



**STATEMENT OF THE  
NURSES ORGANIZATION OF VETERANS AFFAIRS  
BEFORE THE  
COMMITTEE ON VETERANS' AFFAIRS  
UNITED STATES SENATE  
ON  
S. 362**

**APRIL 8, 2009**

Mr. Chairman, Ranking Member Burr and other Members of the Committee:

The Nurses Organization of Veterans Affairs (NOVA) is the professional organization of the approximately 40,000 registered nurses employed by the Department Affairs. NOVA is committed to providing high quality care to our Nation's veterans.

NOVA appreciates the opportunity to provide input into S. 362, legislation that would allow VA health care professionals to bargain over the issue of Clinical Competency, Clinical Conduct, Title 38 Compensation and Peer Review. NOVA is opposed to this legislation.

**Summary:**

This bill would remove from the existing Title 38 collective bargaining statute the provisions that bar bargaining and grievances over issues relating to direct patient care, clinical competence, peer review, or Title 38 compensation. It would also repeal the statutory provision that authorizes the VA Secretary to determine whether a particular union proposal or grievance is subject to one of those subject matter exclusions.

While proponents of the bill assert that it will "restore" collective bargaining rights for VA doctors, nurses, and other medical professionals, those employees have *never* had the right to bargain over the subjects excluded by the current statute. If this bill were to pass, VA would be required to bargain over patient care issues, clinical competence issues, peer review processes, and the discretionary aspects of Title 38 compensation (e.g. nurse locality pay and physicians' market pay and performance pay) to an extent that is unprecedented and would represent an unwarranted intrusion into the way that VHA manages its clinical practices and adjusts pay for physicians and nurses. Quality of care delivered to patients should not be subject to negotiation.

**Background:**

**1. The existing statute.**

An existing provision of the Title 38 personnel statute, 38 U.S.C. § 7422, was enacted in 1991 to authorize VA physicians, nurses, and other Title 38 medical professionals to engage in collective bargaining. Prior to 1991, VA physicians and nurses were not authorized to engage in collective bargaining because they were not covered by the Title 5 statute that authorizes bargaining for most Federal employees.

**a. What the existing statute says:**

Subsection (a) of section 7422 generally authorizes Title 38 medical professionals to engage in bargaining under the Title 5 collective bargaining rules that apply to other Federal employees.

Subsection (b) of section 7422 excludes from Title 38 medical professionals' bargaining rights (and from any grievance procedure provided under a collective bargaining agreement) three specific subjects:

- professional conduct or competence (which subsection (c) of the statute defines to mean clinical competence or direct patient care);
- peer review (the process by which Professional Standards Boards and other peer review entities review medical professionals' clinical skills); and
- the establishment, determination, and adjustment of Title 38 employee compensation (which in general means that VA doctors and nurses, like other Federal employees, can't bargain over their pay, but for slightly different reasons).

Subsection (d) of section 7422 authorizes the VA Secretary to determine whether a particular bargaining proposal or union grievance is subject to one of the exclusions set forth in 38 U.S.C. §7422(b). The VA Secretary has delegated that authority to the Under Secretary for Health.

Subsection (e) of section 7422 says that only the U.S. Court of Appeals for the District of Columbia Circuit can hear certain types of cases relating to collective bargaining for Title 38 medical professionals.

**b. The legislative history of the existing statute:**

The current version of 38 U.S.C. § 7422 was sponsored by Senator Alan Cranston (D-CA), the then-Chairman of the Senate Veterans Affairs Committee. Senator Cranston and his colleagues worked for several years, over several sessions of Congress, to craft a compromise bill that would extend collective bargaining rights to VA doctors and nurses under terms that were acceptable to all stakeholders, including labor unions, physicians' and nurses' professional associations, Veterans' Service Organizations, and the Department. Senator Cranston's remarks to the Senate when he introduced the new law indicate that the statute was intended to strike a balance between inherently conflicting interests, i.e., between the interests of VA physicians and nurses to engage in collective bargaining, and of the Department and its veteran patients to ensure patient care is not compromised by the collective bargaining process.

**2. Proposed bill.**

S. 362 proposes to amend title 38, United States Code, to improve the collective bargaining rights and procedures for review of adverse actions of certain employees of the Department of Veterans Affairs." If enacted, this bill would:

- Repeal the collective bargaining exclusions for professional conduct or competence, peer review, and employee compensation that are currently set forth in 38 U.S.C. § 7422(b);
- Repeal the provisions of 38 U.S.C. § 7422(c) and (d) that define the 7422(b) exclusions and authorize the Secretary to determine whether a particular union proposal or grievance is excluded; and
- Modify certain provisions of 38 U.S.C. §§ 7462 and 7463 relating to Title 38 medical professionals' adverse action appeal rights.

The effect of S. 362 would be to require VA to bargain over issues of clinical competence, patient care, peer review, and employee compensation that are currently excluded from bargaining. Moreover, the bill would allow arbitrators, through rulings on grievances filed through the negotiated grievance procedure, to substitute their own judgment for the judgment of VA managers and clinicians on these issues. Examples of issues that are currently excluded from union bargaining and grievances, but would be subject to bargaining and the negotiated grievance procedure under the Filner legislation, include the following:

- Mandatory TB testing for employees
- Professional Standard's Board restricting a provider's clinical privileges due to competency issues.

- Work schedules for physicians and nurses, including alternative or compressed work schedules;
- The amount of market pay recommended for a particular physician by a Physician Compensation Panel or approved for that physician by a VAMC Director;
- The adjustment of locality pay for nurses at a particular VAMC or within a particular work unit;
- The selection of a particular RN or physician for a specialized work assignment for clinical competence reasons;
- A Professional Standards Board's assessment of a provider's clinical competence;
- A Physical Standards Board's assessment of a provider's mental or physical fitness for duty; and
- The decision of a VAMC Director to require staff psychiatrists to rotate weekend call duty, rather than relying on the Medical Officer of the Day to assess patients' emergent mental health needs.

Consider that without the Title 38 collective bargaining exclusions, the Department would be unable to respond expeditiously to changes in veterans' health care needs. For example, as the need for expanded mental health services for returning OEF/OIF veterans became clear, the Department was able to quickly set up a dedicated Suicide Prevention hotline and to assign qualified medical professionals to staff the hotline on a 24/7 basis. In the first 60 days of the Suicide Prevention hotline's existence, hundreds of veterans in critical need of mental health counseling called the hotline and received the care they needed. Absent the Title 38 collective bargaining exclusion for issues of direct patient care, the Department would have been required to bargain over the procedures by which employees would be assigned to the hotline before it could be implemented, resulting in unacceptable delays and potentially many lost lives.

Finally, the Unions would have you think that the existing statute weakens the VA's ability to recruit and retain an adequate work force. To the contrary, one of the draws for the VA in being able to recruit high quality clinical staff is the high level of "clinical competence" of its existing workforce. Allowing the Unions status to address competency issues will only erode the high level of clinical competence that exists. The VA's current branding for recruitment is *The Best Care/The Best Careers*. Nurses are drawn to the VA because of the quality of care VA nurses provide to the Veterans. VA Nurses are proud of their reputation of providing the best care.



The Secretary has not abused his discretionary authority in using 38 USC 7422 to exclude issues relating to direct patient care, clinical competence, peer review, or Title 38 compensation. Of the issues that were decided by the Secretary in 2008, approximately 41% were held to be partially or fully negotiable.

As is noted above, the current Title 38 statute was a carefully crafted compromise bill that empowers VA doctors and nurses to engage in collective bargaining while protecting from compromise VA clinicians' patient care determinations and related peer review and compensation adjustment processes. S. 362 would upset that careful balance in a way that is unwarranted, unprecedented, and unwise at a time where responding quickly to the needs of our Veterans is imperative.

In conclusion, repeal of Title 38 Collective Bargaining exclusions would cripple VA's patient care mission by:

- Delaying critical changes in health care delivery and substituting the decisions of labor negotiators/arbitrators for clinician's professional judgment;
- Allowing the unions to decide whether or not it is appropriate if patient care needs dictate than an RN stay beyond their scheduled tour;
- Substituting staff preferences for tours of duty in lieu of patient care needs;
- Delay the detail of staff from one area of need to another until negotiations are completed; and
- All other issues pertaining to the clinical needs of our Veterans.

NOVA understands that provisions in S.362 have been adopted by the Department of Defense (DOD); however we feel strongly that this policy cannot adequately be compared to the VA healthcare system. The unions have used the argument that Collective Bargaining within Walter Reed on issues of Clinical Competency, Clinical Conduct, Title 38 Compensation and Peer Review has not compromised patient care and should, therefore, also be adopted by VA. This is not a true comparison. DOD employs considerably fewer bargaining unit MDs and nurses than the VA does. DOD has approximately 500 bargaining unit physicians and 4,600 bargaining unit nurses while VA has 10,000 bargaining unit physicians and 50,000 bargaining unit nurses. If absolutely necessary, NOVA would agree to the reestablishment of Mandatory Labor/Management Councils at each VA Facility and alternative legislative language as proposed by VA. NOVA is dedicated to the safe, quality care of America's heroes and thanks the Committee for considering NOVA's position on S. 362.