

**Title 38 Decision Paper
Department of Veterans Affairs (VA)
Alaska VA Healthcare System**

FACTS:

The Integrated Care Service (ICS) is a component of the Alaska VA Healthcare System (AVAHS). Because the AVAHS is an outpatient clinic with limited specialty care service, the ICS was created to provide clinical assessment and to manage referrals for specialty care services and ancillary testing for Veterans to receive patient care services in non-VA or "lower-48" VA facilities. ICS is comprised mostly of registered nurses (RN) who review consults for clinical appropriateness, determine that all ancillary testing is completed, compile appropriate clinical documentation to send for the referral, and assess patients on urgency for referrals. In essence, ICS RNs use their clinical knowledge to determine: (1) whether medical care that has been ordered is appropriate given the patient's situation, (2) whether the patient needs further testing prior to receiving the medical care, (3) where the patient can best receive that care, and (4) how quickly the patient needs the medical care. In October 2009, ICS Nurse Manager determined that only one RN could be approved for prescheduled annual leave on a given day in order to reduce consult workload backlogs and ensure that patients do not wait longer than 30 days to receive care. Prior to this determination, ICS approved annual leave for up to two RNs on a given day. (Attachment A)

On October 23, 2009, the American Federation of Government Employees, Local 3028 (AFGE or Union) submitted a demand to bargain and requested a briefing on Management's decision to approve only one nurse for prescheduled annual leave per day. (Attachment B) The Nurse Manager distributed the annual leave calendar to the nurses in a meeting on December 3, 2009, attended by the president of AFGE.¹ The next meeting to discuss the demand to bargain and a possible request for a 38 United States Code (U.S.C.) § 7422 determination was held on April 23, 2010. (Attachment A) The meeting concluded with AFGE representatives stating that a follow-up meeting would be scheduled in approximately 2 weeks, which did not occur.

On August 20, 2010, AFGE filed a step 3 grievance² on behalf of ██████████, an ICS RN whose request to take annual leave on August 16, 2010, was denied due to increased work backlog and staffing shortage (one RN was already scheduled to be off on the day for which ██████████ requested leave). (Attachment C) AFGE alleged that Management failed to bargain prior to implementing the new policy that only allowed one nurse per day to take annual leave. AFGE cited violations of Articles 16, 32, and

¹ This was the first meeting Management held with AFGE after receipt of the October 23, 2009, demand to bargain. At this meeting, the AFGE president told the Nurse Manager that she could not implement the leave schedule because the Union filed a grievance. The meeting was terminated and the manager later learned that the alleged grievance was a demand to bargain.

² This grievance, filed with the Associate Director, should have been labeled step 2 because a step 3 grievance was subsequently filed with the Director.

44 of the Master Agreement³ and Articles 2, 8, and 19 of the local supplemental agreement. According to the Union:

“The Supplemental Agreement, Article 8 states, employees will be allowed to utilize their earned leave free of intimidation or coercion. Disapproval of leave requests will be for just cause only. Article 19 [sic] and Article 44 of the Master Agreement states [sic] the Agency will meet its bargaining obligation on proposed changes in personnel policies, practices or working conditions. Management has violated the contract in approving/denying leave and has not been fair and equitable in the treatment of bargaining unit employees.”

The requested remedies stated in the grievance are:

1. Management will immediately cease implementing the new policy that was proposed in October 2009 and has been enforced continuously despite the demand to bargain that was submitted last year.
2. Neither the ICS Nurse Manager nor the ICS Chief will restrict leave based on staffing shortage or the failure of Management to properly staff ICS.

On September 8, 2010, [redacted], responded to the grievance. (Attachment D) In response to the Union’s first remedy, [redacted] stated that the leave policy was changed to ensure that patients have access to care. He stated that Management must have the flexibility to schedule annual leave based on the needs of the service, and will work closely with employees to minimize disruptions to leave plans. He also stated that Management and the Union were attempting to negotiate a resolution. [redacted] response to AFGE’s second remedy was that:

“Management will make every effort to honor annual leave commitments however ‘patient care’ will remain a primary concern. If there is not enough staff to adequately provide patient’s [sic] access to care, management must deny leave. During the cited example, ICS was engaged in addressing staffing turnover and other organizational patient care requirements. Management does agree to work closely with our employee’s [sic] and Union partners to adjust agency requirements with approved plans.”

A response was not provided for the third remedy. [redacted] did, however, comment that:

“Article 32, of the MA, Section 2 (Annual Leave), paragraph F, gives management the right to deny leave in rare and unusual circumstances. The instance of this incidental leave denial was for one of those circumstances. In this case, management did not deny leave to harm the employee but rather to ensure the ability to provide care for our

³ The Master Agreement referred to in the grievance was replaced by a new agreement that was effective on March 15, 2011.

On February 24, 2011, the Union submitted a position paper in response to Management's request for a 7422 determination. (Attachment J) The Union argued that Management had not justified the restriction of one RN on annual leave on a given day and that 38 U.S.C. § 7422 did not apply to this grievance because the ICS RNs do not perform direct patient care services.

In February 2012, AVAHS and the Union entered into an agreement that specified the "maximum number of employees that can be on annual leave in a given week." (Attachment N) This leave policy includes ICS RNs and thus moots the first issue raised in the Union's grievance (that Management will cease the leave policy proposed in October 2009). However, the agreement does not address the Union's contention that ICS RNs do not perform direct patient care duties and that Management cannot restrict leave based upon staffing shortages—the two issues still pending before an arbitrator.

PROCEDURAL HISTORY:

Through 38 U.S.C. § 7422(d), Congress granted to the Secretary of Veterans Affairs the authority to decide whether a matter or question concerns or arises out of professional conduct or competence, peer review, or the establishment, determination, or adjustment of employee compensation under 38 U.S.C. § 7422(b).

ISSUE:

Whether the issue of Management restricting ICS RN leave based upon staffing shortages is a matter or question concerning or arising out of professional conduct or competence within the meaning of 38 U.S.C. § 7422(b).

DISCUSSION:

The Department of Veterans Affairs Labor Relations Act of 1991, 38 U.S.C. § 7422, granted collective bargaining rights to title 38 employees in accordance with title 5 provisions, but specifically excluded from the collective bargaining process matters or questions concerning or arising out of professional conduct or competence, peer review, and employee compensation as determined by the Secretary. "Professional conduct or competence" is defined as either "direct patient care" or "clinical competence." 38 U.S.C. § 7422(c).

Pursuant to 38 U.S.C. § 7421(a), the Secretary has prescribed regulations contained in VA Handbook 5011, Part III, Chapter 3, which establishes the policies and procedures for leave administration for full-time and part-time nurses appointed under authority of 38 U.S.C. chapters 73 and 74. The policy of the title 38 leave program is set forth in VA Handbook 5011, Part III, Chapter 3, Paragraph 2 as:

- a. The proper care and treatment of patients shall be the primary consideration in granting leave.
- b. The VA leave program for employees shall be administered fairly and uniformly within the meaning of this chapter.

Furthermore, paragraph 4 provides that, “[t]he granting of annual leave shall be a matter of administrative discretion as to when and in what amount it may be authorized. Requests for annual leave shall be acted upon in light of essential medical services and with due regard to the welfare and preferences of individual employees.”

In its grievance and response to AVAHS’ 7422 request, AFGE argued that ICS RNs were not involved in direct patient care and, thus, any grievance concerning these RNs could not arise from direct patient care or clinical competence. AFGE also argued that Management could not restrict ICS RN leave based upon staffing shortages.

Regarding the assertion that 38 U.S.C. § 7422(b) does not prohibit this grievance because ICS RNs do not provide direct patient care services, the question is not whether these RNs provide direct patient care services, but whether Management’s leave policy for ICS RNs is a “matter or question concerning or arising out of” direct patient care. 38 U.S.C. § 7422(b). Data submitted by AVAHS supports its argument that limitations on annual leave were necessary in order to provide direct patient care. (Attachment K) Management provided data showing that the number of ICS consults ordered per month has grown dramatically since 2004. In October 2004, for example, there were 1,189 ICS consults ordered. From October 2004 to September 2005, ICS averaged 1,166 consults ordered per month. In October 2008, however, 1,701 consults were ordered - a 43 percent increase over the October 2004 amount. From October 2008 to September 2009, ICS averaged 1,436 consults ordered per month - a 23 percent increase from the same period 4 years prior. Additionally, consults per month continue to increase, as the average number of consults ordered per month from October 2009 to September 2010 was 1,569. AVAHS also provided data showing that the number of ICS consults awaiting processing increased from an average of 515 per month from October 2008 to September 2009, to 786 per month from October 2009 to September 2010, an increase of approximately 52 percent. (Attachment L) These data support Management’s contention that the intent of the change in leave policy was to address consult backlog. Because an ICS RN’s duty is to evaluate whether AVAHS can provide the care that a Veteran requires and then order a non-VA consult if necessary, and the number of consults ordered continues to increase, it is clear that maximizing the number of ICS RNs working on a given day directly impacts patient care. While we need not determine whether ICS RNs provide direct patient care, even assuming, *arguendo*, that ICS RNs do not provide direct patient care, Management’s decision to change the leave policy and deny Ms. Larkin’s leave request was based on direct patient care concerns and are thus exempted from collective bargaining.

The U.S. Court of Appeals for the Ninth Circuit provided support for the conclusion that a § 7422 exclusion may apply when the grievance challenges VA's ability to provide direct patient care. (Attachment M) In *AFGE Local 2152 v. Principi*, 464 F.3d 1049 (2006), Management reassigned a VA physician from surgical duties to compensation and pension (C&P) examinations. *Id.* at 1051. AFGE grieved, arguing that the reassignment was based upon gender and age discrimination. *Id.* The Agency concluded that § 7422 barred this grievance because the grievance concerned both professional conduct or competence and the establishment of title 38 compensation. *Id.* at 1052. A Federal district court subsequently agreed that the Agency properly applied the "professional conduct and competence" exclusion to this issue. *Id.* The Union, however, argued on appeal that the grievance did not arise from direct patient care because the grievance concerned age and gender discrimination. *Id.* at 1057. The Ninth Circuit held that the grievance concerned direct patient care, and was thus excluded from the grievance procedure, because the "grievance challenged the ability of the VA to provide adequate patient care by reducing the backlog of C&P examinations[.]" *Id.* at 1059. Applying this Ninth Circuit decision to the instant case leads to the same outcome - whether the ICS RNs provide direct patient care is not grievable because the grievance challenges the Agency's ability to provide direct patient care.

Having determined that 38 U.S.C. § 7422(b) prohibits this grievance, we need not address the Union's argument that Management may not restrict leave based upon staffing shortages. We will, however, reiterate the provisions of VA Handbook 5011, cited above on page 5, concerning title 38 leave policies.

RECOMMENDED DECISION:

The issue of Management restricting ICS RN leave based upon staffing shortages is a matter or question concerning or arising out of professional conduct or competence within the meaning of 38 U.S.C. § 7422(b).

APPROVED/DISAPPROVED



Eric K. Shinseki

Secretary

5/29/2013

Date