

**Title 38 Decision Paper**  
**Department of Veterans Affairs (VA)**  
**VA Roseburg Healthcare System, Roseburg, Oregon**

**FACTS**

On September 11, 2013, the Associate Chief of Staff for the VA Roseburg Healthcare System (Medical Center) determined that, due to a shortage of Primary Care Providers, it was necessary to modify the schedules and assignments of its physicians to ensure adequate Primary Care coverage. (Exhibit 1). The schedule and assignments for one of the facility's part-time physicians, Dr. Arlene Bradley, was substantially modified to address the Primary Care shortage. (*Id.*). Prior to the modification, Dr. Bradley worked 24-hours (0.6 Full-time Employee Equivalent (FTEE)) per week. (Exhibit 2). Her duties included acting as medical director of the Medical Center's Community Living Center (CLC), as well as patient care related to stress testing and traumatic brain injuries. (Exhibit 1). Prior to the schedule modification, Dr. Bradley worked a regular weekly schedule of 8 hours on Monday and Wednesday and 4 hours on Tuesday and Thursday. (Exhibit 2)

In a memorandum dated September 11, 2013, the Associate Chief of Staff outlined a proposed revised schedule for Dr. Bradley's consideration. (Exhibit 3). The proposed weekly schedule allocated 8 hours to CLC activities and between 16 and 24 hours per week to Primary Care and other duties, including stress testing and traumatic brain injury evaluations. (*Id.*). Instead of a 4-day work week, the new proposed work schedule included provider duties 5-days each week-- Monday through Friday.<sup>1</sup> (*Id.*).

On September 15, 2013, Dr. Bradley responded by e-mail to the proposed schedule modification. She explained that the proposal was unacceptable, based on the following reasons:

We have not discussed this change in-person;

The union has not been appropriately involved (because this is a proposed change in work duties, schedule);

It's inconsistent with the developing consensus from recent discussions I've had with COS and you;

I have not agreed to work more than my current 0.6 FTEE (the attached schedule has me working full-time);<sup>2</sup> [and]

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<sup>1</sup> The Medical Center was apparently under the impression that Dr. Bradley was open to increasing her work schedule beyond 24-hours per week. In a memorandum dated August 1, 2013, Dr. Bradley stated, "In addition, I am willing to consider, in the future, increasing my work time." (Exhibit 5).

<sup>2</sup> Dr. Bradley explained that she would consider working full-time only if she continued serving as the MST Coordinator. (Exhibit 4).

It's illegal.

(Exhibit 4).

The following day, September 16, 2013, the American Federation of Government Employees Local 1042 (AFGE or Union) complained that the Medical Center "bypassed AFGE by negotiating directly with a front-line employee regarding her scheduling and working conditions." (Exhibit 6). The Union stated that it "expect[ed] this proposed schedule change to CEASE and DESIST until the facility's bargaining obligation has been met, including impasse." (*Id.*).

On September 18, 2013, the Associate Chief of Staff met with Dr. Bradley and her Union steward. (Exhibit 1). The Associate Chief of Staff provided Dr. Bradley with a copy of her new, modified schedule, which was to begin on September 30, 2013. (*Id.*). The new schedule included aspects of the tentative schedule proposed on September 12, 2013, but limited Dr. Bradley to a regular part-time schedule of 24 hours per week. (Exhibit 7). The new schedule established Dr. Bradley as a Primary Care Gap Provider, with most of her time devoted to Primary Care. Each week, she was scheduled to perform Primary Care exams for 16 hours and "CLC/Other" during the remaining 8-hours of her regular work week. (*Id.*). "CLC/Other" included her work as the CLC medical director, as well as duties in palliative care and hospice, Emergency Department coverage, Mental Health medicine coverage, stress testing, and traumatic brain injury exams. (*Id.*).

The new schedule included regular duties on Monday through Friday -- four hours on Monday, Wednesday, Thursday, and Friday, and 8 hours on Tuesday. (*Id.*).

On September 19, 2013, Dr. Bradley forwarded a memo to Medical Center staff in which she summarized the previous day's meeting and stated that the new schedule "fails to adequately meet the patient care needs of CLC and the [Palliative Care and Consult Team] while also not adequately addressing the needs of ongoing stress testing . . . ." (Exhibit 8). Dr. Bradley suggested convening another meeting on September 23, 2013, to further "fine-tune" her expected duties and schedule. (*Id.*). The September 23, 2013, meeting never took place. (Exhibit 9).

On September 20, 2013, the Union reiterated its demand to bargain and its cease and desist order, and stated that, "ANY IMPLEMENTATION before negotiations are complete will constitute bypass of AFGE and I will file accordingly." (Exhibit 10).

On September 30, 2013, the first day that Dr. Bradley was expected to begin her new schedule, she was scheduled to see Primary Care patients from 10:00 a.m. to 12:00 p.m. (Exhibit 7). Instead, Dr. Bradley began seeing traumatic brain injury patients, as she had under her previous schedule. In the confusion that ensued, one or more of the scheduled traumatic brain injury appointments was canceled and the Chief of Staff tended to the scheduled Primary Care patients assigned to Dr. Bradley. (Exhibit 1).

On November 13, 2013, Dr. Bradley was reprimanded by the Medical Center for failing to follow her supervisor's instructions and leaving her job assignment without

permission.<sup>3</sup> (Exhibit 12). The Union filed a grievance regarding the reprimand, but never advanced the grievance to arbitration. (Exhibit 1).

On October 17, 2013, the Union filed an unfair labor practice charge (ULP), claiming that the Medical Center refused to bargain Dr. Bradley's new schedule and duties, and unilaterally changed Dr. Bradley's work schedule and duties without notice or bargaining. (Exhibit 13).

On May 15, 2014, the Medical Center notified the Union and the Federal Labor Relations Authority (FLRA) that it believed the matters complained of in the ULP were excluded by application of 38 U.S.C. § 7422. (Exhibit 14). On May 30, 2014, the FLRA decided to hold the case in abeyance pending the Secretary's 7422 determination. (Exhibit 15).

On May 30, 2014, the Medical Center e-mailed the Union citing examples of previous 7422 decisions in which similar matters had been found to be excluded from bargaining. (Exhibit 16). In its e-mail, the Medical Center stated, "It is management's position that each of these [ULP] allegations involves the provision of direct patient care . . . . [D]ue to changing patient care needs, management found it necessary to make changes to Dr. Bradley's duties and work schedule, all of which concerned the provision of direct patient care." (*Id.*). The Medical Center offered to arrange a time to further discuss the matter. (*Id.*).

After receiving no response from the Union, the Medical Center sent an e-mail on June 10, 2014, reminding the Union that it was interested in "engag[ing] in discussion as directed by LMR policy, to attempt the resolve the issue locally." (Exhibit 17).

The Medical Center and the Union met on June 12, 2014, but were unable to agree on the application of 38 U.S.C. § 7422 to Dr. Bradley's situation. The Union stated that, in its view, "the ULP regarding the agency's refusal to negotiate Dr. Bradley's schedule is NOT related to direct patient care but is, in fact a scheduling problem, created by the facility itself." (Exhibit 18).

The Office of Labor-Management Relations received the Medical Center's request for a 38 U.S.C. § 7422 determination on September 18, 2014.<sup>4</sup> The Union filed its response (Response) on October 6, 2014.

## **AUTHORITY**

The Secretary of the Department of Veterans Affairs (Department) 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).

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<sup>3</sup> Dr. Bradley argued in her defense that the Union's cease and desist notice trumped facility management's instructions and that a Medical Center Memorandum required part-time physician schedule changes to occur only at the beginning of a new pay period (September 30, 2013, fell in the middle of a pay period). (Exhibit 11; Exhibit 29).

<sup>4</sup> The request for determination is dated August 25, 2014.

## **ISSUE**

Whether an Unfair Labor Practice charge claiming that the Medical Center failed to negotiate a change in a part-time physician's schedule and duties involves a matter or question concerning or arising out of professional conduct or competence within the meaning of 38 U.S.C. § 7422(b).

## **DISCUSSION**

The Department of Veterans Affairs Labor Relations Improvement Act of 1991 granted collective bargaining rights to Title 38 employees but 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. 38 U.S.C. § 7422.

Here, the Roseburg Medical Center determined that, due to a shortage of Primary Care providers, there was a need for coverage in Primary Care in order to see patients in a timely manner. (Exhibit 1). More specifically, the Medical Center believed that the need for Dr. Bradley to perform Primary Care exams was more urgently needed than the CLC, stress testing and TBI exams she was currently performing. The Medical Center Director and his staff must determine where and when to expend and distribute facility resources, which includes utilizing its doctors in the most effective and efficient manner to timely serve patients.

38 U.S.C. § 7421(a) authorizes the Secretary of Veterans Affairs to "prescribe by regulation the hours and conditions of employment and leaves of absence" of Title 38 medical professionals, including physicians. (Exhibit 19). The Secretary has exercised this authority through VA Directives and Handbooks. For example, VA Handbook 5011, Part II, Chapter 1, ¶ 2(b), provides in part: "In Veterans Health Administration (VHA), the proper care and treatment of patients shall be the primary consideration in scheduling tours of duty . . . . Duty schedules shall be established as appropriate and necessary for performance of services in the care and treatment of patients and other essential activities . . . ." (Exhibit 20). VA Handbook 5005, Part IV, Chapter 3, Section A, ¶ 4(b), provides that, in assigning, reassigning, and detailing Title 38 professionals, ". . . primary consideration will be given to the efficient and effective accomplishment of the VA mission." (Exhibit 21). These Handbook provisions recognize management's right and obligation to arrange patient scheduling and provider tours of duty and assignments in a manner that ensures consistent access to health care, and timely and professional treatment of patients.

The Medical Center concluded that it would lose Primary Care providers during the latter part of 2013. In June 2013, the Medical Center employed 8.74 Primary Care providers. (Exhibit 22). By August, the number of Primary Care providers had dropped to 6.75, with an increase in September and a final tally in October of 6.95 providers. (*Id.*). With the facility short nearly two FTEE Primary Care providers, the Medical

Center decided to adjust Dr. Bradley's schedule and duties to focus on Primary Care needs. (Exhibit 1).

The question to resolve is whether the Medical Center's decision to modify Dr. Bradley's schedule and duties is a matter concerning direct patient care, a component of 38 U.S.C. § 7422's "professional conduct or competence" exclusion. We have reviewed similar matters in the past.

For example, in VAMC Asheville (October 9, 2014), the Medical Center, after reviewing wait times in its Mental Health Services, concluded that lengthy delays in psychiatric services were problematic. (Exhibit 23). In order to address the substantial wait times for patient appointments, the Medical Center adjusted the schedules of three bargaining unit psychiatrists. (*Id.*) Under the adjusted schedule, each psychiatrist was expected to see up to two new patients per day. (*Id.*) The Secretary concluded that the schedule modification was "meant to accommodate and improve direct patient care" and was excluded from collective bargaining. (*Id.*) In a 2012 decision, the Secretary issued a 7422 determination involving two physicians who were detailed for two days per week from their home clinic to an underserved clinic. (Exhibit 24), VAMC Fargo (December 17, 2012). The medical center determined that the detail would correct a workload imbalance between the two clinics. At their home clinic the physicians were assigned too few patients, while the underserved clinic had too many patients and too few doctors. (*Id.*) The Secretary concluded "that the detail of underutilized staff to a facility that is understaffed is inherently a direct patient care issue," and is not subject to collective bargaining. (*Id.*) In VAMC Charleston (May 27, 2005), the Under Secretary for Health<sup>5</sup> considered the medical center's decision to assign Primary Care physicians to the Urgent Care Clinic to assist in patient care coverage. (Exhibit 25). The Under Secretary held that, "The underlying management determination that Primary Care physicians should cover Urgent Care involves issues of professional conduct or competence, including direct patient care, and is therefore non-negotiable and non-grievable under 38 U.S.C. § 7422(b)." (*Id.*)

In its Response, the Union claimed that provider staffing shortages at the Medical Center were due to the actions of the Chief of Staff. (Exhibit 9). Although the Union provided no evidence to support its claim, if true, the claim itself does not negate the Medical Center's need to reassign Dr. Bradley to ensure appropriate primary patient care needs were being met. However, the facility should review the Union's claim that the Medical Center's Chief of Staff caused the resignation or retirement of 20 health care providers between December 2012 and July 2013 and appropriately address it if true.

The Union also claimed in its Response that the Medical Center violated its own policy when it reassigned Dr. Bradley to Primary Care duties in the middle of a pay period. (Exhibit 9). MCM 2206, entitled "Time and Attendance for Part-Time Physicians," places Roseburg part-time physicians in one of two categories -- those on adjustable

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<sup>5</sup> During this time frame, the responsibility for rendering 38 U.S.C. § 7422 decisions was delegated to the Under Secretary for Health.

work hours and those, like Dr. Bradley, on a fixed part-time tour of duty. (Exhibit 28). The Union mistakenly places Dr. Bradley in the category of a part-time physician on adjustable work hours. (Exhibit 9). Presumably, the Union then relies on the statement in MCM 2206 that the "biweekly work requirement" for part-time physicians on adjustable work hours "may be adjusted by the supervisor on a pay period to pay period basis." (Exhibit 28). That provision, even if interpreted to prohibit schedule changes in the middle of a pay period, does not apply to Dr. Bradley. Under both her old schedule and her new schedule, Dr. Bradley works a fixed part-time schedule on specific days and specific hours. (Exhibit 2; Exhibit 7). Although Dr. Bradley's tour was modified from four days to 5 days, the revised schedule was still a fixed, part-time tour of duty comprised of 24-hours per week. (Exhibit 7).

### **CONCLUSION**

Changes to Title 38 health care providers' schedules and assigned duties, when made to address patient care needs, are not subject to collective bargaining because such modifications are matters concerning direct patient care, a component of professional conduct or competence. I have determined that the Medical Center's modification of Dr. Bradley's schedule and duties is not subject to collective bargaining.

### **RECOMMENDED DECISION**

The Unfair Labor Practice charge claiming that the Medical Center failed to negotiate a change in a part-time physician's schedule and duties involves a matter or question concerning or arising out of professional conduct or competence within the meaning of 38 U.S.C. § 7422(b).

APPROVED/DISAPPROVED

  
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Robert A. McDonald  
Secretary of Veterans Affairs

  
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Date