

**Title 38 Decision Paper  
VA Oklahoma City Healthcare System  
Oklahoma City, Oklahoma**

**FACTS**

On November 27, 2015, the Professional Standards Board (PSB) at the Oklahoma City VA Medical Center (Medical Center) recommended that a ninety day Focused Professional Practice Evaluation (FPPE) for cause be initiated for a podiatrist based upon concerns regarding the provider's clinical competence. Exhibit A; Exhibit B.

On December 17, 2015, the podiatrist was issued and accepted a letter entitled "FPPE for Cause" that identified the reason for the initiation of the FPPE, the process to be utilized for the review, and the expectations that would need to be met for the successful completion of the FPPE for cause. Exhibit C.

On February 23, 2016, the podiatrist inquired with his supervisor as to how the benchmark percentages were established for the FPPE. Exhibit D. The supervisor explained that the benchmarks were "developed locally, but with guidance from people who are more experienced in the process of setting up a[n] FPPE for cause." *Id.*

On June 1, 2016, American Federation of Government Employees, Local 2562 (Union) sent via email to the Medical Center a request for the "new mathematical equation/benchmark/matrix" to be used in FPPEs for podiatrists. Exhibit A; Exhibit L.

On June 15, 2016, the Union filed an Unfair Labor Practice (ULP) with the Federal Labor Relations Authority (FLRA). Exhibit E. The ULP charged the Medical Center with, among other things, failure to bargain over the benchmarks used to evaluate the podiatrist for the FPPE. *Id.* The Union requested the reinstatement of the podiatrist's credentials and privileges and that the FPPE be considered completed. *Id.*

On July 1, 2016, the Medical Center requested an informal review of the issues set forth in the ULP by the Veterans Health Administration (VHA) Workforce Management and Consulting Office (WMC) to determine whether 38 U.S.C. § 7422(b) may apply. Exhibit G.

Subsequently, on July 20, 2016, WMC received the Medical Center's request for a 38 U.S.C. § 7422 determination. *Id.*; see Exhibit F.

Shortly thereafter, the Union submitted its response to the 38 U.S.C. § 7422 request to the Under Secretary for Health (USH). Exhibit L.

## **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 October 18, 2017, the Secretary delegated his authority to the Under Secretary for Health. Exhibit I.

## **ISSUE**

Whether a ULP charge that the Medical Center failed to bargain over the benchmarks used to evaluate the podiatrist for an FPPE for cause is 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, 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).

In the ULP, the Union asserted that the Medical Center developed a new mathematical equation/benchmark to be used to measure the podiatrist for the FPPE, and the creation of such benchmarks was a change in working conditions, which the Medical Center had failed to notify the Union of and bargain over. Exhibit E. 38 U.S.C. § 7422(b); however, excludes from collective bargaining any matter that concerns professional conduct or competence or peer review.

An FPPE is a specific, time-limited, clinical review and evaluation of a medical provider by experienced hospital staff. VHA Handbook 1109.19, ¶ 14g(1). The FPPE "may be used when a question arises regarding a currently privileged practitioner's ability to provide safe, high-quality patient care." *Id.*, ¶ 14g(2); Exhibit H. An "FPPE for Cause is a customized opportunity for a provider to demonstrate improvement or requisite knowledge and skill. These reviews are typically initiated after a trigger is met or a Focused Clinical Care Review has identified a concern that can likely be rectified without risk to patients or if there is a concern raised from routine reviews." Exhibit M. "These triggers need to be defined locally to meet the facility's needs and, depending upon the seriousness of the identified trigger, a more-in-depth review could be based on a single event or a specified number of events identified and aggregate data." VHA Handbook 1109.19, ¶ 14h(1); Exhibit H. Additionally, "the criteria that would trigger a

more in-depth review must be defined in advance, and be objective, [and] measurable.” VHA Handbook 1109.19, ¶ 14h(2); Exhibit H.

As evidenced by the policy definition, development of criteria, and outcome upon completion, an FPPE ascertains a provider’s competence and may be a result of a matter concerning or arising out of peer review. In this case, the Medical Center explained that the FPPE was initiated following an in-depth external management level review, which “entailed a review of 25 Follow-up Notes and 25 Consult Notes” that concluded “[m]ore than 65% of items reviewed for appropriate documentation and/or coordination of care did not meet the standard of care.” Exhibit B. Because the FPPE was designed to address both clinical documentation, as well as coordination of patient care, the issuance of the FPPE for cause is a matter concerning direct patient care and clinical competence, as well as peer review.

VA has addressed the peer review process in previous 38 U.S.C. § 7422 decisions. For example, in *VAMC Washington DC*, the medical center’s PSB recommended that a radiologist be placed on a FPPE consisting of a “graduated 90-day evaluation with three phases.” Exhibit K (*VAMC Washington DC* (June 3, 2014)). The Union submitted “information requests asking for documentation concerning the [m]edical [c]enter’s peer review processes” and “for the most part, the [m]edical [c]enter refused to provide the requested information, basing its refusal on the nature of the peer review processes.” *Id.* The Acting Secretary of Veterans Affairs concluded that “performance reviews conducted by the [m]edical [c]enter are peer review processes, or alternatively, involves assessments of the professional conduct or competence of a title 38 health care professional.” As such, it was determined that “[t]he requests are excluded from mandatory disclosure because they . . . are matters or questions concerning or arising out of a 38 U.S.C. § 7422(b) exclusion.” *Id.*

### **RECOMMENDED DECISION**

A ULP charge that the Medical Center failed to bargain over the benchmarks used to evaluate a podiatrist for an FPPE is 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, excluded from collective bargaining.



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3/15/18  
Date