

**Title 38 Decision Paper**  
**Edward Hines, Jr. Department of Veterans Affairs (VA) Hospital**  
**Hines, Illinois**

**FACTS**

On February 12, 2016, the Associate Chief of Staff for Geriatrics and Extended Care (ACOS) at the Edward Hines, Jr. VA Hospital (Medical Center) notified a primary care physician that a panel had been assigned to conduct a “comprehensive focused-clinical care review” in accordance with the Medical Center bylaws due to “concerns regarding care issues.” Exhibit 2.

On April 19, 2016, the comprehensive-focused clinical care review was conducted and the primary care provider was interviewed. Exhibit 4.

On May 2, 2016, the American Federation of Government Employees, Local 781 (Union) filed an Unfair Labor Practice charge (ULP) with the Federal Labor Relations Authority (FLRA). Exhibit 5. The ULP charged the Medical Center with denying a request by the primary care physician to “Union representation at the Investigatory examination.” *Id.* Prior to the filing of the ULP, the Medical Center’s Human Resources Officer (HRO) had received a request for the Union to be present during the review; however, the HRO advised that the review “is an issue governed by 38 U.S.C. 7422.” Exhibit 1; *see also* Exhibit 3.

On May 27, 2016, the Medical Center verbally communicated with the FLRA that it planned on requesting a 38 U.S.C. § 7422 determination from the Under Secretary for Health (USH). Exhibit 1. The Medical Center asked that the FLRA hold the ULP in abeyance until the USH made a determination. *Id.*

On May 31, 2016, the Medical Center submitted its response to the ULP to the FLRA. Exhibit 6. The Medical Center stated that “this matter was discussed with AFGE on April 14, 2016. Correspondence was provided to AFGE from [the] Chief of Employee Relations. The correspondence showed examples of 7422 determinations of management’s right’s to invoke 7422 at this time” and that “this matter is excluded from bargaining.” *Id.* The Medical Center stated that “[u]nder Article 60 of AFGE master agreement, employees are entitled representation before a Title 38 Disciplinary Board, however, this was not a Professional Standards Board or a hearing in which discipline was being decided.” *Id.*

On August 24, 2016, the Medical Center submitted a request for a 38 U.S.C. § 7422 determination. Exhibit 1.

On September 23, 2016, the Union submitted its response to the Medical Center’s request. Exhibit 16. The Union asserted that when it was notified by the Medical Center that the employee was not entitled to representation due to 7422, it explained

that it “was not bargaining nor filing a grievance in this matter, but was seeking to represent the employee in what clearly constituted a Weingarten Meeting.”

## **AUTHORITY**

The Secretary of Veterans Affairs has the final authority to decide 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). On August 23, 2015, the Secretary delegated his authority to the Under Secretary for Health. Exhibit 10.

## **ISSUE**

Whether a ULP charge that the Medical Center improperly denied a primary care physician Union representation during a comprehensive focused-clinical care review involves a matter or question concerning or arising out of professional conduct or competence, or peer review within the meaning of 38 U.S.C. § 7422(b), and thus, is excluded from collective bargaining.

## **DISCUSSION**

The Department of Veterans Affairs Labor Relations Improvement Act of 1991, codified in part at 38 U.S.C. § 7422, granted limited collective bargaining rights to employees appointed under title 38 of the United States Code (Title 38), and specifically excluded from the collective bargaining process matters or questions concerning or arising out of professional conduct or competence (i.e., direct patient care or clinical competence), peer review, or employee compensation, as determined by the Secretary. “Professional conduct or competence” is defined to mean “direct patient care” and “clinical competence.” 38 U.S.C. § 7422(c).

On February 12, 2016, the ACOS provided the physician with the Medical Staff Bylaws which state that under article IX, section 4c, “individual(s) who are conducting the comprehensive focused clinical care review have the discretion to meet with the Practitioner to discuss or explain the clinical care concerns. This meeting does not constitute a Hearing and none of the procedural rules set forth in Article X of these Bylaws apply thereto.” Exhibit 2; Exhibit 7. The Bylaws further explain that such an investigation is an administrative matter and not an adversarial hearing. *Id.* The review is a “retrospective focused clinical care review (look-back) that is an objective, fact finding process.” Exhibit 8.

According to Veterans Health Administration Directive 2010-025, “[p]eer review is defined as an organized process carried out by an individual health care professional or select committee of professionals, to evaluate the performance of other professionals.” Exhibit 9. The comprehensive focused clinical review is peer review in that a peer (someone with the same education/training/specialty) is tasked with conducting an objective retrospective review of the Title 38 provider’s care and treatment. *Id.*

In *Hampton*, the Under Secretary for Health concluded that the “the issue of union representation of an employee in a [Quality Assurance] investigation concerns or arises out of professional conduct or competence as well as peer review under Title 38, United States Code and is outside the scope of collective bargaining.” Exhibit 13 (VAMC Hampton (Jan. 4, 1993)). The purpose of the investigation in *Hampton* was to conduct an inquiry into an incident involving patient care by the employee. *Id.* The Union was permitted to attend the inquiry; however, they were not “allowed to speak or otherwise participate in the meeting.” *Id.*; see also *Nat’l Fed’n of Fed. Emps. Local 589 v. Federal Labor Relations Auth.*, 73 F.3d 390, 393-94 (D.C. Cir. 1996) (Secretary of Veterans Affairs exercises complete discretion over peer review procedures, including representational rights).

In this case, the comprehensive focused-clinical care review was an objective investigation and administrative in nature, not adversarial. Furthermore, the underlying cause of the review was based on the primary care physician’s care and treatment, which is a matter that involves direct patient care and clinical competence. As such, the issue whether the Union may represent the employee before the comprehensive focused-clinical care review, is a matter concerning or arising out of professional conduct or competence and peer review as defined within meaning of 38 U.S.C. § 7422(b), and thus, excluded from collective bargaining.<sup>1</sup>

**DECISION**

The ULP charge that the Medical Center improperly denied a primary care physician Union representation during a comprehensive focused-clinical care review is a matter or question concerning or arising out professional conduct or competence and peer review within the meaning of 38 U.S.C. § 7422(b), and is thereby excluded from collective bargaining.



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Office of the Under Secretary for Health

3/15/18  
Date

<sup>1</sup> To the extent that the Union asserts that the comprehensive focused-clinical care review constituted a Weingarten meeting, the Union failed to provide any evidence to support such a contention.