



DEPARTMENT OF VETERANS AFFAIRS  
Under Secretary for Health  
Washington DC 20420

October 31, 2017

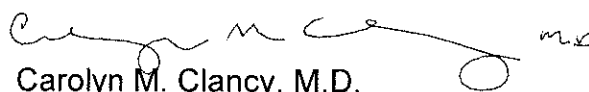
Mary Sipple  
President, AFGE Local 1687  
P.O. Box 518  
Mountain Home, TN 37684

Dear Ms. Sipple:

I am responding to the August 26, 2015, request for a 38 U.S.C. § 7422 decision from the Director of the Mountain Home VA Medical Center (Medical Center) regarding AFGE Local 1687's grievance alleging that the Medical Center violated the Master Agreement when it reassigned Dr. R. Harber Wood from the Emergency Department to the Compensation and Pension Department.

I have determined, on the basis of the enclosed decision paper, that there is insufficient information to make a determination that the issue presented is a matter or question that concerns or arises out of professional conduct or competence and is thus exempted from collective bargaining by 38 U.S.C. § 7422(b). Please review the enclosed Decision Paper for a more complete explanation of my decision.

Sincerely,

  
Carolyn M. Clancy, M.D.  
Executive in Charge

Enclosures



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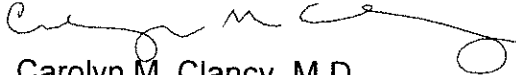
Mr. Dean B. Borsos  
Director  
Mountain Home VA Medical Center  
P.O. Box 4000  
Mountain Home, TN 37684

Dear Mr. Borsos:

I am responding to your August 26, 2015, request for a 38 U.S.C. § 7422 decision regarding AFGE Local 1687's grievance alleging that the Mountain Home VA Medical Center violated the Master Agreement when it reassigned Dr. R. Harber Wood from the Emergency Department to the Compensation and Pension Department.

I have determined, on the basis of the enclosed decision paper, that there is insufficient information to make a determination that the issue presented is a matter or question that concerns or arises out of professional conduct or competence and is thus exempted from collective bargaining by 38 U.S.C. § 7422(b). Please review the enclosed Decision Paper for a more complete explanation of my decision.

Sincerely,

  
Carolyn M. Clancy, M.D.  
Executive in Charge

Enclosures

Title 38 Decision Paper  
Department of Veterans Affairs (VA)  
Mountain Home VA Medical Center, Mountain Home, Tennessee

I. FACTS

On December 11, 2014, the Mountain Home VA Medical Center (Medical Center) notified one of its physicians (Doctor) that he was being temporarily detailed from the Medical Center's Emergency Department (ED) to its Compensation and Pension (C&P) Department, pending the outcome of a fact-finding investigation. Exhibit 1.

The fact-finding was related to claims that the Doctor sexually harassed female nurses in the ED by inappropriately touching them and getting close to them when speaking to them in a whisper. Exhibit 2.

On March 17, 2015, following the Medical Center's fact-finding, management proposed to suspend the Doctor for 7 days. Exhibit 3. The proposed suspension was based on a single charge, "Conduct Unbecoming a Physician," and focused on two specifications involving "uninvited inappropriate physical contact with a female co-worker." *Id.* According to the specifications, the Doctor's conduct "created and fostered an atmosphere of distrust and fear in the Emergency Department, which has impacted the efficiency of the service provided in the unit." *Id.* It was further explained that the Doctor's "behavior was unprofessional and caused a disruption to the workplace to the point of interfering with the work performance of others." *Id.*

On March 23, 2015, the Doctor provided both a written response to the allegations set out in the Medical Center's notice of proposed suspension. Exhibit 4.

On April 8, 2015, the Medical Center extended the Doctor's temporary detail at the facility's C&P Department, and instructed him "not to initiate any contact with ED employees, nor come into the ED during this time." Exhibit 5.

On April 10, 2015, the Medical Center issued the Doctor a notice of a five-day suspension, based on the earlier "Conduct Unbecoming" charge.<sup>1</sup> Exhibit 6. The Medical Center stated that, because the charge did not "involve a question of professional conduct or competence," the Doctor was entitled to appeal his suspension through the parties' negotiated grievance procedure. *Id.*

On April 27, 2015, the Medical Center notified the Doctor that, effective May 17, 2015, he was being permanently reassigned from the ED to the C&P Department, where his duties would include "Compensation and Pension Disability and Special Exams."<sup>2</sup> Exhibit 8.

On May 27, 2015, the American Federation of Government Employees, Local 1687 (Union), filed two grievances on behalf of the Doctor. Exhibit 9. The first grievance contested the Doctor's five-day suspension; the second grievance contested the Doctor's permanent reassignment. *Id.* The reassignment grievance alleged that the Medical Center violated

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<sup>1</sup> The Doctor served his suspension from April 20, 2015, to April 24, 2015. Exhibit 7.

<sup>2</sup> He was further notified that his pay and duty station would be unchanged. Exhibit 8.

several provisions of the parties' negotiated Master Agreement, primarily Article 14 § 4, which states, "[a]dministrative reassignments will not be used as discipline against any employees, unless appropriate procedures are followed." *Id.* As remedies, the Union requested, in part, that management rescind the directed reassignment and compensate the Doctor "for all lost pay and benefits lost in connection with the unjust reassignment." *Id.*

On June 4, 2015, the Medical Center responded separately to the grievances, rejecting the Union's claims, arguing in both instances that the grievances were untimely filed. Exhibit 10.

On June 8, 2015, the Union invoked arbitration on the permanent reassignment grievance. Exhibit 11.

On July 2, 2015, the Medical Center alerted the Union that it considered the Doctor's directed reassignment to be a matter concerning or arising out of professional conduct or competence "because it was based on the direct patient care needs in both the ED and C&P," and therefore, the matter was "not subject to arbitration." The Union disagreed and the parties selected an arbitrator on July 10, 2015. Exhibit 12.

Over the next 7 weeks, the Medical Center attempted to persuade the Union and the arbitrator that arbitration was excluded by 38 U.S.C. § 7422 and should be postponed pending a determination by the VA Secretary. Despite the Medical Center's efforts, an arbitration hearing was set for October 20, 2015.<sup>3</sup> Exhibit 13.

On August 26, 2015, the Medical Center filed a request for a 38 U.S.C. § 7422 determination. Exhibit 7. The Union filed its response to the Medical Center's request for determination on September 4, 2015. Exhibit 14.

## II. TITLE 38 U.S.C. § 7422 AUTHORITY

The Secretary of the Department of Veterans Affairs has the final authority 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).<sup>4</sup>

## III. ISSUE

Whether the Union grievance alleging that the Medical Center violated the parties' Master Agreement when it reassigned the Doctor from the ED to the C&P Department is a matter or question concerning or arising out of professional conduct or competence within the meaning of 38 U.S.C. § 7422(b).<sup>5</sup>

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<sup>3</sup> The arbitrator noted that the "essential purpose" of the October hearing was to consider the arbitrability of the grievance. Exhibit 13.

<sup>4</sup> On August 23, 2015, the VA Secretary delegated the responsibility to issue final 38 U.S.C. § 7422 determinations to the Under Secretary for Health (USH). Exhibit 15.

<sup>5</sup> "Professional conduct or competence" is more fully described as "direct patient care" and "clinical competence." 38 U.S.C. § 7422(c).

#### IV. 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 Title 38 employees and specifically excluded from the collective bargaining process matters or questions concerning or arising out of professional conduct or competence, peer review, or employee compensation, as determined by the Secretary.

In the 38 U.S.C. § 7422 request, the Director provided the following rationale for the permanent reassignment:

1. “[T]here had been a need for a full-time permanent physician in C&P,” and in late October 2014, the facility posted a position for a C&P physician and Clinical Director, but no selection was made. Therefore, the need for a C&P provider continued.
2. After the Doctor was detailed to C&P, the Chief of the ED reported a dramatic increase in the productivity of two mid-level health care providers “who had regularly worked with or for” the Doctor prior to his detail.
3. Since the Doctor’s detail, the Chief of the ED “noticed a discernible improvement in the mood and morale” of the ED employees following the Doctor’s detail. The Director explained that, “[i]mproved mood and morale foster an environment more conducive to high quality care for our Veteran patients.”

#### Exhibit 7.

The Director’s request for a 38 U.S.C. § 7422 determination is the only written basis provided by the Medical Center to assess whether the reassignment of the Doctor was related to professional conduct or competence, i.e., direct patient care or clinical competence. Id. The initial stated basis for the Doctor’s temporary detail to the C&P Department was to conduct a fact-finding investigation into claims against the Doctor of sexual harassment, which resulted in a five-day suspension of the Doctor. Exhibit 3 & 5. Prior to the suspension, the Doctor was notified that the detail was being extended “until a determination of your future permanent assignment is made[.]” Exhibit 5. Shortly after the five-day suspension, the Medical Center determined that the Doctor was to be reassigned from the ED to the C&P Department. Exhibit 8. The Medical Center noted in the determination that the reassignment was not a disciplinary action, but based on the needs of the organization. Id.

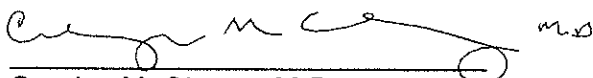
With the exception of the request for a 38 U.S.C. § 7422 determination, there is no additional factual basis or supporting documentation to reflect that the reassignment was actually related to direct patient care or clinical competence. The Director’s cited reasons in the request, specifically the increased productivity and improvement in morale, are not conclusively related to the detail, and the Director did not present any data to suggest a strong correlation between the changes and the detail. In addition, outside of the request, there is no documentation to indicate that the Doctor was notified of the opening for a full-time permanent physician in the C&P Department. Exhibit 8. The notice to the Doctor of the Medical Center’s determination to reassign him does not reflect that he was being

reassigned to fill an opening in C&P. Id.

Based on the foregoing, there is insufficient evidence to conclude that the reassignment of the Doctor was based on direct patient care or clinical competence within the meaning of 38 U.S.C. § 7422(b). As such, the USH is unable to determine that the Union's grievance alleging that the Medical Center violated the parties' Master Agreement when it reassigned the Doctor from the ED to the C&P Department is excluded by 38 U.S.C. § 7422(b).

#### VI. RECOMMENDED DECISION

There is insufficient information to make a determination that the Union's grievance alleging that the Medical Center violated the parties' Master Agreement when it reassigned the Doctor from the ED to the C&P Department is a matter or question that concerns or arises out of professional conduct or competence within the meaning of 38 U.S.C. § 7422(b).



Carolyn M. Clancy, M.D.  
Executive in Charge  
Office of the Under Secretary for Health

10/31/17  
Date/