

**Title 38 Decision Paper
Department of Veterans Affairs (VA)
Gulf Coast Veterans Health Care System
Biloxi, Mississippi**

FACTS

On July 30, 2012, the Gulf Coast Veterans Health Care System (Medical Center) notified one of its registered nurses that she would be assigned non-patient care duties pending the outcome of an Administrative Investigation Board (AIB). (Exhibit 1). As a result of this assignment, the registered nurse's tour was changed to 7:30 a.m. to 4:00 p.m., Monday through Friday. (*Id.*).

A fact-finding and AIB, which is a formal investigation, were conducted by the Medical Center from July 2012 through December 2012.¹ (Exhibit 2). At the conclusion of the fact-finding, the Interim Medical Center Director charged an AIB to conduct a formal investigation of allegations of patient abuse and unethical conduct by some of the health care professionals on 2-2 East, Community Living Center (CLC).² On October 5, 2012, a second charge memorandum was submitted expanding the scope of the AIB to include investigation into allegations that "2-2 East/CLC staff is creating a hostile/negative environment that can affect patient care, staff satisfaction and a cohesive work environment." (Exhibit 13).

On December 26, 2012, the AIB provided the Medical Center Director with the final AIB report.

On January 29, 2013, the American Federation of Government Employees, Local 1045 (Union), filed a Step 3 grievance on behalf of the registered nurse assigned non-patient care duties pending the outcome of the AIB. (Exhibit 3). The Union asserted that the registered nurse suffered a pay loss due to the Medical Center's decision to temporarily place her in a daytime, Monday-Friday position. (*Id.*). According to the Union, prior to the investigation, the registered nurse worked a different tour of duty which entitled her to weekend premium pay and holiday pay. (*Id.*). The Union stated that "6-months of investigating is over burdensome and continues to harm [the nurse's] pay entitlements." (*Id.*). The Union also claimed that the registered nurse had "been forced to use some

¹ Local Policy, Memorandum No. 00F-07-12, Allegations of Patient Abuse, require the Medical Center Director to:

- (1) Determine if the incident meets the definition of patient abuse.
 - (a) If the definition of patient abuse is not met, the matter will be referred to the appropriate supervisor for administrative action regarding employee conduct.
 - (b) If the definition is met, the Director will determine the appropriate level of investigation required. This may be through an Administrative Board of Investigation.
 - (c) The Director will review findings and approve, disapprove, or modify recommendations resulting from investigations relating to alleged patient abuse. (Exhibit 11).

²The Charge memo is not dated but the document submitted by the Medical Center is saved as dated September 24, 2012. (Exhibit 12).

50 hours of sick leave for doctor appointments," which, under her former 12-hour tour, she scheduled on her regular days off.³ (*Id.*)

In satisfaction of the grievance, the Union sought three make whole remedies: (1) the registered nurse would be paid the sum of \$6,824.90 for foregone weekend premium pay and holiday pay;⁴ (2) the Medical Center would promptly conclude the investigation; and (3) fifty hours of sick leave would be restored to the registered nurse. (*Id.*)

On February 8, 2013, the parties met to discuss the grievance. (Exhibit 2).

The Medical Center Director issued a Step 3 grievance response on February 11, 2013. (Exhibit 5). The Director determined that the registered nurse was not entitled to additional pay because she had not worked on weekends or holidays. (*Id.*) He also rejected the Union's request for restored sick leave, explaining, "I am unaware of any hours of sick leave that the agency forced [the registered nurse] to use, and there has been nothing submitted to substantiate this allegation." (*Id.*) The Medical Center Director also stated that he had "informed all parties involved of an expected timeline to conclude the case." (*Id.*)

On February 27, 2013, the Medical Center notified the nurse and the Union President of her permanent reassignment from 2-2 CLC to 2-3 CLC, effective March 31, 2013, without change to her grade, pay, or title, "for the operational need of promoting a positive conductive work environment." (Exhibit 14).

On March 12, 2013, the Union invoked arbitration on its grievance. (Exhibit 6).

On August 20, 2013, the Federal Mediation and Conciliation Service (FMCS) provided the Union and the Medical Center with a list of potential arbitrators. (Exhibit 7).

On October 1, 2013, Medical Center management communicated its belief to the Union President that the issue was excluded from the parties' negotiated grievance procedure by application of 38 U.S.C. § 7422. The parties attempted to resolve the grievance issues through discussion, but were unsuccessful. (Exhibit 2).

Also on October 1, 2013, the parties selected an arbitrator and forwarded the selection to FMCS. (Exhibit 8).

³ In addition, the Union claimed that the Medical Center violated Articles 14 (Discipline and Adverse Action), 22 (Investigations), and 17 (Employee Rights) of the parties' Master Agreement. Reliance on a claimed violation of a Master Agreement provision is unavailing when the issue relates to a matter or question concerning or arising out of a 38 U.S.C. § 7422 exclusion. Such matters or questions are specifically referenced and excluded from the parties negotiated grievance procedure in Article 43, Section 2(C), of the Master Agreement. (Exhibit 4).

⁴ The Union attached a worksheet to its grievance, which outlined each pay period along with the claimed dollar amounts of weekend premium pay and holiday pay the registered nurse missed during the 6 months she was reassigned pending the outcome of the AIB. (Exhibit 3).

On October 28, 2013, the Medical Center provided a copy of its formal request for a 38 U.S.C. § 7422 determination to the Union. (Exhibit 2).

The Office of Labor-Management Relations (LMR) received the Medical Center's request for a 38 U.S.C. § 7422 determination (Request) on November 1, 2013. LMR received the Union's response (Response) on November 18, 2013.⁵ (Exhibit 9).

AUTHORITY

The Secretary has the final authority in the Department of Veterans Affairs (Department) to decide whether a matter or question concerns or arises out of professional conduct or competence, peer review, or employee compensation within the meaning of 38 U.S.C. § 7422(b).

ISSUE

Whether the Union's grievance claiming that a registered nurse was entitled to the restoration of sick leave and additional pay for weekends and holidays because of a temporary change in her tour of duty pending the outcome of an AIB, is a matter or question concerning or arising out of professional conduct or competence or the establishment, determination, or adjustment of employee compensation within the meaning of 38 U.S.C. § 7422(b).

DISCUSSION

The Department of Veterans Affairs Labor Relations Improvement Act of 1991 granted collective bargaining rights to title 38 employees but specifically excluded from the collective bargaining process and the parties' negotiated grievance procedure any matter or question concerning or arising out of professional conduct or competence, peer review, or employee compensation, as determined by the Secretary. 38 U.S.C. § 7422.

Handbook 5005, Part IV, Chapter 3, paragraph 4.b, provides that in assigning, reassigning, and detailing title 38 employees, "primary consideration will be given to the efficient and effective accomplishment of the VA mission." Handbook 5021, Part II, Chapter 1, paragraph 6.b, "Status of Employee Pending Inquiry or Investigation," provides that where an employee's continued presence at his or her worksite during an inquiry or investigation "might pose a threat to the employee or others," the employee may be detailed to other duties to eliminate any threat to safety. Handbook 5007, Part V, Chapter 6, paragraphs 1.a. and 1.b, which tracks the statutory weekend and nighttime premium pay authorized under 38 U.S.C. 7453(b) and (c) respectively, provides for the payment of weekend and nighttime shift differential pay when an employee, "*performs service*" on a tour of duty falling within qualifying hours.

⁵ The Medical Center's request is dated October 25, 2013. It is signed by both the Medical Center Director and the Network Director for VISN 16. (Exhibit 2).

In the instant case, specific allegations of patient abuse and unethical conduct required the Medical Center to conduct a thorough investigation. VA policy authorizes facility management to detail an employee during an inquiry or investigation. During its investigation, Medical Center management assigned the nurse to non-patient care duties outside the CLC to ensure that patients were protected from potential harm. As a consequence, the Medical Center's actions are matters or questions concerning or arising out of professional conduct or competence (direct patient care or clinical competence) under 38 U.S.C. § 7422, and may not be challenged through the parties negotiated grievance procedure.⁶

The Union asserts that it was unfair to assign the registered nurse to a tour of duty that prevented her from benefiting from the premium pay that she regularly earned on her previous tour of duty.⁷ While the nurse's concern is certainly understandable, the Union's arguments concerning the applicability of 38 U.S.C. § 7422 are unpersuasive.

In its response, the Union contends that the Medical Center Director waited 6 months after being made aware that the Union intended to invoke arbitration before submitting the Director's request for a 38 U.S.C. § 7422 determination. (Exhibit 9). However, although the Union invoked arbitration on March 12, 2013, it did not receive the list of potential arbitrators from FMCS until more than 5 months later, and the Union and Medical Center did not strike arbitrators until 5 weeks after receiving the arbitrator list. (Exhibit 6, Exhibit 7, Exhibit 8). The parties' Master Agreement allows the Union to request a list of arbitrators on the same day it invokes arbitration and the parties are required to meet to strike arbitrators "within 10 calendar days" of receiving the list. Article 44, § 2(A). (Exhibit 10). Had the Union genuinely been concerned about undue delay, it could have acted expeditiously to move the process forward.⁸ There is no indication that it did so.

The Union also alleges in its response that the Medical Center moved the registered nurse from one direct patient care assignment to another direct patient care assignment, which would undermine the Medical Center's assertion that the new assignment was made to protect patients from potential harm. (Exhibit 9). In support of its position, the Union included an attachment with a description of the registered nurse's new duties that actually belies the Union's position. (*Id.*). In the attachment, the nurse catalogued her new responsibilities, which included entering incident reports in the computer, ensuring that the nursing staff timely documented wound assessments, and monitoring timeliness of monthly summaries. (*Id.*). Other than strictly

⁶ The parties' Master Agreement, Article 13 (Reassignments, Shift Changes, and Relocations), section 1c., also provides, "if a reassignment, shift change, or relocation of a Title 38 employee involves an issue of professional conduct or competence, then 38 U.S.C. 7422 applies."

⁷ The Union suggested that she had been receiving premium pay for working weekends and holidays "for 15 years." (Exhibit 9).

⁸ When the Union invoked arbitration, it notified the Medical Center that it intended to submit a request for an arbitration panel 2 weeks later. (Exhibit 6). Although the record does not include the actual date that the Union requested a panel from FMCS, it is unlikely that FMCS failed to act on the Union's request for more than 5 months.

administrative duties, the registered nurse was also tasked with asking clinic patients waiting for appointments if the check-in nurse had asked each patient for the patient's name, date of birth, and social security number. (*Id.*). While this last duty involved limited contact with patients, it is still administrative in nature and far from the kind of direct clinical care a registered nurse would be responsible for in a CLC. None of the registered nurse's self-described new duties could accurately be deemed as direct patient care assignments.

Finally, the Union contends that the registered nurse's "reassignment went far beyond the realm of reasonableness and ultimately she was cleared of any wrong doing and did not receive disciplinary action." (Exhibit 9). However, although the Medical Center did not discipline the registered nurse following its investigation, that is not dispositive of whether the Medical Center had cause to detail the registered nurse during the pending investigation, as the Union alleged. (*Id.*). There is no evidence that the Medical Center maliciously targeted the registered nurse or fabricated its stated concerns about patient abuse. Given the Medical Center's genuine concern for the well-being of its patients, the registered nurse's extended assignment to non-patient care duties was a reasonable response to its concerns. That the registered nurse received less pay than she would have otherwise was a result of the Medical Center's obligation to ensure the care and safety of its patients.⁹

In addition, the Union's grievance remedies primarily concern recouping premium pay the registered nurse would have been entitled to had she not been temporarily detailed to a daytime, Monday-Friday tour of duty. There is no authority for the Medical Center to compensate the registered nurse for weekend and holiday pay that she did not earn on days that she did not actually work.¹⁰ To the extent that the Union's grievance involves a request for additional pay, that issue is a matter or question relating to the establishment, determination, or adjustment of employee compensation, and is excluded from the parties' negotiated grievance procedure by operation of 38 U.S.C. § 7422.

⁹ In its response, the Union raised for the first time a claim that the nurse's assignment had a negative impact on the timeliness of her annual proficiency. As this claim was neither included in the Union's grievance nor fully developed in the Union's response, it will not be further addressed in this decision. (Exhibit 9).

¹⁰ VA Handbook 5007, Part V, Chapter 6, paragraphs 1a, 1b, and 1c.

RECOMMENDED DECISION

The Union's grievance claiming that a registered nurse was entitled to restoration of sick leave and additional pay for weekends and holidays she was unable to work because of a temporary change in her tour of duty pending the outcome of an AIB is a matter or question concerning or arising out of professional conduct or competence or the establishment, determination, or adjustment of employee compensation within the meaning of 38 U.S.C. § 7422(b).

APPROVED/DISAPPROVED



Eric K. Shinseki
Secretary of Veterans Affairs

4/9/2014

Date