

**Title 38 Decision Paper
Department of Veterans Affairs (VA)
VA North Texas Health Care System, Dallas, Texas**

FACTS

In May 2014, the Secretary of the Department of Veterans Affairs directed leadership at VA facilities nationwide to do everything possible to schedule timely medical appointments for Veterans. (Exhibit 1). In response, the Veterans Health Administration (VHA) developed the "Accelerating Access to Care Initiative" (Care Initiative), a "coordinated system-wide initiative to accelerate care to Veterans." In accordance with the Secretary's directive and VHA's Care Initiative, the VA North Texas Health Care System in Dallas, Texas (Medical Center) initiated a review of clinic capacity and developed a three-phase plan to address scheduling of medical appointments for Veterans. (Exhibit 2).

The Medical Center's plan included the following:

PHASE 1 (effective immediately and up to 90 days - not permanent)

- Temporary reduction of primary care providers' administrative time to 2.5 hours per regular work week (1600 – 1630 hours daily).
- Temporary standardization of all primary care appointments (new and established patients) to 30-minute slots.
- Maximized efforts to expedite the recruitment and onboarding of primary care providers for currently vacant positions (expected to be realized during subsequent phases).

PHASE 2 (30 – 120 days)

- Accelerated request and approval process of salary increases for primary care physicians willing to work additional extended hours (evenings and weekends), in addition to current established commitments. The current proposal is for \$5,000/yr for 6 additional Saturday clinics every 12 months (3 evening clinics = 1 Saturday clinic). This was strictly voluntary; notify Section Chief as soon as possible if interested.
- Expansion of current CBOC contracts to transfer the primary care of Veterans who live in remote areas but currently receive care in our main campuses.
- Augmentation of available contracts to provisionally "fee out" the primary care of some new patients near the Dallas area.

PHASE 3 (90-365 days)

- Implementation of standardized clinic profiles that support and promote individualized panel management and advanced access practices in primary care.
- Progressive optimization of PACT teams with additional support staff, space, and resources commensurate with our clinical demand. (Exhibit 2).

On June 24, 2014, a representative from the American Federation of Government Employees, Local 2437 (Union) contacted the Associate Chief and expressed that the facility's plan was communicated to facility providers "without prior notification or discussion with the Union." (Exhibit 3). The Union also referenced an April 28, 2014, agreement between the Medical Center and the Union concerning standardized clinic profiles.¹ (*Id.*).

On June 25, 2014, the Medical Center responded to the Union and explained that the Care Initiative was "not identical to the clinic profile changes" that the parties had agreed to in April 2014. Further, the standardized clinic profiles that the parties had earlier agreed to would "take place on October 1st as part of phase 3" of the new plan. (*Id.*). The Medical Center also informed the Union that the plan was subject to 38 U.S.C. § 7422, which allowed for immediate implementation. (*Id.*).

On July 18, 2014, the Union filed a demand to bargain, stating that the Medical Center "arbitrarily implemented the 'Accelerated Care Initiative' resulting in various changes in conditions of employment for Ambulatory Care providers without proper notification and negotiation with AFGE Local 2437." (Exhibit 10). The Union notified Medical Center management that it needed to "cease and halt" the initiative, revert to the status quo [*ante*," and "[b]argain on the Implementation and Impact of this action . . . to the fullest extent of the law." (*Id.*). Additionally, the Union submitted a list of eight Union proposals related to the Care Initiative and the operation of extended hours and Saturday clinics. (Exhibit 11).

On July 23, 2014, the Medical Center notified the Union that it intended to augment staffing at the Medical Center's evening and Saturday clinics, effective August 2, 2014. Exhibit 12. The Medical Center proposed three dates to meet with the Union to discuss the change in staffing, consider the Union's "implementation proposals," and address significant impacts to affected employees. (*Id.*). The Union did not respond to the Medical Center's offer to meet. (Exhibit 2).

On July 28, 2014, the Union submitted a second demand to bargain, claiming that the Medical Center failed to negotiate the implementation of its Care Initiative. (Exhibit 14).

¹ The April 2014 standardized clinic profile provided for 6.5 hours of administrative time per week to the facility's providers. (Exhibit 6).

On July 31, 2014, the Medical Center responded to the Union's second demand to bargain and offered three potential meeting dates. (Exhibit 15). The parties arranged to meet on August 13, 2014. (Exhibit 2).

On August 11, 2014, the Union filed an Unfair Labor Practice charge (ULP) with the Federal Labor Relations Authority (FLRA). Exhibit 17. The Union claimed that the Medical Center implemented the Care Initiative without notifying or bargaining with the Union, and also claimed that the Medical Center repudiated an April 28, 2014, agreement between the parties concerning standardized clinic profiles. (*Id.*).

On August 13, 2014, Medical Center management met with the Union to discuss the Union's concerns about the implementation of the plan. (Exhibit 2). Management arranged a meeting on August 15, 2014, in which providers could meet with their Union leadership to discuss the Care Initiative and its impact in the workplace, and to suggest "proposed solutions" to identified issues and problems. (Exhibit 18).

On August 26, 2014, the Union re-submitted an identical set of proposals it originally submitted to the Medical Center on July 18, 2014. (Exhibit 20). The proposals included the following:

1. Fill all existing vacancies for physicians within Ambulatory Care and announce/recruit for these vacancies (currently a total of 7) in a manner that will require the newly hired employees to work extended hour weekdays and on Saturdays.
2. Announce/recruit for these vacancies for the three "floaters" that are currently to be recruited in a manner that will require the newly hired "floaters" to work extended hour weekdays and on Saturdays.
3. All current providers who agreed to and who are currently working extended hour clinics on weekdays and Saturdays will continue to do so. This does not include those who agreed to work Extended Hours as part of the Agency and Union agreement reached June-August 2013.
4. Seek volunteers from the existing staff who may want to work extended hours during the week and on Saturdays.
5. With the exception of providers with bona fide and legitimate hardships, all current providers will work extended hour weekdays and on Saturdays while the recruitment and selection process identified in items #1&2 above is ongoing.
6. The providers in the item #5 will be relieved on the requirement to work extended hour weekdays and on Saturdays through attrition and using seniority (i.e. each time a selection is made and an appointee is on

board, the provider referenced in item #5 with the most seniority will no longer be required to work extended hour weekdays and on Saturdays. This "attrition" approach will continue until all 10 vacancies referenced in items 1&2 are filled and brought on board. Once the last provider is hired from the pool referenced in items 1&2, only the providers in items #1-4 will be provided to work extended hour weekdays and on Saturdays. *Note: It is expected that using this approach, the providers in items #1-4 would have to work no more than one extended hour weekday and one Saturday every two to three months and improve access.*

7. Alternatively, authorize compressed tours for "pairs" of physicians which would have the immediate impact of providing extending hour weekdays and weekends and potentially increase the number of extended hour appointments available to veterans.
8. In order to meet future demands, utilize HR 3230 to request the immediate hiring of an additional 10 physicians to improve wait times and appointment availability.

(Id.) (all grammar and word choices found in original).

After reviewing the Union's proposals, the Medical Center responded to the Union on September 16, 2014 and agreed to incorporate most, but not all, of the Union's proposals during completion of the Medical Center's plan.² (Exhibit 21). On October 3, 2014, the Medical Center and the Union met to discuss the Union's proposals. (Exhibit 23). The parties failed to reach agreement, and on October 16, 2014, the Union notified the Medical Center that it intended to invoke impasse proceedings with the Federal Service Impasses Panel. *(Id.)*. The Union suggested that management was required to hold in abeyance further implementation of the plan "pending resolution of the impasse." *(Id.)*. On October 24, 2014, the Union contacted the Federal Mediation and Conciliation Service to request mediation assistance concerning "a point of impasse on the negotiations of the Accelerated Care Initiative and Extended Hours Clinics for ambulatory care providers." (Exhibit 24).

On October 1, 2014, the Medical Center implemented its standardized clinic profiles, including expanding providers' weekly administrative time from the temporary limitation imposed as part of phase 1 of the plan. (Exhibit 2).

On February 19, 2015, the Medical Center filed its request for a 38 U.S.C. § 7422 determination.³ (Exhibit 2). The Union did not submit a response to the Medical Center's request.

² The Associate Chief did not agree to the Union's proposal six (6).

³ The request for determination is dated February 2, 2015.

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 the Union's ULP, claiming that the Medical Center failed to negotiate workplace changes concerning implementation of VHA's "Accelerating Access to Care Initiative", involves a matter or question concerning or arising out of professional conduct or competence within the meaning of 38 U.S.C. § 7422(b).⁴

DISCUSSION

The Department of Veterans Affairs Labor Relations Improvement Act of 1991, codified in part at 38 U.S.C. § 7422, granted collective bargaining rights to Title 38 employees but specifically excluded from the collective bargaining process, and the parties' negotiated grievance procedure, 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.

Here, in order to focus attention and resources on reducing wait times for Veteran patients, VHA established the Care Initiative. (Exhibit 2). The Medical Center pursued the goals set out in the Care Initiative by drafting a three-phase plan. (Exhibit 25). The plan included a number of components in phase 1, including temporarily reducing administrative time for providers, standardizing primary care appointments in thirty-minute slots, ensuring coverage of extended weekday and Saturday clinic hours, and maximizing efforts to expedite recruitment and onboarding of new primary care providers. (*Id.*). Understanding the urgency of moving quickly to reduce facility wait times, the Medical Center implemented phase 1 of the plan immediately. (Exhibit 2).

The Union claims that the Medical Center was required to bargain with the Union prior to the implementation of phase 1 of the plan. However, 38 U.S.C. § 7422 precludes from collective bargaining any matter or question concerning or arising out of professional conduct or competence.⁵

In prior 38 U.S.C. § 7422 decisions, the Secretary has considered the negotiability of facility efforts to address excessive patient wait times. For example, in VAMC Martinsburg (September 19, 2013), the Secretary considered a situation where a medical center temporarily reduced administrative time for primary care providers in

⁴ "Professional conduct or competence" is more fully defined as "clinical competence" or "direct patient care." 38 U.S.C. § 7422(c).

⁵ The prohibition on collective bargaining concerning matters excluded under 38 U.S.C. § 7422 applies to both substantive bargaining and "impact and implementation" bargaining.

order to address patient backlogs and extensive patient wait times for appointments. (Exhibit 26). The Secretary determined that the "number of available patient appointments and wait time for appointments are fundamental to establishing the level of patient care provided by the Department. As summarized in the request for a 38 U.S.C. § 7422 determination, the VAMC's decision to schedule patients during administrative time was based on the need to increase patient access to care by reducing wait time for appointments. Accordingly, management's decision to schedule patients during administrative time concerns professional conduct or competence . . . and is excluded from collective bargaining under 38 U.S.C. § 7422(b)." (*Id.*).

The Medical Center's plan in this case was based on the need to increase patient access to care by reducing wait time for appointments, which is an important component of direct patient care at the Medical Center. Accordingly, collective bargaining concerning the Medical Center's decision to implement its plan is excluded by 38 U.S.C. § 7422.

CONCLUSION

I view the initiatives put in place by the Medical Center in North Texas in light of both the historical approach evidenced in previous section 7422 decisions, and the importance and urgency associated with reducing patient wait times. Reacting to the very real need nationwide to address serious problems associated with providing timely care to Veteran patients, the Medical Center quickly created a comprehensive three-phase plan and immediately implemented phase 1 of the plan. Following the initial implementation, facility management met with Union representatives over several months, and considered and accepted many of the Union's ideas and suggestions. During this period, the Medical Center regularly explained to the Union what it intended to do and how it intended to do it. But, in instances like these, which involve Title 38 health care providers exclusively, there is no obligation to bargain over workplace changes targeted to assuring and enhancing timely access to care. The components of the Medical Center's three-phase plan are all directed to ensuring the highest level of patient care and the maximum number of available patient appointments. As determined by prior 38 U.S.C. 7422 decisions, facility initiatives such as those embodied in the Medical Center's well-considered plan, are matters or questions concerning or arising out of direct patient care and are wholly excluded from collective bargaining.⁶

⁶ The Union also argued that the Medical Center repudiated a local agreement between the parties concerning standardized clinic profiles for and administrative time for providers in the Ambulatory Care Service. (Exhibit 17). While the actions taken by management pursuant to the Access to Care Initiative initially changed the administrative time previously agreed upon by management concerning the clinic profile changes in April 2014, the Access to Care Initiative effectively only delayed implementation of providers administrative time temporarily in order to focus providers' attention and Medical Center resources on reducing wait times for Veteran patients. This temporary change/delay in implementation is rooted in the professional conduct or competence exclusion of 38 U.S.C. § 7422; and therefore, is not subject to collective bargaining or the parties negotiated grievance procedure.

DECISION

The Unfair Labor Practice charge claiming that the Medical Center failed to negotiate workplace changes concerning implementation of VHA's "Accelerating Access to Care Initiative" involves 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 _____

David J. Shulkin, M.D.

David J. Shulkin, M.D.
Under Secretary for Health

11/10/15
Date