

**Title 38 Decision Paper
Department of Veterans Affairs (VA)
Charles George Medical Center
Asheville, North Carolina**

FACTS

In 2012, the Charles George VA Medical Center in Asheville, North Carolina (Medical Center), initiated a review of the average wait times for Veterans' appointments at the Medical Center's mental health outpatient clinic.¹ (Exhibit 1). The Medical Center's review was conducted in accordance with Veterans Health Administration (VHA) Directive 2010-027.² (*Id.*)

As part of its review, the Medical Center looked at appointment data for a cross-section of its mental health outpatient clinic providers — psychiatrists, pharmacists, psychologists, and social workers — on two separate days, April 27, 2012, and May 2, 2012. (*Id.*); (Exhibit 3). This data revealed that the Medical Center's outpatient psychiatrists had the longest average wait time for next-available appointments — 71.8 days on April 27, 2012, and 66 days on May 2, 2012. (Exhibit 1); (Exhibit 3). Based on this data and in an effort to improve patient access to psychiatric care, the Medical Center decided to modify the schedules of three outpatient psychiatrists. (Exhibit 1). These psychiatrists primarily manage patient medications and, under the modified schedule, are expected to see up to two new patients per day. (Exhibit 5). The psychiatrists are represented by the American Federation of Government Employees (AFGE), Local 446 (Union). (Exhibit 1).

On May 31, 2013, the Medical Center's Assistant Chief of Mental Health Service (Assistant Chief) met with Union representatives to discuss the modified schedules for the three outpatient psychiatrists. (*Id.*); (Exhibit 5). The Assistant Chief provided the Union representatives with information about the Medical Center's clinic profile system redesign and copies of the impacted psychiatrists' revised schedules. (Exhibit 1); (Exhibit 4). On June 11, 2013, the Assistant Chief emailed the Union with additional details about the psychiatrists' new schedules. (Exhibit 5). On June 25, 2013, the Medical Center's Chief of Mental Health Service (Chief) held a meeting with outpatient Mental Health Service staff, including psychiatrists, psychologists, social workers, nurses, and other staff. (Exhibit 7). The psychiatrists' new schedules were discussed at the meeting. See (*Id.*)

¹The Medical Center's review was part of the Veterans Health Administration's (VHA) Clinic Profile Clean-up Initiative for fiscal year (FY) 2010 (Exhibit 1). One of the goals of the Initiative was to match medical center clinic profiles with actual provider schedules in order to more accurately reflect VHA clinic capacity (*Id.*); (Exhibit 6).

²VHA Directive 2010-027, paragraph 2a, emphasizes VA's "commitment to provide clinically appropriate quality care for eligible Veterans," which "requires the ability to create appointments that meet the patient's needs with no undue waits or delays" (Exhibit 2)

On June 27, 2013, the Union filed an unfair labor practice (ULP) charge with the Federal Labor Relations Authority (FLRA). (*Id.*) The ULP asserted that the Medical Center: (a) modified the working conditions of bargaining unit psychiatrists without bargaining with the Union and (b) met with bargaining unit psychiatrists to discuss a change in working conditions without notifying the Union. (*Id.*)

On July 2, 2013, the Union notified Medical Center management that it needed to "cease and desist" the implementation of the new outpatient psychiatrist schedules. (Exhibit 8). On July 8, 2013, the Assistant Chief responded to the Union's "cease and desist" notice and explained that the modified schedules for outpatient psychiatrists were an exercise of management's right to assign work. (*Id.*); (Exhibit 1). The Assistant Chief also noted that the psychiatrists' schedules were modified to meet the health care needs of the Medical Center's patients. (Exhibit 8). Consequently, the Medical Center believed that the modification of the outpatient psychiatrists' schedules was excluded from bargaining under title 38 United States Code (U.S.C.) section 7422(b)(1), as it had a direct impact on patient care. (*Id.*); (Exhibit 1).

On July 16, 2013, representatives from the Medical Center's Mental Health Service met with the affected psychiatrists and the Union to discuss the ULP and the Medical Center's July 8, 2013, response to the Union's "cease and desist notice." (Exhibit 1). The parties met on three additional occasions but were unable to come to an agreement. (*Id.*) On November 27, 2013, the Medical Center filed a response to the ULP. (Exhibit 10). In its response, the Medical Center asserted that the modification of the psychiatrists' schedules was excluded from collective bargaining by 38 U.S.C. § 7422(b)(1), as the "change was made to improve patient access [to psychiatric care] and reduce the number of days patients must wait to be seen by [an outpatient psychiatric care] provider." (*Id.*) The Medical Center also noted that the Union knew about the meeting on June 25, 2013, and could have sent a representative. (*Id.*)

On December 9, 2013, the Chief of Mental Health Service informed the Union that the Medical Center was seeking an informal 38 U.S.C. § 7422 advisory letter from VA's Office of Labor Management Relations, and would thereafter request a formal decision from the Secretary of Veterans Affairs.³ (Exhibit 11). In a letter dated February 5, 2014, the Medical Center notified the Union that it filed a formal request for a 38 U.S.C. § 7422 determination. (Exhibit 12).

On February 27, 2014, VA received the Medical Center's formal request for a 38 U.S.C. § 7422 determination on the modification of the psychiatrists' schedules.⁴ (Exhibit 1). The Union's response to the Medical Center's request was received on February 24, 2014. (Exhibit 13).

³The Chief responded to the Union's position that meetings between Medical Center and Union staff constituted negotiations (Exhibit 11)

⁴The Medical Center did not seek a 38 U.S.C. § 7422 determination on the status of the meeting that took place on June 25, 2013

AUTHORITY

The Secretary of VA has the 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).

ISSUES

Whether a ULP claiming that the Medical Center modified the schedules of its outpatient psychiatrists without bargaining with the Union involves a matter or question concerning or arising out of professional conduct or competence under 38 U.S.C. § 7422(b).

DISCUSSION

Before we begin our analysis, we first review the extent of the Secretary's authority, under 38 U.S.C. § 7422(d), to make a determination on the issue presented: whether the modification of the psychiatrists' schedules involves a matter or question concerning or arising out of professional conduct or competence under 38 U.S.C. § 7422(b). Our review is conducted in response to the Union's assertion, in its response, that 38 U.S.C. § 7422 "is not applicable in this particular case." (Exhibit 13).

A. The Secretary's Authority to Decide this Issue

"[C]ollective bargaining [rights] (and any grievance procedures provided under a collective bargaining agreement)" do not apply to matters or questions "concerning or arising out of (1) professional conduct or competence, (2) peer review, or (3) the establishment, determination, or adjustment of employee compensation" for employees appointed under title 38 U.S.C. (Exhibit 14). As it relates to 38 U.S.C. § 7422, "professional conduct or competence" is defined as direct patient care or clinical competence. (*Id.*) (38 U.S.C. § 7422(c)).

The Secretary may determine whether a matter or question concerns or arises out of one of the provisions excluded from collective bargaining under 38 U.S.C. § 7422(b). (*Id.*) (38 U.S.C. § 7422(d)). The Secretary's determination "may not be reviewed by any other agency." (*Id.*)

Before determining whether a matter or question concerns or arises out of the provisions excluded from collective bargaining under 38 U.S.C. § 7422(b), the Secretary must determine whether collective bargaining is at issue. In this instance, the Union attempted to "negotiate procedures used for impact and implementation" of the revised outpatient psychiatrist schedules. (Exhibit 13). This negotiation is akin to collective bargaining.

Effectively, the Union attempted to collectively bargain with the Medical Center about the impact and implementation of the revised outpatient psychiatrist schedules. Assuming the Secretary were to determine that the change in outpatient psychiatrist schedules concerned or impacted direct patient care (and consequently professional conduct or competence), the Union's attempt to bargain with the Medical Center about the impact and implementation of such an action would be properly excluded by 38 U.S.C. § 7422(b).

B. The Issue Concerns or Impacts Direct Patient Care

The Medical Center, after reviewing wait times in Mental Health Service, concluded that lengthy delays in psychiatric services were problematic in that psychiatric patients were not being provided timely access to medical services at the facility. (Exhibit 1). In order to address the substantial wait times for patient appointments, the Medical Center adjusted the schedules of three bargaining unit psychiatrists.⁵ (*Id.*) Under the adjusted schedules, each psychiatrist is expected to see up to two new patients per day. (Exhibit 5).

The Secretary of VA has the authority to prescribe, "[n]otwithstanding any law, Executive order, or regulation," the "hours and conditions of employment and leaves of absence" for medical professionals, including physicians and psychiatrists. (Exhibit 14) (38 U.S.C. § 7421(a)). The Secretary has exercised the authority under 38 U.S.C. § 7421(a) through VA directives and handbooks. For example, VA Handbook 5011, part II, chapter 1, states that "the proper care and treatment of patients shall be the primary consideration in scheduling tours of duty" in VHA. (Exhibit 15). Likewise, VA Handbook 5005, part IV, chapter 3, 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 16). 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. (Exhibit 17).

The Secretary has consistently determined that efforts to increase patient access to timely medical care are matters relating to direct patient care, a component of professional conduct or competence. (Exhibit 14) (38 U.S.C. § 7422(c) – defining "professional conduct or competence" as direct patient care or clinical competence.) In VA Medical Center (VAMC) Fargo, the Secretary determined that negotiations concerning a reduction in administrative time for title 38 providers was 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." (Exhibit 17).

⁵The psychiatrists' practice primarily consists of managing patient medications. (Exhibit 5)

Like the Fargo medical center, the Martinsburg medical center also weighed a number of options when attempting to reduce patient wait times in its primary care clinic. (Exhibit 18) (VAMC Martinsburg, (Sept. 19, 2013)). Management at Martinsburg ultimately decided that the best option was to temporarily schedule patients during Thursday afternoons, a time slot previously earmarked for “administrative duties” and “staff training.” (*Id.*) In VAMC Martinsburg, the Secretary, concluded:

the VA [Medical Center’s] decision to schedule patients during administrative time was based on the need to increase patient access to care by reducing wait time for appointments. Accordingly, management’s decision to schedule patients during administrative time concerns professional conduct or competence (direct patient care or clinical competence) and is excluded from collective bargaining under 38 U.S.C. § 7422(b).

(*Id.*) (internal citation omitted). In its response to the Medical Center’s 38 U.S.C. § 7422 request, the Union asserts that it is entitled to “negotiate procedures used for impact and implementation” of the modifications to the Medical Center’s psychiatrists’ schedules. (Exhibit 13). However, the Secretary has concluded that impact and implementation bargaining involving an excluded matter is also excluded by 38 U.S.C. § 7422. (Exhibit 22) (VAMC Northern California (Aug. 29, 2013) “when an issue, such as assignment of psychiatrists to on-call duty at another facility, is determined to be a matter excluded by application of 38 U.S.C. § 7422, any proposals concerning or arising out of the excluded matter are similarly excluded from bargaining”.)

The Union also asserts that 38 U.S.C. § 7422 does not allow the Secretary to exclude “the number of patients a provider sees” from collective bargaining. (Exhibit 13). However, as addressed below, the number of patients seen by the psychiatrists flows from the Medical Center’s decision to adjust the psychiatrists’ schedules. (Exhibit 1). The decision to adjust the psychiatrists’ schedules was made so that the Medical Center could improve patient access to psychiatric care. (*Id.*) Matters concerning or arising out of improving patient access to care are excluded by 38 U.S.C. § 7422(b)(1). (Exhibit 18) (VAMC Martinsburg - excluding from collective bargaining facility’s decision to schedule patients during providers’ administrative time because the facility was trying to reduce patient wait time).

In its response, the Union posits that 38 U.S.C. § 7422 was “written specifically for managers to have the ability to [e]nsure that title 38 practitioners are both professionally competent and that [these practitioners are professional] in their exchanges during direct patient care.” (Exhibit 13). However, the statute, 38 U.S.C. § 7422(d), states that “[a]n issue of whether a matter or question concerns or arises out of (1) professional conduct or competence, (2) peer review, or (3) the establishment, determination, or adjustment of employee compensation under this title, shall be decided by the

Secretary." Local management and Unions are involved in the initial identification of these issues. If unable to come to a resolution locally, the Secretary, as stated above, has final decision authority.

As discussed above and consistent with the Secretary's prior 38 U.S.C. § 7422 decisions, the Medical Center's modification of its outpatient psychiatrists' schedules was meant to accommodate and improve direct patient care. Consequently, this issue is excluded from collective bargaining under 38 U.S.C. § 7422(b)(1).

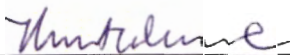
CONCLUSION

We conclude that the Medical Center was under no obligation to negotiate either the substance or the impact and implementation of its decision to modify psychiatrists' schedules when its objective was to ensure timely patient access to medical care.

RECOMMENDED DECISION

The ULP charge that the Medical Center modified the schedules of psychiatrists in Mental Health Service without bargaining with the Union 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



Robert A. McDonald
Secretary of Veterans Affairs

10/2/19

Date