

Title 38 Decision Paper
Department of Veterans Affairs (VA)
Salt Lake City Health Care System (Medical Center)

FACTS

On April 20, 2015, the Chief of Staff at the Salt Lake City Health Care System (Medical Center) issued all medical providers responsible for outpatient clinic care a memorandum entitled “Expectations for Outpatient Clinical Work,” informing them of “standardized expectations for outpatient clinical providers.” Exhibit 1. In her memorandum, the Chief of Staff explained that “due to a wide variation of outpatient clinical supply practices,” she was expecting these providers to “perform patient care in the form of bookable hours (face-to-face appointments, group appointments, telephone appointments, or other direct patient care appointments) for at least 80% of their mapped outpatient clinical time.” *Id.* According to the Medical Center, the remaining time could be considered administrative time (i.e., non-bookable clinical time), during which a provider can “perform clinical tasks essential to direct patient care” such as “reviewing or writing patient notes, charts or records.” Exhibit 8. The Medical Center asserts that the memorandum impacts physicians, physician assistants, and nurse practitioners, as they are afforded administrative time to perform clinical tasks, but not registered nurses, as they are not afforded administrative time. *Id.*

In the months that followed the April 2015 memorandum, the Medical Center learned that one of its community based outpatient clinic (CBOC), the Pocatello CBOC, “had reserved Thursday afternoons exclusively for administrative time, effectively shutting down the clinic and disrupting access during those hours.” *Id.* During that time, the Pocatello CBOC was “saddled with an Electronic Wait List (EWL) of 25 new patients waiting to be seen and was closed to accepting new patients.” Exhibit 18. According to the Medical Center, “although approximately 97.94% of established patients were being seen within thirty (30) days of the patient desired date from March 2015 through July 2015, during that same period of time, only 36.15% of new patients had been seen by the clinic within the patient desired date” and only “30.91% of new patients had been seen or cared for in the clinic within the clinically desired date.” *Id.*

The Medical Center also considered clinic slot utilization within the CBOC to be at an unacceptable level, averaging at only 58.33%, which meant “that a considerable amount of provider and/or panel time available for seeing patients was not being utilized.” *Id.* The Medical Center was concerned that “grouping non-bookable clinical time together into half days was contributing to provider burn out and delays in encounter completion, indirectly impacting quality of care” and that “ending administrative half days would help remedy these access deficiencies along with any other related concerns throughout the system.” *Id.*

In response to the disruption of patient access to care, the Medical Center sent an email to the Medical Center's Community Care Clinic Managers on August 21, 2015, stating that "in an effort to increase clinic efficiency and reduce provider burnout, we would like to strongly encourage you to spread your providers['] administrative time throughout the workweek. Administrative half-days are not encouraged or approved by the Chief of Staff." Exhibit 2.

After receiving a number of questions, comments, and concerns from staff regarding the August 21, 2015 email, the Medical Center sent a follow-up email on August 24, 2015, explaining why administrative half-days impact patient access to care:

- Missed opportunities – low (or no) room utilization during block of time.
- [Patient Aligned Care Team] not being used to full capacity.
 - Although the clinicians may be working on encounters, other staff are not being utilized. 16 hours of time for [training] per month is excessive.
- Not spreading admin[istrative] time throughout the week does not allow providers time to catch up on daily work which:
 - Increases the likelihood of O[ver] T[ime]/Comp[ensatory] Time.
 - Creates a lag in encounter completion. *Id.*

On September 25, 2015, the American Federation Government Employees, AFL-CIO, Local 2199 (Union) filed an Unfair Labor Practice charge (ULP) with the Federal Labor Relations Authority (FLRA). Exhibit 3. The ULP asserted that "on or about August 21, 2015, [the Medical Center] sent an email ordering providers to discontinue administrative half-days" impacting the "ability of providers to complete paperwork and/or administrative duties in a timely manner." *Id.* The Union also asserted that the Medical Center did not notify the Union of this change or provide the Union an opportunity to bargain over these changes. *Id.*

In an email to the FLRA dated October 22, 2015, the Medical Center asserts that it had a conversation with the Union about the ULP. According to the Medical Center, the Union stated that it would withdraw its ULP only if the Medical Center admits that it violated the law, provides an assurance that no future violations will occur, and negotiates with the Union about administrative time for the Medical Center's medical providers. Exhibit 8. On this same date, the Union also informally alleged that a bypass had occurred. Management argued that it was under no obligation to bargain over the change because the change involves a matter concerning or arising out of professional conduct or competence, and is, therefore, excluded from collective bargaining under 38 U.S.C. § 7422. *Id.*

On October 29, 2015, the Medical Center responded to the ULP stating that its decision to change the use of administrative time was in accordance with VA Handbook 5011 and, because the "change involves direct patient care," it was excluded from collective bargaining under 38 U.S.C. § 7422. Exhibit 8; Exhibit 9. In its response, the Medical

Center also requested that the FLRA stay the ULP proceeding pending a 38 U.S.C. § 7422 decision. Exhibit 8; Exhibit 9.

On November 17, 2015, the Medical Center requested an informal review of the issue by VA's Office of Labor Management Relations (LMR) to determine whether 38 U.S.C. § 7422(b) may apply. Exhibit 10. On December 17, 2015, the Medical Center formally requested a 38 U.S.C. § 7422 decision. Exhibit 11. On the same day, LMR notified the Union that the Medical Center had requested a 38 U.S.C. § 7422 decision and asked it to submit any response within 20 calendar days. The Union did not submit a response to the issues raised in the Medical Center's request for decision.

On or around December 17, 2015, this 38 U.S.C. § 7422 decision request was transferred over to the Veterans Health Administration (VHA) for processing. On March 8, 2016, VHA asked the Medical Center for additional information, which was provided on March 18, 2016. Exhibit 18. On the same day, VHA forwarded a copy of the Medical Center's additional information to the Union and provided the Union with seven days to respond. *Id.* The Union failed to timely respond to the Medical Center's additional information.

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 17.

ISSUE

Whether the Medical Center's failure to bargain with the Union over the discontinuation of administrative half-days for clinical providers appointed under title 38 of the United States Code (Title 38) and the Union's subsequent ULP about that issue involve a matter or question concerning or arising out of professional conduct or competence within the meaning of 38 U.S.C. § 7422(b), and thus, are 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 Title 38 employees 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).

VA policy requires that “proper care and treatment of patients” serve as “the primary consideration in scheduling tours of duty.” Exhibit 12 (VA Handbook 5011, pt. II, ch. 1, ¶ 2b). “Duty schedules shall be established as appropriate and necessary for performance of services in the care and treatment of patients and other essential activities.” *Id.* (VA Handbook 5011, pt. II, ch. 1, ¶ 2b). A VA Facility Director or his or her designee “has the authority to prescribe any tour of duty to ensure adequate professional care and treatment to the patient, consistent with these provisions.” Exhibit 13 (VA Handbook 5011, pt. II, ch. 3, ¶ 2d). Facilities may also change their providers’ administrative time schedules in response to “unusual circumstances” and when those changes are “in the best interests of the service.” *Id.* (VA Handbook 5011, pt. II, ch. 3, ¶ 2b).

Together these VA policies recognize management’s right and obligation to manage patient scheduling and provider tours of duty and assignments in a manner that ensures consistent access and timely and professional treatment of patients. *Id.*

The Medical Center became concerned about the impact that administrative half-days were having on patient care after learning that the Pocatello CBOC was reserving “Thursday afternoons exclusively for administrative time, effectively shutting down the clinic and disrupting patient access during those hours.” Exhibit 8. In order to prevent patient access problems and improve patient care, the Medical Center stated that “administrative half-days were no longer authorized and that the practice was to be discontinued – a decision driven by the overarching need to promote timely delivery of treatment, enhance clinical efficiency, and improve patient access.” *Id.* Providers were encouraged to distribute their administrative time over the course of their work week, to minimize problematic impact to patient access from scheduling administrative time in a single four hour block. Exhibit 2. Therefore, consistent with VA policies, the Medical Center discontinued administrative half-days for Title 38 clinical staff in order to improve patient care and access.

Elimination, modification, or reduction of administrative time for Title 38 providers has been addressed in prior 38 U.S.C. § 7422 decisions. In 2013, the St. Cloud VA Health Care System ended the practice of allowing a half-day of administrative time following a primary or specialty medical provider’s return from scheduled annual leave. Exhibit 14 (*VAMC St. Cloud* (Jan. 18, 2014)). The Secretary determined that the decision to schedule patients during administrative time was directly related to patient care, and was excluded from collective bargaining. *Id.*

In *VAMC Fargo*, the Fargo VA Health Care System temporarily limited some medical providers’ eligibility for administrative time associated with their leave. The facility hoped to maximize available patient appointment times during the period between Memorial Day weekend and Labor Day weekend, the time frame when providers requested more leave than usual. Exhibit 15 (*VAMC Fargo* (Sep. 17, 2013)). In *VAMC Fargo*, the Secretary determined that negotiations concerning the reduction in administrative time were excluded by 38 U.S.C. § 7422 because management “sufficiently established that the temporary change was implemented to improve patient

access to care... when appointment wait times were high and patients were requesting provider changes because of poor access.” *Id.* Likewise, in *VAMC Martinsburg*, the Martinsburg VA Medical Center decided to schedule patient appointments during hours that had been previously set aside as administrative time in order to address patient care access issues. Exhibit 16 (*VAMC Martinsburg* (Sep. 19, 2013)). The Secretary determined that the decision to schedule patients during time previously set aside for administrative time is directly related to patient care, and thus, excluded from collective bargaining. *Id.*

As illustrated by the above decisions, the Secretary has repeatedly held that efforts to improve patient access to timely medical care by eliminating, modifying, or reducing administrative time are matters relating to direct patient care, a component of professional conduct or competence. The Medical Center determined that scheduling blocks of administrative time negatively impacted appropriate access to patient care at the Medical Center’s clinics. As a result, the Medical Center instructed its clinical providers to disperse administrative time throughout the providers’ work weeks. That decision was clearly designed to ensure timely access to care, and as a result, is a matter or question that concerns or arises from direct patient care.

RECOMMENDED DECISION

The Medical Center’s failure to bargain with the Union over the discontinuation of administrative half-days for clinical providers appointed under Title 38 and the Union’s subsequent ULP about that issue involve a matter or question concerning or arising out of professional conduct or competence within the meaning of 38 U.S.C. § 7422(b), and thus, are excluded from collective bargaining.



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3/15/18
Date