



DEPARTMENT OF VETERANS AFFAIRS
Under Secretary for Health
Washington DC 20420

June 8, 2016

Mr. David Stockwell
Director
VA Northern California Health Care System
10535 Hospital Way
Mather, CA 95655

Dear Mr. Stockwell:

I am responding to the request for a 38 U.S.C. § 7422 determination from the VA Northern California Health Care System, regarding AFGE Local 1206's Step III grievance concerning the Medical Center's decision to summarily suspend a physician's privileges.

I have determined that the issue presented addresses matters or questions that concern or arise out of professional conduct or competence and are 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,

A handwritten signature in black ink, appearing to be "D. Shulkin", written over a horizontal line.

David J. Shulkin, M.D.

Enclosures

Title 38 Decision Paper
Department of Veterans Affairs (VA)
VA Northern California Health Care System, Mather, California

FACTS

After conducting a management review of a physician's operating room cases, the Director of the VA Northern California Health Care System (Medical Center) summarily suspended the physician's privileges based on concerns related to the physician's clinical practice, including substandard care and competency in routine examination of the head and neck, clinical and surgical management both of paranasal sinus disease and head and neck malignancies, and surgical decision making and performance competency for otologic procedures. Exhibit 1. The notice provided to the physician stated that the summary suspension was due to concerns surrounding the physician's clinical practice and his failure to meet "the accepted standards of practice" which could "potentially constitute an imminent threat to patient welfare." *Id.* The notice further stated that the Medical Center intended to complete a comprehensive review of the physician's practice, and his privileges would remain suspended pending completion of the review.¹ *Id.*

On October 3, 2014, on behalf of the physician, AFGE Local 1206 (Union) responded to the Medical Center's notice of summary suspension. Exhibit 2. In its response, the Union confirmed that the physician agreed to accept a Focused Professional Practice Evaluation (FPPE).² *Id.* The Union also stated that based on the Medical Center's failure to provide specific information related to the cases, the physician was unable to adequately respond to the Medical Center's notice. Additionally, the Union challenged whether the physician's care posed an imminent risk to patient care. The Union also stated that the integrity of the process was compromised, and therefore, requested that the physician "be made whole, specifically that his privileges be restored, effective immediately and the FPPE cancelled." *Id.* On October 7, 2014, in response to the Union's statement, the Medical Center explained that no FPPE would be initiated until after completion of the comprehensive review. Exhibit 3.

On October 15, 2014, the Medical Center provided the physician with the FPPE. *Id.* On October 22, 2014, the physician was provided a revised version of the FPPE which incorporated changes to the FPPE to address the physician's concerns. On

¹ The comprehensive review was to be accomplished within 30 calendar days, after which the Director would decide to either restore the physician's privileges to active status or begin the administrative process to reduce or revoke the physician's privileges. Exhibit 1.

² An FPPE "is a time-limited period during which the medical staff leadership evaluates and determines the practitioner's professional performance," and "may be used when a question arises regarding a currently privileged practitioner's ability to provide safe, high-quality patient care." Exhibit 4, p. 43.

October 31, 2014, the physician executed the FPPE, although stating that his signature was "under duress". Exhibit 7. Although the physician signed the FPPE, including the terms of the FPPE, the physician never acted in accordance with the FPPE's expectations. Exhibit 8. Indeed, from the date his privileges were suspended to November 21, 2014, the date he retired,³ the physician spent very little time in the workplace.⁴ Exhibit 3. During the time he was actually present at the Medical Center, the physician refused to perform the surgeries required by the FPPE,⁵ and generally did nothing to conform his behavior to the expectations set out in the FPPE. Exhibit 8. On November 3, 2014, the Union filed a Step 3 grievance against the Medical Center. Exhibit 11. The grievance alleged that the Medical Center denied the physician his right to pursue conditions of employment which promote and sustain human dignity and self-respect; failed to inform the Union in advance that it was conducting a formal administrative investigation of the physician; and summarily suspended the physician's privileges in violation of prescribed local procedures. Id. The grievance alleged that the Medical Center's actions violated the Medical Center's bylaws, and Article 17, Section 8, and Article 22, Section 2B, of the parties' Master Agreement. Id. As remedies, the Union requested that the Medical Center expunge the physician's summary suspension of privileges from his employee records and rescind the pending FPPE. Id.

On December 3, 2014, the Union invoked arbitration on the grievance. Exhibit 12. On December 17, 2014, the parties met to discuss the grievance, but were unable to reach a resolution. Exhibit 13. On December 30, 2014, the Medical Center denied the Union's grievance because the issues involved the professional conduct and competence of a Title 38 physician, and thus, were "covered under Title 38, Section 7422." Id.

On August 17, 2015, the Medical Center submitted a request for a 38 U.S.C. § 7422 determination. Exhibit 3.

On October 8, 2015, the Union provided a response to the Medical Center's request for determination. Exhibit 15.

³ The physician began making plans to retire on September 16, 2014, a few days after he was notified that his privileges were summarily suspended. Exhibit 9.

⁴ The physician was placed on administrative leave from September 15, 2014, to October 24, 2014. He then took annual leave from October 31, 2014, to November 7, 2014, and was on sick leave November 12, 13, and 14, 2014. He was then on annual leave from November 17, 2014, until November 21, 2014, the date the physician retired. Exhibit 3.

⁵ The Union claimed it was unethical to require the physician to perform surgery on patients he had not previously seen and treated. Exhibit 10.

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).⁶

ISSUES

Issue 1

Whether a grievance claiming that the Medical Center summarily suspended a physicians' privileges in violation of local procedures is a matter or question concerning or arising out of professional conduct or competence within the meaning of 38 U.S.C. § 7422(b).

Issue 2

Whether a grievance claiming that the Medical Center violated the parties' Master Agreement by failing to provide a physician the right to pursue conditions of employment which promote and sustain human dignity and self-respect, and by failing to inform the Union in advance that it was conducting a formal administrative investigation of the physician, is 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, 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.⁷

Issue 1

After completing a management review of the physician's operating room cases, the Medical Center believed that the physician's conduct "potentially constitute[d] an imminent threat to patient welfare." Exhibit 1. The Medical Center moved quickly to ensure that the physician could do no harm to patients pending a comprehensive

⁶ 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. Exhibit 14.

⁷ "Professional conduct or competence" is more fully described as "direct patient care" and "clinical competence." 38 U.S.C. § 7422(c).

review, by summarily suspending the physician's privileges and placing him on administrative leave. Id.

Following its comprehensive review, the Medical Center advised the physician that in order to continue his privileges, he had to complete an FPPE developed by his supervisor. Exhibit 5. Although the physician accepted the FPPE, he never actually performed any of the expected surgeries under the FPPE, or, in the little time he spent in the workplace before retiring, fulfilled any of the other expectations set out in the FPPE. Exhibit 8. In fact, shortly after he was notified that his privileges were summarily suspended, the physician began making plans to retire, and did retire, on November 21, 2014. Exhibit 3; Exhibit 9. Less than 3 weeks before his retirement the Union filed a grievance on the physician's behalf, requesting that the Medical Center rescind the pending FPPE and expunge the physician's summary suspension of privileges from his employee records. Exhibit 11.

The Union asserts that the Medical Center failed to comply with its bylaws when it suspended the physician's privileges and commenced its comprehensive review following the suspension of the physician's privileges. Id. The Union; however, offered no evidence that the Medical Center violated any bylaw or prescribed local procedure. The bylaws require that the Medical Center initiate a fact finding when a physician's conduct may "pose a threat to patient safety." Id. As explained by the Director, after becoming aware that questions had been raised concerning the physician's operating room cases, the Medical Center conducted a fact-finding, which involved review of the physician's cases by qualified specialists. Exhibit 1. The fact-finding pointed to "concerns regarding substandard care and competency," and the Medical Center immediately suspended the physician's privileges. Id. The Medical Center's initial actions -- fact-finding followed by summary suspension and a comprehensive review of the physician's practice -- are consistent with the bylaws.⁸ According to the Union, the bylaws also require the Medical Center to forward the results of the comprehensive review to an executive committee at the Medical Center, and this referral process never took place. Exhibit 11. The Union; however, offered no specific reference to the bylaws or policy to support its claim. After reviewing the physician's clinical activities over a 30-day period, the Medical Center Director restored the physician's privileges and placed him on an FPPE, where he could be observed and monitored over the course of 180 days. Exhibit 5.

Essentially, the Union's allegation is that there was not "sufficient cause" to summarily suspend the physician, and therefore, the physician was somehow denied due process during the comprehensive review.⁹ Exhibit 11. I find no support for the Union's position. The Medical Center followed the processes set out in the local bylaws and

⁸ The Medical Center's approach is also consistent with national policy, found in VHA Directive 1100.19, "Credentialing and Privileging": "Clinical privileges may be summarily suspended when the failure to take such action may result in an imminent danger to the health of any individual." Exhibit 4, p. 51.

⁹ From the Union's perspective, "the Chief of Staff did not have sufficient cause to unilaterally issue a summary suspension of privileges . . ." Exhibit 11.

national policy, which operate to ensure patient safety when the clinical competency of a physician is a concern.

38 U.S.C. § 7422 excludes matters that concern or arise out of direct patient care or clinical competence from the parties' negotiated grievance procedure. The Medical Center's decisions to temporarily suspend the physician and place him on a 180-day FPPE concern both direct patient care and clinical competence. The decisions are related to Medical Center concerns regarding the physician's quality of care, clinical and surgical management, and surgical decision-making and performance. Exhibit 1. As a result, the grievance claims involving the initial summary suspension of privileges, resulting review, restoration of privileges, and issuance of an FPPE, are excluded from the negotiated grievance procedure pursuant to 38 U.S.C. § 7422 and may not be considered at arbitration.

Issue 2

The Union also asserts that the Medical Center violated Article 22, Section 2B, of the parties' Master Agreement by failing to notify the Union before formally investigating the physician. Exhibit 11. Section 2B references Administrative Investigation Boards (AIB), which are sometimes convened to conduct formal workplace investigations. An AIB, however, is a completely different process than the comprehensive review of a provider's practice subsequent to a summary suspension of the provider's clinical privileges. The comprehensive review is conducted in accordance with VHA Handbook 1100.19, and relates primarily to determining whether a provider's privileges should be restored, or permanently reduced or revoked. Exhibit 4, p. 52. Even if an AIB had been convened to review the physician's professional qualifications, when a matter concerns direct patient care or clinical competence, as it did in these circumstances, the Union may not claim a violation of the Master Agreement and pursue a grievance via the parties' negotiated grievance procedure as that is excluded by 38 U.S.C. 7422. See Master Agreement, Article 43, Section 2C.

The Union also contends that the Medical Center violated Article 17, Section 8, of the Master Agreement by denying the physician the right to expect and pursue conditions of employment which promote and sustain human dignity and self-respect. Exhibit 11. It is unclear which of the Medical Center's actions interfered with the physician's right to dignity and self-respect. As discussed above, the Medical Center took appropriate steps to ensure the safety of its patients, and therefore, followed both national policy and local bylaws when it reviewed the physician's practice. Even if the Medical Center's actions impacted the physician's expectation of dignified treatment, when a matter concerns direct patient care or clinical competence, as it did in these circumstances, a claimed violation of the Master Agreement may not be pursued through the parties' negotiated grievance procedure and is excluded by application of 38 U.S.C. § 7422.

CONCLUSION

The Medical Center identified a patient care concern that required immediate action to ensure no patient was harmed. It followed national policy and the Medical Center's bylaws when it summarily suspended a physician's privileges, conducted a comprehensive review of the physician's practice, and issued a 180-day FPPE to the physician. These actions are matters that concern or arise out of direct patient care and clinical competence, and may not be challenged through the parties' negotiated grievance procedure. Similarly, any claimed violation of the parties' Master Agreement is excluded from the negotiated grievance procedure when, as here, the underlying matter is a matter that concerns or arises out of direct patient care or clinical competence.


DECISION

Issue 1

A grievance claiming that the Medical Center summarily suspended a physician's privileges in violation of local procedures is a matter or question concerning or arising out of professional conduct or competence within the meaning of 38 U.S.C. § 7422(b).

Issue 2

A grievance claiming that the Medical Center violated the parties' Master Agreement by failing to provide a physician the right to pursue conditions of employment which promote and sustain human dignity and self-respect, and by failing to inform the Union in advance that it was conducting a formal administrative investigation of the physician, is a matter or question concerning or arising out of professional conduct or competence within the meaning of 38 U.S.C. § 7422(b).



David J. Shulkin, M.D.
Under Secretary for Health

6/8/14
Date