

**Title 38 Decision Paper
Department of Veterans Affairs (VA)
Wilmington, Delaware VA Medical Center (VAMC)**

FACTS

On September 13, 2011, the American Federation of Government Employees, Local 0342 (Union) filed a Step 1 grievance against the Wilmington, Delaware VA Medical Center (Medical Center). (Exhibit 1). The grievance states that Advanced Practice Registered Nurses (APN) "working in the ambulatory care setting have been historically forced to work outside of their assigned tours to complete patient encounter needs of their assigned patient panel and to provide coverage for absent and or nonexistent primary care/specialty providers." (*Id.*). The grievance further states that APNs who requested overtime compensation were "flatly denied and or instructed that compensation for hours worked outside of their tours must be asked in advance." (*Id.*). As a consequence, the Union claimed that, "The APN staff members have been placed in a terminal non compensated mandatory overtime status by the departments actions and inappropriate PCMM [Primary Care Management Model] oversight." (*Id.*).

The grievance alleged violations of Articles 17, 20, 21, and 41 of the parties' Master Agreement, 38 United States Code (U.S.C.) § 7459 (relating to limitations on registered nurse mandatory overtime), the Fair Labor Standards Act, VHA Handbook 1101.02 (Primary Care Management Module), and State Board of Nursing guidance. It also included various references to the relationship between patient safety and limitations on nurse overtime.¹ (*Id.*).

The Union requested 14 remedies, including, prominently, the following 2 remedies:

2. Cease and desist from current mandatory daily non compensated overtime requirements of the APN group related to historical and insufficient patient panel management and provider staffing needs of the department.

10. Complete an APN service wide key stroke analysis for the past 2 years to determine the amount of overtime due, self report those findings to the appropriate federal agencies, forward the findings to the Union and

¹ The Union also claimed that the Medical Center "fail[ed] to meet all bargaining obligations." (Exhibit 1). This claim, although nonspecific, appears to be related to telework. The grievance states that APNs spend time "outside of the facility electronically completing patient encounter needs of the department timely requirements," and "this is directly related to their current ineligibility for tele-work status as well." (*Id.*). Among the requested remedies, the Union included: "Meet bargaining obligations related to tele work status for continued remote access use." (*Id.*). There is no evidence that the Union submitted a demand to bargain telework. In addition, the grievance appears to be wholly focused on establishing claims for overtime payments. As a result, the bargaining issue will not be further addressed in this decision.

compensate each individual accordingly. Key strokes to include remote access as well (*Id.*).

On September 20, 2011, Medical Center management met with the Union to discuss the grievance. (Exhibit 2). Management did not prepare a written grievance response and the Union advanced the grievance to the second step on September 28, 2011. (*Id.*).

The claims and requested remedies in the Step 2 grievance were identical to those outlined in the Step 1 grievance. (Exhibit 1, Exhibit 3).

The Medical Center's Associate Director of Patient Care Services prepared a written response to the Union's Step 2 grievance on October 3, 2011, which reads in part:

"This memorandum is in response to your Step II grievance dated 9.28.11 regarding the alleged denial of pay for APNs working overtime. . . . At this point, I am unable to meet all of your demands for many reasons such as inaccurate citation and application of nurse staffing law related to definition of emergency, some requests are above my pay grade to approve and remedies such as the key stroke audit is not possible or reasonable to accomplish. Additionally I am not aware of Nurse Practitioners being mandated to stay by management to work over their tour of duty." (Exhibit 4).

On October 12, 2011, the Union advanced the grievance to the third step.² No grievance meeting was held and no grievance response was issued by the Medical Center. (Exhibit 2, Exhibit 5).

On November 1, 2011, the Union invoked arbitration on the grievance. The arbitration hearing was scheduled for January 22, 2014. (Exhibit 2). However, the Union agreed to postpone the arbitration hearing until the Secretary rendered a 38 U.S.C. § 7422 decision. (Exhibit 16).

On October 8, 2013, the Medical Center submitted a formal request for a 38 U.S.C. § 7422 determination concerning the grievance (Exhibit 2).

The Union submitted its response (Response) on October 28, 2013. (Exhibit 6).

AUTHORITY

The Secretary of the Department of Veterans Affairs (Department) has the final authority in the 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).

² The claims and remedies in the Step 3 grievance are identical to those outlined in the Step 1 and Step 2 grievances. (Exhibit 1, Exhibit 3, Exhibit 5).

ISSUE

Whether the Union's grievance claiming that APNs in the Medical Center's ambulatory care setting are not appropriately compensated for overtime work involves 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).

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).

In its grievance, the Union claims that "APN staff members have historically worked long hours after the end of their tour, reporting to work hours prior to start of their official tour, on weekends and many work from home after hours all uncompensated in an attempt to keep up with the requirements of their patient panels." (Exhibit 1). The grievance suggests that management expects APNs to perform a certain level of service related to their patient panels and that expectation cannot be met without regularly working substantial amounts of overtime.³ According to the grievance, when APNs request approval for overtime, they are told that they are not eligible, that they need to be better time-managers, or that the overtime must be requested in advance. (*Id.*).

Although unmentioned in the grievance, the Union's Response to the Department's request for a 7422 determination asserts that, "Due to improper staffing in violation of the PACT MOU, Advanced Practice Registered Nurses (APNs) have been performing overtime work due to vacant or under-staffed positions in PACT teams."⁴ (Exhibit 6). The Response further states that, "Supervisors were not only aware of the short-staffing, but also aware that APNs were performing overtime. Supervisors never told the employees not to perform the overtime." (*Id.*).

The Union set out in its Response what appears to be an alternative rationale for its grievance, "[t]he grievance seeks to resolve whether the Agency violated its own regulation and policies on the payment of overtime for officially ordered or approved

³ In its grievance, the Union did not provide information about particular employees who were allegedly impacted by management's expectations, and did not provide dates and times that those employees allegedly worked uncompensated overtime. The statements in the grievance lack any specific details, which makes the legitimacy of the complaints difficult to assess.

⁴ Here, the Union may also be asserting the Medical Center is understaffed. Such understaffing could impact patient care and be a professional conduct or competence issue (direct patient care); however, we would need additional specific information about the staffing before we could appropriately address this issue.

work.” (Exhibit 6). The Union further cited the *Joint 38 U.S.C. § 7422 Workgroup Recommendations As Revised and Approved by the Secretary of the Department of Veterans Affairs* (Secretary’s Decision Document), which states in Section (B)(4), “Not following established VA policy regarding payment of compensation to which [an] employee is entitled is grievable, including appropriate remedy as determined by the Secretary.” (*Id.*, Exhibit 9).

In order to determine if the Union is foreclosed from pursuing its grievance pursuant to the Secretary’s Decision Document, two questions must be considered: (1) whether the Medical Center violated the Department’s compensation regulations or policies; and if so (2) whether APNs at the Medical Center were denied compensation to which they were otherwise entitled. If the answer to both questions is affirmative, then the cited provision in the Secretary’s Decision Document, Section B(4) permits the grievance to go forward to arbitration.⁵ (*Id.*). Otherwise, the Union’s grievance is excluded from the parties’ negotiated grievance procedure as 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).

Question 1: Did the Medical Center violate the Department’s compensation regulations or policies?

In its Response, the Union contends that the Medical Centers’ failure to follow the parties’ nationally negotiated Memorandum of Understanding (MOU) concerning Patient Aligned Care Teams (PACT) is a violation of Agency policy. “The issue of improper staffing of a PACT team is an issue of not following established VA policy in a National MOU and is therefore grievable under the SDD.” (Exhibit 6). Negotiated agreements like the MOU concerning PACT include provisions that may, under the proper circumstances, be grieved when one of the parties fails to comply with the agreement, but it is inaccurate to characterize the negotiated provisions as statements of Departmental policy. Even if one were to view the MOU as a policy statement or statements, the Union failed to tie a violation of any provision in the MOU to the overtime complaint in the instant grievance.

The Union’s Response also discusses generally that the Medical Center failed to compensate its APNs in accordance with VA Handbook 5011. (*Id.*). The Union includes in its Response a single reference to VA Handbook 5011, Part II, Chapter 2, ¶ 3(a), “Administration heads and other top officials are authorized to prescribe, in their responsible areas, such limitations as are necessary to provide control and prevent abuse of the use of overtime.” (*Id.*, Exhibit 10). That Handbook reference, however, even if relevant (rather than a description of a management authorization), is inapposite

⁵ A violation of a national Department policy may act to remove an otherwise excluded compensation issue from the ambit of 38 U.S.C. § 7422. However, the extent of appropriate compensation, i.e., a remedy or award, is a decision exclusively within the province of, and reserved to, the VA Secretary. (Exhibit 9).

as it applies exclusively to Title 5 employees.⁶ (Exhibit 10).

In its Response, the Union further asserts that, "Nothing in the Handbook requires that the overtime be officially ordered or approved *in advance* or *in writing*." (emphasis in original). (Exhibit 6). VA Handbook 5011 also does not limit local management's ability to require overtime requests to be submitted in writing in advance of the requested overtime.⁷ Introducing those requirements locally is entirely within management's discretion.

The sole reference in the grievance (rather than in the Response to the Medical Center's request for a 7422 determination) to a potential violation of Departmental national policy is the Union's inclusion of "VHA Handbook, 'The Primary Care Management Module (PCMM)' 1101.02" in its list of violations. (Exhibit 1). In the body of the grievance, the Union claimed that the APNs have been "placed in a terminal non compensated mandatory overtime status by the departments[*sic*] actions and *inappropriate PCMM oversight*." (*Id.*) (emphasis added). In its list of remedies, the Union requested that the Medical Center, "Provide for appropriate clinical designee over PCMM, per VHA handbook." (*Id.*) However, there is no specific reference to any provision in the VHA Handbook the union believes the Agency is violating or failing to follow. (Exhibit 14).

Since the grievance does not identify any portion of VHA Handbook 1101.02 that the Medical Center failed to follow, or the degree to which any alleged failure impacted APNs at the facility, we are unable to address that issue in this decision.

Question 2: Were APNs at the Medical Center were denied compensation to which they were otherwise entitled?

Finding no evidence of a violation of the Department's policies or regulations, we consider whether the Medical Center's APNs were uncompensated for overtime that was "officially ordered or approved," the statutory standard for registered nurse overtime set out in 38 USC § 7453(e)(1).⁸ In its grievance, the Union contends that overtime work, although necessary from the perspective of the APNs, was generally not ordered and normally not approved, even when requested (e.g. "[t]he APN staff members have historically worked long hours after the end of their tour, reporting to work hours prior to

⁶ VA Handbook 5011, Part II, Chapter 2, applies to Title 5 employees; VA Handbook 5011, Part II, Chapter 3, applies to Title 38 employees. (Exhibit 11).

⁷ Generally, the Department's policies require that overtime must be "officially ordered or approved." See, e.g., VA Handbook 5011, Part II, Chapter 3, ¶ 5(g)(2)(a), ¶ 7(c)(5). Exhibit 12. However, for Title 38 employees on flexitime, overtime must be "officially ordered or approved *in advance*." VA Handbook 5011, Part II, Chapter 3, ¶ 5(c)(11)(a) (emphasis added). (Exhibit 13).

⁸ The Union stated the matter similarly in its Response: "The primary factual issue the union seeks to resolve is whether the required duties performed during overtime by these Nurse Practitioners was officially ordered or approved, thereby entitling these employees to overtime compensation." (Exhibit 6).

the start of their official tour, on weekends and many work from home after hours. All uncompensated in an attempt to keep up with the requirements of their patients panels.”). (Exhibit 1). The suggestion in the grievance that APNs are required to work extensive unpaid overtime is unsupported. Further, since no APN is identified in the grievance, and there is no documentation identifying a date or time when any APN worked overtime without being appropriately compensated, we are unable to determine whether any APN was officially ordered and approved to work overtime without being properly compensated for the work.⁹ (*Id.*).

In short, the Union has not identified a compensation policy or regulation that was violated by the Medical Center, either in the grievance itself or in the Union's Response. In addition, no evidence was offered to support the claim that APNs are entitled to overtime payments for overtime officially ordered or approved by Medical Center management. As a result, the Union may not resort to the parties' negotiated grievance procedure to adjudicate claims that concern or arise out of the establishment, determination, or adjustment of employee compensation within the meaning of 38 U.S.C. § 7422(b).

RECOMMENDED DECISION

The Union's grievance claiming that APNs in the Medical Center's ambulatory care setting are not appropriately compensated for overtime work involves 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).

APPROVED / DISAPPROVED



Eric K. Shinseki
Secretary of Veterans Affairs

4/16/2014

Date

⁹ In this case, the Union did not provide any evidence of personnel who are required to work extensive unpaid overtime. When preparing for arbitration, management requested a list of witnesses from the union (who presumably would be used to prove the claims of unpaid overtime). The union refused to provide management with such names. (Exhibit 15).