachment J, VAMC Minneapolis (September 25, 2008). Further, the USH concluded “that by enabling the union to determine staff-patient ratios and other staffing patterns, these proposals would have a direct impact on management’s ability to determine the appropriate staff mix, numbers of nurses and the clinical qualifications required within patient areas. And the Secretary already had a number of established policies pertaining to the staffing, assignment and reassignment of nurses.” *Id.*

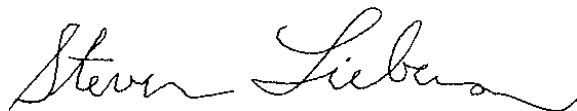
The recruitment process is part and parcel of the Secretary’s inherent authority to appoint personnel under 38 U.S.C. § 7401(1) to deliver health care to Veterans and to determine the needed qualifications for such Title 38 personnel. These matters directly concern or arise out of such employees’ clinical competence to ensure quality care to Veterans.

**DECISION**

The grievance regarding the Medical Center’s decision to not hire locum tenens psychiatrists involves a matter or question concerning or arising out of professional conduct or competence within the meaning of 38 U.S.C. § 7422(b), and thus, excluded from the collective bargaining.

**APPROVED**  X

DISAPPROVED \_\_\_\_\_



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Steven L. Lieberman, M.D.  
Deputy Under Secretary for Health,  
Performing the Delegable Duties of the  
Under Secretary for Health

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Date

