

**Title 38 Decision Paper  
Department of Veterans Affairs (VA)  
Oscar G. Johnson VA Medical Center (VAMC)**

**FACTS**

In late 2011, registered nurses in the Intensive Care Unit (ICU) at the Oscar G. Johnson VAMC, Iron Mountain, Michigan (Iron Mountain VAMC or Agency), formed a committee to explore the use of a 12-hour compressed work schedule for registered nurses in the ICU and the Emergency Department (ED). (Exhibit 1).

On March 9, 2012, the committee made a presentation to Ms. \_\_\_\_\_, then Associate Director of Nursing and Patient Care Service at the Iron Mountain VAMC. (*Id.*). The meeting included a PowerPoint presentation prepared by the committee titled, "The Pros of 12 hour shifts in the N.I.C.E."<sup>1</sup> (Exhibit 2).

Following the meeting, at management's request, the committee prepared a proposed 12-hour compressed work schedule for the combined ICU/ED covering 7 weeks at the Iron Mountain VAMC. (Exhibit 3, Exhibit 4).

After reviewing the proposed 7-week schedule, as well as other considerations, Ms. \_\_\_\_\_ determined that direct patient care would suffer if a 12-hour compressed work schedule for ICU/ED registered nurses was initiated at the Iron Mountain VAMC. (Exhibit 1). On June 26, 2012, Ms. \_\_\_\_\_ met with ICU/ED staff and the American Federation of Government Employees (AFGE) Local 2280, to inform them of her decision. (*Id.*). At the meeting, Ms. \_\_\_\_\_ discussed literature and research to support her patient care concerns.<sup>2</sup> (*Id.*).

The day after the meeting, June 27, 2012, AFGE filed a formal demand to bargain the 12-hour compressed work schedule. (Exhibit 5). The Agency rejected the demand on July 3, 2012, stating that no change in compressed work schedules would be initiated at the Iron Mountain VAMC ICU/ED. (Exhibit 6).

Two days later, July 5, 2012, the union filed an unfair labor practice charge (ULP) with the Federal Labor Relations Authority (FLRA), contending that the Agency had refused to bargain over the 12-hour compressed work schedule. (Exhibit 7). On February 1, 2013, the Agency advised the FLRA that the proposed 12-hour compressed work schedule for ICU/ED registered nurses impacts direct patient care and, therefore, the issue is excluded from collective bargaining by application of 38 United States Code (U.S.C.) § 7422(b). (Exhibit 8). On February 5, 2013, the FLRA agreed (assuming prompt submission of the request for determination) to hold the ULP in abeyance pending the outcome of the Secretary's 38 U.S.C. § 7422 determination. (*Id.*).

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<sup>1</sup> N.I.C.E. is an acronym created by the nursing staff; it stands for Nurse on Duty, Intensive Care Unit, Emergency Department team. Exhibit 2(a).

<sup>2</sup> The specific studies referenced by Ms. \_\_\_\_\_ are described in Exhibit 1, p. 3, n.1.

Ms. \_\_\_\_\_, the Acting Medical Center Director for Iron Mountain VAMC, filed a request for a 38 U.S.C. § 7422 determination on April 2, 2013. (Exhibit 1). AFGE filed its response to the Agency's request for determination on April 26, 2013. (Exhibit 9).

## **AUTHORITY**

The Secretary has the final authority to determine 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).

## **ISSUE**

Whether a demand to bargain a 12-hour compressed work schedule for registered nurses at Iron Mountain VAMC ICU/ED is a matter or question concerning or arising out of professional conduct or competence (direct patient care or clinical competence) within the meaning of 38 U.S.C. § 7422(b) and thus exempted from collective bargaining.

## **DISCUSSION**

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

In its letter response, AFGE explained that a committee of ICU/ED registered nurses was formed in 2011 in the Iron Mountain VAMC to research 12-hour shift scheduling as a means to address employee dissatisfaction evidenced in the 2011 All Employee Survey. (Exhibit 9). According to the union, ICU/ED registered nursing staff had complained of difficulties balancing work and family life. The registered nurse committee viewed the 12-hour shift as a positive step towards helping nurses create an appropriate work-life balance. (Exhibit 10). In its presentation, the committee stated that 12-hour shifts would enhance morale, save money, reduce reliance on overtime, assist in retaining employees, lessen excessive use of sick leave, and result in no negative consequences to direct patient care. (Exhibit 9, Exhibit 2, and Exhibit 10).

The Agency, on the other hand, concluded that 12-hour shifts would be detrimental to patient care. Ms. \_\_\_\_\_, then Associate Director of Nursing and Patient Care Service, discussed potential drawbacks of establishing such shifts with nurse executives at other VA hospital facilities. (Exhibit 11). The nurse executives with 12-hour compressed work schedules at their facilities noted substantial difficulty covering sick and annual leave. (*Id.*). In addition, the nurse executives explained to Ms. \_\_\_\_\_ that 12-hour tours were utilized at their facilities in areas in which their medical center had difficulty

recruiting and retaining registered nurses, a non-issue at the Iron Mountain VAMC. (*Id.*).

After reviewing the mock 7-week ICU/ED schedule prepared by the registered nurse committee, Ms. noted several problems accommodating the proposed schedule with existing staff. Over the course of 7 weeks, part-time nursing staff on the mock schedule worked up to 122 hours over their part-time status and the facility's nurse educator was utilized in the ICU/ED for more hours than her allotted weekend tour. (Exhibit 11). Ms. was also concerned that the facility had a total of 16 full-time equivalent registered nurse positions in ICU/ED and 4 of the 16 were opposed to working 12-hour shifts. (*Id.*). In addition, ICU/ED nurses are not interchangeable with nurses in other areas of the hospital; registered nurses with other specialties cannot readily fill in or cover for ICU/ED nurses.<sup>3</sup> (Exhibit 12). As a result, for a small facility like the Iron Mountain VAMC, with a limited number of qualified registered nurses, a 12-hour compressed work schedule would compromise the level and degree of patient care in ICU/ED.<sup>4</sup> (Exhibit 13).

While the registered nurse committee presented support in favor of introducing a 12-hour compressed work schedule, Iron Mountain VAMC management, after discussions with nurse executives at other facilities, consideration of the nurse committee's 7-week mock schedule, and consideration of the unique staffing issues in the facility's ICU/ED, ultimately concluded that the impact on patient care outweighed the potential benefit to ICU/ED registered nurses.

In several past decisions, the Secretary has concluded that scheduling proposals involving title 38 employees that impact direct patient care are excluded from collective bargaining under 38 U.S.C. § 7422.<sup>5</sup> For example, in VAMC Anchorage (August 22, 2005), the union proposed implementation of a 6-month compressed work schedule (5-4-9) for doctors and nurses in the facility's Primary Care Service. (Exhibit 14). The Under Secretary for Health decided that, "if participation of Title 38 employees in a proposed (or ongoing) [compressed work schedule] program adversely impacts on patient care, then the implementation (or continuation) of such [compressed

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<sup>3</sup> ICU/ED registered nurses must maintain specific ICU/ED competencies, must be certified in advanced cardiovascular life support, and must observe certain protocols that differ from registered nurses in other specialties. (Exhibit 12).

<sup>4</sup> The Iron Mountain VAMC "is a primary and secondary level care facility with 17 acute care beds, 13 in the medical/surgical ward and 4 in the ICU. The main facility provides limited emergency and acute inpatient care, and collaborates with larger VA Medical Centers in Milwaukee and Madison, WI, to provide higher-level emergency and specialty care services." (Exhibit 13).

<sup>5</sup> 38 U.S.C. § 7422 excludes from collective bargaining a matter or question concerning or arising out of professional conduct or competence, which includes both direct patient care and clinical competence.

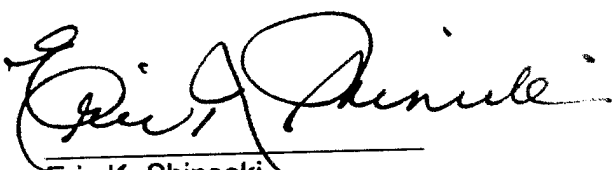
work schedule] program is non-negotiable under 38 U.S.C. § 7422(b) and is not subject to third party review.”<sup>6</sup> (*Id.*).

In another decision, VAMC Leavenworth (May 13, 1992), VA considered whether negotiation was appropriate when a facility expanded 12-hour tours to nursing home care and intermediate care after a successful pilot with ICU nurses. The Chief Medical Director, acting on behalf of the Secretary, held that “the matter concerning 12-hour shifts for Registered Nurses” was excluded from collective bargaining under 38 U.S.C. § 7422. (Exhibit 15). In VAMC Biloxi (October 16, 2003), the Under Secretary for Health reached a similar conclusion when considering the facility’s decision to eliminate 12-hour tours in favor of 8-hour tours for registered nurses. (Exhibit 16).

**RECOMMENDED DECISION**

That AFGE’s demand to bargain and subsequent ULP charge regarding a proposal to establish a 12-hour compressed work schedule for registered nurses in the ICU/ED at Iron Mountain VAMC involve a matter or question concerning or arising out of professional conduct or competence within the meaning of 38 U.S.C. § 7422(b) and is thus excluded from collective bargaining.

APPROVED/DISAPPROVED

  
Eric K. Shinseki  
Secretary of Veterans Affairs

12/6/2013  
Date

<sup>6</sup> The Secretary now exercises his authority to issue decisions regarding 38 U.S.C. § 7422.