

Title 38 Decision Paper

VA Northern California Health Care System, Mather, California

I. FACTS

On March 18, 2014, management at the VA Northern California Health Care System, Mather, California (Medical Center), learned that the blood pressure readings for a surgery patient under general anesthesia were not monitored or recorded for over an hour during a surgery performed that day. Exhibit 1. This information was discovered when the anesthesiologist who relieved the responsible anesthesiologist noted there were no vital signs recorded for the last 75 minutes of the surgery case. Exhibit 22. The responsible anesthesiologist¹, a bargaining unit employee, was placed on float duties and preoperative care pending an investigation into the lapse in monitoring. Id.

In an e-mail to Medical Center management on March 18, 2014, the American Federation of Government Employees, Local 1206 (Union), stated that the anesthesiologist had "invoked her right to union representation." Exhibit 2. The Union demanded that the Medical Center "**CEASE and DESIST** implementation of unilaterally changing the working conditions of the [anesthesiologist] by removing her from the Surgical Case on tomorrow 3/19/2014 and requiring her to float shift in providing relief for other providers. Please immediately return her back to status quo ante and allow her to work on assigned Surgical Case." Id. In support of its "cease and desist" demand, the Union cited Article 49, section 4, of the parties' master collective bargaining agreement: "The Department shall provide reasonable advance notice to the appropriate official(s) *prior to changing conditions of employment of bargaining unit employees*. The Department agrees to forward, along with the notice, a copy of any and all information and/or material relied upon to propose the change(s) in conditions of employment." According to the Union, once it "received and assessed the requested information," the Union would "offer tentative dates and times to meet to bargain to the fullest extent allowed by law." Id.

The following day, March 19, 2014, the anesthesiologist was provided a letter from the Medical Center Director (Director) summarily suspending a portion of² her clinical

¹ The responsible anesthesiologist also held the title of "Director of Education," although she did not have any specific responsibilities related to this position, and she did not supervise anyone.

² **Summary Suspension:** 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. Summary suspension may be applied to one or more selected privileges or all privileges depending upon the circumstances and clinical concern. If a provider is removed from clinical care during a focused clinical care review, the applicable privileges should be summarily suspended during the time of the review and longer if concern remains for imminent danger to the health of any individual. **Note:** *A summary suspension is reportable to the National Practitioner Data Bank (NPDB) if it results in a final action against the privileges of a physician or dentist.* VHA Handbook 1100.19, Section 14(l)(3)(c)(1); Exhibit 21, page 4, *Provider Competency and Clinical Care Concerns*.

privileges at the facility. Exhibit 3. The Director explained that the “action is being taken upon the recommendation of the Chief of Staff since concerns have been raised to suggest that aspects of your clinical practice do not meet the accepted standards of practice and potentially constitute an imminent threat to patient welfare.” Id. The Director further explained that the partial suspension of privileges “is in effect pending a comprehensive review” of the matter and that all her other “currently approve Anesthesiology privileges remain active.”³ Id.

Prior to the summary suspension, the anesthesiologist had privileges in several different cognitive and procedural areas. Exhibit 4. The suspension of privileges included only the Anesthesiology “Cognitive Bundle #2,” which includes a number of high-level responsibilities like surgical critical care privileges, interpretation of results from monitoring devices, ventilator management, use of vaso-active medications, complete medical management of critically ill and postoperative patients, and medical preparation of patients for surgery. Id.

After receiving the notice of summary suspension of her privileges, the anesthesiologist reported to work on March 19, 2014, but has not reported to work at the Medical Center since that date. Exhibit 5. Beginning on March 20, 2014, the anesthesiologist has been absent on Family Medical Leave Act (FMLA), using a combination of annual leave, sick leave, or leave without pay, and is currently on leave without pay. Exhibit 6, Exhibit 22.

On April 9, 2014, the Union filed two unfair labor practice charges (ULP) with the Federal Labor Relations Authority (FLRA). The first ULP (ULP1) claimed that the Medical Center “bypassed the Union” when it directly notified the anesthesiologist that her privileges at the facility were being summarily suspended, after being informed that the Union represented the anesthesiologist. Exhibit 7. The second ULP (ULP2) claimed that the Medical Center “bypassed the Union” when, after summarily suspending some of the anesthesiologist’s privileges, it reassigned the anesthesiologist to other cases and float duties without notifying the Union and allowing the Union to bargain the anticipated change in the anesthesiologist’s working conditions. Exhibit 8.

In a letter dated April 18, 2014, the anesthesiologist was notified that the summary suspension of her privileges was extended to April 30, 2014, due to a delay in the comprehensive review.⁴ Exhibit 9.

³ In the memo, the Director also stated that the comprehensive review would be completed within thirty calendar days, “with recommendations to proceed with formal procedures for reduction or revocation of privileges forwarded to me for consideration and action.” After receiving the recommendations, the Director explained that he would either restore the anesthesiologist’s summarily suspended privileges or initiate the process to reduce or revoke her Cognitive Bundle #2 privileges. Exhibit 3.

⁴The letter was also provided to the Union. Exhibit 10.

In a letter dated May 5, 2014, the anesthesiologist was notified by the Director that her privileges were restored to active status.⁵ Exhibit 11. Noting major concerns from the Medical Center's comprehensive review, the anesthesiologist was also notified that she would be subject to a Focused Professional Practice Evaluation (FPPE)⁶ upon her return to the Medical Center. According to the letter and accompanying documentation, the FPPE would be performed in two phases, and would be supervised by the Chief of Anesthesiology. *Id.* The Director explained the consequences of failing the FPPE, as follows: "If you receive any unsuccessful rating in either Phase I or II that results in an action taken against your privileges, you will be notified at that time of your rights as per VA Northern California Health Care System Medical Staff Bylaws, VHA Handbook 1100.19, and Handbook 5021." *Id.*

The Medical Center submitted a response to ULP1 to the FLRA on July 15, 2014. Exhibit 14. The Medical Center contended that it summarily suspended the anesthesiologist's Cognitive Bundle #2 privileges pending a comprehensive review of "alleged substandard patient care," and that the issue raised in the Union's ULP "involves direct patient care with a Physician appointed under Title 38 and is a matter of professional conduct or competence covered under Title 38, Section 7422." *Id.*

On November 25, 2014, the Department's Office of Labor-Management relations received the Medical Center's request for a 38 U.S.C. § 7422 determination. The Union did not submit a response to the Medical Center's request.⁷ Exhibit 1.

II. TITLE 38 U.S.C. § 7422 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).

III. ISSUES

1. Whether a ULP charge claiming that the Medical Center, after being informed that the Union represented an anesthesiologist, bypassed the Union when it directly notified the anesthesiologist that some of her privileges at the facility were being summarily suspended, is a matter or question concerning or arising

⁵ The Union confirmed receipt of the letter on May 7, 2014. Exhibit 12.

⁶ 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 such as Ongoing Professional Practice Evaluation (OPPE) or FPPE. Exhibit 21, *Provider Competency and Clinical Care Concerns*; see also VHA Handbook 1100.19(14)(g).

⁷ The Medical Center's request for determination is dated November 17, 2014. Exhibit 1

out of professional conduct or competence or peer review.

2. Whether a ULP charge claiming that the Medical Center bypassed the Union when, after summarily suspending a portion of anesthesiologist's privileges, it reassigned the anesthesiologist to other cases and float duties without notifying the Union and allowing the Union to bargain the anticipated change in the anesthesiologist's working conditions, is a matter or question concerning or arising out of professional conduct or competence or peer review.

IV. 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.

ISSUE 1

The first ULP filed by the Union, ULP1, alleges that Medical Center management did not sufficiently involve the Union when communicating with a bargaining unit anesthesiologist represented by the Union. Exhibit 7. Under 38 U.S.C. § 7421(a), the Secretary of the Department has the authority to prescribe by regulation the hours and conditions of employment of Title 38 professionals, "[n]otwithstanding any law, Executive order, or regulation." The Secretary has determined, in VHA Handbook 1100.19 (Handbook), Section 14 (I)(4) "Reduction of Privileges, The Process," those circumstances where an employee is entitled to representation during Departmental processes involving credentialing or privileging decisions. Exhibit 15.

In the March 19, 2014 letter to the anesthesiologist summarily suspending her privileges, the Medical Center followed the Handbook's suggested notification format. See VHA Handbook 1100.19, Appendix E, "Sample Advisement to Licensed Health Care Professional of Summary Suspension of Privilege." Exhibit 3; Exhibit 16. The Director explained that the facility intended to conduct a comprehensive review of the anesthesiologist's clinical activities and, if the review resulted in a tentative decision to restrict or revoke her privileges, or to take an adverse personnel action, she would be notified at that time and would be entitled to be represented by an attorney or other representative of her choice.⁸ Exhibit 3. In accordance with VHA Handbook 1100.19, Section 14(I)(4), the right to any representation is triggered when a Medical Center

⁸ A comprehensive review is a retrospective focused clinical care review (look back) that is an objective, fact-finding process. Exhibit 21

decision might permanently impact the anesthesiologist's clinical privileges or result in an adverse personnel action. Exhibit 15.

While the Union represents all bargaining unit employees in its local unit, Title 38 employees are not entitled to all of the ordinary requirements of the Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101-7135 (the Statute). Congress created the exemptions in 38 U.S.C 7421(a) "in order to afford the Secretary control over conditions of employment for VA medical personnel unrestricted by the regular civil service system for federal government employees." Exhibit 17, National Federation of Federal Employees, Local 589 v. FLRA, 73 F.3d 390 (D.C. Cir. 1996). When the Secretary issues policies that limit Union representation in procedures involving Title 38 employees, those policies override representational rights ordinarily afforded employees under the Statute. See, e.g., Department of Veterans Affairs Medical Center, Jackson, Mississippi and NFFE, Local 589, 49 FLRA 171 (1994), (affirming the Department's authority to "prescribe regulations governing, among other things, probationary peer review proceedings for nonhybrid employees without regard to the bargaining and representational rights and obligations set forth in the Statute"). Exhibit 18.

38 U.S.C. § 7422 provides that collective bargaining and the parties' negotiated grievance procedures may not cover, or have any applicability to, any matter or question concerning or arising out of professional conduct or competence or peer review. The statute further defines "professional conduct or competence" as "direct patient care" or "clinical competence." The Union's claim that the Medical Center was obligated to involve it in its communications with the anesthesiologist concerning a matter that is firmly within the 38 U.S.C § 7422 professional conduct or competence and peer review exclusion is incorrect.⁹ The Union has no representational role when management contemplates summarily suspending an anesthesiologist's privileges. The Union may not grieve the decision; nor is the decision subject to collective bargaining. When a matter is excluded by 38 U.S.C § 7422, the Secretary's authority under 38 U.S.C. § 7421(a) to promulgate regulations concerning Title 38 employees' conditions of employment is unfettered.¹⁰ Here, in accordance with the Handbook 1100.19 Section 14 (1)(4), until the Executive Committee recommends a reduction in privileges that would permanently impact the anesthesiologists clinical privileges, no right to union

⁹ Nonetheless, the Medical Center should "strive," whenever possible, to provide the Union advance notice of proposed changes to employee working conditions before implementing the changes. See Joint 38 U.S.C. § 7422 Workgroup Recommendations As Revised and Approved by the Secretary of the Department of Veterans Affairs, § C(4). Exhibit 19.

¹⁰ "We also find no merit to the [Union's] assertions in its opposition that the right to representation is unconstrained by restrictions on the scope of bargaining and that Congress mandated the right to representation, which mandate supersedes the Department's right to promulgate regulations on working conditions." Department of Veterans Affairs, Medical Center, Leavenworth, KS and NFFE, Local 1765, 49 FLRA 1624 (1994). Exhibit 20.

representation exists.

VA relies on a number of peer review processes to ensure health care providers are qualified and meet the standard of care. In this case, management notified the anesthesiologist that there were “concerns...raised to suggest that aspects of your clinical practice do not meet the accepted standards of practice and potentially constitute an imminent threat to patient welfare.” Exhibit 3. Additionally, such concerns were brought to the attention of the acting Chief of Staff by another anesthesiologist. The anesthesiologist’s privileges were suspended in accordance with the procedures set for in VHA Handbook 1100.19, Section 14(l)(3)(1) Summary Suspension. Exhibit 15. VA Handbook 5021, Part III, Chapter 1, ¶ 3 further states: “**NOTE:** *Because summary reviews deal with issues related to professional competence or conduct and peer review, a union representative is not entitled to be present at a summary review except when serving as the employee’s personal representative.* [underlined added].” (Exhibit 23) Therefore, it is clear that the decision and notification to summarily suspend the anesthesiologist’s privileges is a matter of peer review and not subject to the union’s representational role, grievance procedures, or collective bargaining.

ISSUE 2

In ULP2, the Union claims the Medical Center was required to bargain with the Union prior to making changes to the anesthesiologist’s schedule or assignments. Exhibit 8. The Director’s initial decision to limit the anesthesiologist’s involvement with surgical patients was the direct result of concerns that the anesthesiologist’s actions “potentially constituted an imminent threat to patient welfare.” Exhibit 3. After determining that a patient under the anesthesiologist’s care was not properly monitored during surgery, the Director was concerned that patient safety may be compromised by the anesthesiologist in future surgeries. As a result, the anesthesiologist was notified that her surgery privileges were temporarily suspended pending an investigation.¹¹ *Id.* Questions about the adequacy of an anesthesiologist’s responsibilities to monitor a patient during surgery certainly qualify as matters concerning both direct patient care and the anesthesiologist’s clinical competence, and fall within the 38 U.S.C. § 7422 exclusions. Furthermore, the process used to review the provider’s competency is a peer review process that also falls under the 38 U.S.C. § 7422 exclusions. As such, Medical Center management was under no obligation to engage in collective bargaining prior to limiting the anesthesiologist’s scope of practice and summarily suspending her clinical

¹¹ The Medical Center acted in accordance with VHA Handbook 1100.19, which provides that “[c]linical 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 15 at ¶ 14(l)(3)(c)(1).

privileges.¹²

V. CONCLUSION

The Medical Center is under no obligation to involve the Union in its decision to summarily suspend the privileges of an anesthesiologist suspected of failing to properly monitor a surgery patient under her care. The Medical Center's decision and subsequent actions were conducted in accordance with the Department's policies and are matters concerning the professional conduct or competence and peer review of a Title 38 medical professional.

ISSUE 1

The ULP charge claiming that the Medical Center, after being informed that the Union represented an anesthesiologist, bypassed the Union when it directly notified the anesthesiologist that her partial privileges at the facility were being summarily suspended, is a matter or question concerning or arising out of professional conduct or competence or peer review and is thus excluded under 38 U.S.C. § 7422(b).

ISSUE 2

The ULP charge claiming that the Medical Center bypassed the Union when, after summarily suspending an anesthesiologist's partial privileges, it reassigned the anesthesiologist to other cases and float duties without notifying the Union and allowing the Union to bargain the anticipated change in the anesthesiologist's working conditions, is a matter or question concerning or arising out of professional conduct or competence or peer review and is thus excluded under 38 U.S.C. § 7422(b).



Robert A. McDonald
Secretary of Veterans Affairs



Date

¹² The Union claimed that the Medical Center was required, according to the parties' master collective bargaining agreement, to provide notice and an opportunity to bargain prior to temporarily removing the anesthesiologist from involvement in future surgeries. Exhibit 2. The referenced Master Agreement provisions, however, apply only in those instances when a matter is not excluded from collective bargaining under 38 U.S.C § 7422.

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