

IN THE MATTER OF ARBITRATION

**American Federation of Government Employees,
National VA Council, #53
Union**

FMCS Case No. 200616-07127

v.

**U.S. Department of Veterans Affairs,
Veterans Benefits Administration
Agency**

Shalonda Miller, Esquire

Counsel for the Union

Janell Bell, Esquire

Counsel for the Agency

BEFORE: GARVIN LEE OLIVER

ARBITRATOR

DECISION AND ORDER

This arbitration proceeds from a grievance filed by the American Federation of Government Employees, National VA Council 53, hereinafter "Union," against the U. S. Department of Veterans Affairs, Veterans Benefits Administration, hereinafter "Agency." The grievance alleged that the Agency violated six articles of the collective bargaining agreement and 5 U. S. C. 7116(a) by failing to notify and bargain with the Union over a change in conditions of employment regarding leave and overtime policies. The Agency responded that the alleged contract violations and other concerns were outside the scope of collective bargaining and the negotiated grievance procedure.

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The Agency advised on January 27, 2021 that it had requested a decision from the Secretary that the matters involved were excluded from collective bargaining and review by any other agency pursuant to 38 U.S.C. 7422(d)ⁱ. It had not received a decision from the Secretary as of that date.

A virtual hearing was held on February 3, 2021. The parties were represented, afforded full opportunity to be heard, adduce relevant evidence, examine and cross-examine witnesses, and present documentary and oral evidence. The parties were to submit closing briefs by April 2, 2021.

The Agency advised, on March 18, 2021, that on February 25, 2021, the Secretary issued a determination stating that the grievance is within the Agency's jurisdiction under 38 U.S.C. 7422. The determination was made by the Acting Under Secretary for Health, who was delegated authority by the Secretary. He approved two recommendations, as follows:

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§7422. Collective bargaining

(a) Except as otherwise specifically provided in this title, the authority of the Secretary to prescribe regulations under

section 7421 of this title is subject to the right of Federal employees to engage in collective bargaining with respect to conditions of employment through representatives chosen by them in accordance with chapter 71 of title 5 (relating to labor-management relations).

(b) Such collective bargaining (and any grievance procedures provided under a collective bargaining agreement) in the case of employees described in section 7421(b) of this title may not cover, or have any applicability to, any matter or question concerning or arising out of (1) professional conduct or competence, (2) peer review, or (3) the establishment, determination, or adjustment of employee compensation under this title.

(c) For purposes of this section, the term "professional conduct or competence" means any of the following:

(1) Direct patient care.

(2) Clinical competence.

(d) An issue of whether a matter or question concerns or arises out of (1) professional conduct or competence, (2) peer review, or (3) the establishment, determination, or adjustment of employee compensation under this title shall be decided by the Secretary and is not itself subject to collective bargaining and may not be reviewed by any other agency.

(e) A petition for judicial review or petition for enforcement under section 7123 of title 5 in any case involving employees described in section 7421(b) of this title or arising out of the applicability of chapter 71 of title 5 to employees in those positions, shall be taken only in the United States Court of Appeals for the District of Columbia Circuit.

(Added Pub. L. 102-40, title II, §202, May 7, 1991, 105 Stat. 200 .)

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1. A grievance concerning the Medical Center's decision to require PER RNs to self-schedule on the weekends is a matter or question concerning or arising out of professional conduct or competence (i.e. direct patient care or clinical competence) within the meaning of 38 U.S.C. 7422(b), and thus, is excluded from collective bargaining and review by any other agency pursuant to 38 U.S.C. 7422(d).
2. A grievance concerning the Medical Center's decision to require PER Registered Nurses to self-schedule on the weekends resulting in the loss of potential voluntary overtime compensation is 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) and thus, is excluded from collective bargaining and review by any other agency pursuant to 38 U.S.C. 7422(d).

Based on the 38 U.S. C. 7422(d) determination, the Agency moved to dismiss this case. The Union took no position on the motion to dismiss, but reserved the right to challenge the decision in the future.

Under 38 U. S. C. 7422(d) "An issue of whether a matter or question concerns or arises out of (1) professional conduct or competence, (2) peer review, or (3) the establishment, determination, or adjustment of employee compensation under this title shall be decided by the Secretary and is not itself subject to collective bargaining and may not be reviewed by any other agency." The Secretary in this case made such determinations within his exclusive jurisdiction "concerning or arising out of professional conduct or competence" and "concerning or arising out of the establishment, determination, or adjustment of employee compensation." Accordingly, the arbitrator is deprived of jurisdiction over the matter, and the motion to dismiss is GRANTED

Based on the foregoing, I enter the following Order:

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ORDER

1. FMCS case No. 200616-07127, NVAC NG-3/4/20, involving the American Federation of Government Employees, National VA Council, 53, Union, and U. S. Department of Veterans Affairs, Veterans Benefits Administration, Agency, is hereby DISMISSED.

2. Pursuant to Article 44, Section 2D of the collective bargaining agreement, the fees and expenses of the arbitrator, as set forth in a separate statement, shall be borne equally by the parties.

/s/

Garvin Lee Oliver, Arbitrator

March 22, 2021

IN THE MATTER OF ARBITRATION

CERTIFICATE OF SERVICE

I CERTIFY THAT A COPY OF THE DECISION AND ORDER IN FMCS Case No. 200616-07127, NVAC NG-3/4/20, involving the American Federation of Government Employees, National VA Council, 53, Union, and U. S. Department of Veterans Affairs, Veterans Benefits Administration, Agency was served on the following by email on the date set forth below.

Shalonda Miller, Esquire
Counsel for the Union

Shalonda.Miller@afge.org

Janell Bell, Esquire
Counsel for the Agency

Janell.Bell@va.gov

/s/

Garvin Lee Oliver, Arbitrator

March 22, 2021

IN THE MATTER OF ARBITRATION

Garvin Lee Oliver
8403 Ashwood Drive
Alexandria, VA 22308

**American Federation of Government Employees,
National VA Council, #53
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FMCS Case No. 200616-07127

v.

**U.S. Department of Veterans Affairs,
Veterans Benefits Administration**

Agency

INVOICE FOR ARBITRATION SERVICES

DATE	DESCRIPTION	CHARGE
6/22/2020	Case Docketed	No Charge
6-22/20-3/18/21	Emails re hearing, exhibits	No Charge
2/3/21	Hearing	\$!000.00
3/21-22/21	Consideration of record, Motion To Dismiss, preparation of Decision 4 hours @ \$125	500.00
Total		\$1500.00
AMOUNT DUE AS ONE HALF FROM EACH PARTY		\$ 750.00

IN THE MATTER OF ARBITRATION

CERTIFICATE OF SERVICE

I CERTIFY THAT A COPY OF THE INVOICE FOR ARBITRATION SERVICES IN FMCS Case No. 200616-07127, NVAC NG-3/4/20, involving the American Federation of Government Employees, National VA Council, 53, Union, and U. S. Department of Veterans Affairs, Veterans Benefits Administration, Agency was served on the following by email on the date set forth below.

Shalonda Miller, Esquire
Counsel for the Union

Shalonda.Miller@afge.org

Janell Bell, Esquire
Counsel for the Agency

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/s/

Garvin Lee Oliver, Arbitrator
March 22, 2021
