

Title 38 Decision Paper
Department of Veterans Affairs (VA)
VA Long Beach Healthcare System, Long Beach, California

I. FACTS

On August 15, 2016, the Chief of Primary Care at the VA Long Beach Healthcare System (Medical Center) notified Primary Care physicians, registered nurses and licensed vocational nurses working in “Long Beach [Patient Aligned Care Teams (PACT)], WHC and OEF/OIF/OND (VTC) clinics” that, “[i]n order to improve patient access and care coordination, starting October 1st, 2016, they would be returned to the regular 8hr/days, 5 days/week schedule.” Attachment B.

On August 19, 2016, the American Federation of Government Employees Local 1203 (Union) submitted to the Medical Center “a demand to bargain over the suspension of Compressed Work Schedules, (CWS), for all hospital staff in Primary Care that [was] planned to commence on October 1, 2016.” Attachment C.

On August 22, 2016, the American Federation of Government Employees (AFGE) submitted to the Medical Center a demand “to bargain on the . . . suspension of compress[ed] work schedules in Primary Care Clinics in [Veteran’s Integrated Service Network (VISN)] 22”. Attachment D.

On September 28, 2016, the Medical Center and AFGE Local 1061 and the Union discussed the termination of CWS in Primary Care Clinics. Attachment J.

On October 12, 2016, AFGE Local 1601 provided to the Medical Center “[p]roposals regarding Primary Care Compressed Work Schedules” being terminated at the Medical Center. Attachment E.

On November 10, 2016, the Medical Center notified AFGE Local 1061 and the Union that “the Compressed Work Schedule (CWS) in Primary Care Clinics w[ould] be terminated effective December 4, 2016” in order “[t]o meet patient same day access and to optimize continuity of patient care, care coordination and a balanced work load distribution, Primary Care staff [wa]s needed to work regular tours of duty.” Attachment F.

On November 16, 2016, the Medical Center informed AFGE Local 1061 and the Union that “the termination of the CWS for Physicians and Registered Nurses [wa]s outside the scope of collective bargaining under 38 USC 7422 because it involve[d] matters related to direct patient care and [wa]s not subject to bargaining.” Attachment G.

On November 18, 2016, the Medical Center notified the Primary Care staff physicians, registered nurses and licensed vocational nurses that, “effective December 04, 2016,

the Compressed Work Schedule (CWS) w[ould] be suspended until further notice.” Attachment H.

On January 25, 2017, the Union filed an Unfair Labor Practice (ULP) charge with the Federal Labor Relations Authority (FLRA), in which it alleged that the Medical Center was “committing BAD FAITH bargaining,” and requested that the FLRA “[p]lease investigate as soon as possible.” Attachment I.

On February 28, 2017, the Medical Center responded to the Union’s ULP charge, requesting its dismissal. Attachment J. The Medical Center asserted that “the termination of CWS for physicians and registered nurses [wa]s outside the scope of collective bargaining under Title 38 USC 7422” and “the Agency did not engage in bad faith bargaining.” *Id.*

On March 27, 2017, the Medical Center formally requested a 38 U.S.C. § 7422 determination concerning its decision to terminate CWS for physicians and registered nurses in Primary Care. Attachment P. The Medical Center subsequently notified the Union of the request and the timeframe in which it could submit a response. Attachment Q.

On April 19, 2017, the Union submitted a position paper, describing how the Medical Center “ha[d] failed to complete the required bargaining requirements per the 2011 Master Agreement” and had “implemented th[e] CWS termination in Primary Care Clinics PRIOR to receiving a §7422 Determination.” Attachment T.

II. AUTHORITY

The Secretary of Veterans Affairs has final authority to determine 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 October 18, 2017, the Secretary delegated this authority to the Under Secretary for Health (USH). Attachment R.

III. ISSUE

Whether the Medical Center’s refusal to bargain over the termination of CWS for Primary Care physicians and registered nurses is 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 excluded from collective bargaining.

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. 38 U.S.C. § 7422(b). “Professional conduct or competence” is defined to mean “direct patient care” and “clinical competence.” 38 U.S.C. § 7422(c).

38 U.S.C. § 7421(a) authorizes the Secretary of Veterans Affairs to prescribe by regulation the “hours and conditions of employment” of Title 38 medical professionals. Attachment S. Medical Center Directors are authorized to “prescribe any tour of duty to ensure adequate professional care and treatment” and VA policy requires that “proper care and treatment of patients” serve as “the primary consideration in scheduling tours of duty.” Attachment O (VA Handbook 5011, pt. II, ch. 1, ¶ 2b). VA policy states that “[d]uty 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 policy further states that Medical Center Directors are authorized to “prescribe any tour of duty to ensure adequate professional care and treatment” to patients. Attachment K (VA Handbook 5011, pt. II, ch. 3, ¶ 2d). VA policy also states that CWS “shall be consistent with patient care requirements.” *Id.* (VA Handbook 5011, pt. II, ch. 3, ¶ 5g). Therefore, if participation by Title 38 medical professionals in a proposed or ongoing CWS program adversely impacts patient care, management has the right to manage Title 38 medical professionals’ tours of duty and assignments to ensure the appropriate professional care and treatment of patients.

The Medical Center received notice of “MyVA Breakthrough Initiatives” for “Veterans to receive same day access to primary health care by the end of calendar year 2016” in or around the Spring of 2016. Attachment P; Attachment A, p. 1. Subsequently, “management assessed staffing needs and determined that in order to meet veterans[] same day access and to optimize continuity of patient care, care coordination and a balanced work load distribution, the Primary Care Staff needed to work an 8-hour tour of duty, Monday through Friday.” Attachment P; Attachment J. The decision was supported by a systems redesign study of the Medical Center’s Fiscal Year 2015 and 2016 Primary Care functions to include Primary Care Appointments Completed Per Month, New Patients, Estimated Patients, Appointments Same Day, and Walk in Data (over the past six months) demonstrating “an inability to meet same day access by national deadline of December 31, 2016 due to the lack of full PACT teams and unbalance work load distribution amongst the PACT teamlets,” which was attributed to CWS. Attachment A, pp. 5-10. The study noted that “[r]egular tour PACT teamlets (0800-1630) have increased work load as they will see walk-ins or unscheduled patients on the DAY OFF for the compressed teamlets.” Attachment P, p. 14. Additionally, the study noted that “[g]etting a routine appointment when the patient needs it with the assigned PACT team will reduce 28% of [Emergency Department] visits. Furthermore, same day access by the PACT teams [will] improve better continuity [of care] by 7%, and better care coordination of 58% or higher. In addition, same-day-access by the assigned PACT teams will have 10.3% lower admission rate.” *Id.* The study concluded that “[i]n order to achieve open access, regular tours [needed] to be implemented to optimize continuity of patient care, care coordination, and balanced work load distribution.” *Id.*, p. 26. To “meet the Same Day Access Initiative to provide timely

patient care and a balanced work load distribution for the healthcare clinical staff,” the Medical Center terminated the CWS of Primary Care staff physicians and registered nurses. *Id.*, p. 1. The Medical Center’s request asserted that returning to the regular schedule in Primary Care “provide[d] Veterans continuity of same day services when needed, that allow[ed] the delivery of centered, proactive, personalized, team-based care.” *Id.*

VA has addressed the termination of CWS for Title 38 employees in several previous 38 U.S.C. § 7422 determinations. For example, in *VAMC Alexandria*, the medical center terminated the CWS for all clinicians in Primary Care clinics as part of its PACT implementation process after determining “that patient care would be impacted unless all members of a teamlet worked the same schedule,” among other things. Attachment M, p. 1 (*VAMC Alexandria* (Aug. 30, 2013)). After noting that the medical center had assessed staffing and concluded that both communication and continuity of providers were affected when the members of a teamlet worked different schedules, the Secretary determined that the elimination of CWS was excluded from collective bargaining by 38 U.S.C. § 7422. *Id.*, p. 5.

In *VAMC Cleveland*, the medical center eliminated CWS for registered nurses on a unit based on the medical center’s assessment that the unit did not have “enough staff to adequately [and safely] take care of patients for the 5 days [it] [wa]s open”. Attachment L, p. 2 (*VAMC Cleveland* (July 9, 2008)). In determining that the schedule change involved issues of professional conduct or competence and was therefore non-negotiable under 38 U.S.C. § 7422, the USH noted that “[i]f participation of Title 38 employees in a proposed or ongoing CWS program adversely impacts patient care, then the implementation or continuation of a CWS program is non-negotiable under 38 U.S.C. § 7422(b) and not subject to third party review.” *Id.*, p. 6. The USH further clarified that “management cannot bargain, or fail to bargain in good faith, over patient care matters that are exempted from the collective bargaining process as a whole by 38 U.S.C. § 7422(b).” *Id.*, pp. 6-7.

In this case, the Medical Center demonstrated, through the systems redesign study and documentation related to providing same day access to Primary Care, that the continuation of CWS would cause an unbalance in work load distribution and would impact patients’ timely access to, and continuity of, care at the Medical Center. As such, and in line with previous 38 U.S.C. § 7422 determinations, the termination of CWS for the physicians and registered nurses in the Medical Center’s Primary Care Clinics is a matter that concerns or arises out of direct patient care and, consequently, is excluded from collective bargaining.¹

¹ The Union asserted in its ULP charge that the Medical Center committed bad faith bargaining when it terminated CWS for Primary Care clinicians without bargaining with the Union as required by Article 21, Hours of Work and Overtime, of the VA-AFGE Master Agreement, and reiterated this position in its response. Attachment I; Attachment T. However, in accordance with Article 2, Governing Laws and Regulations, Section 1, of the Master Agreement, a 38 U.S.C. § 7422(d) determination that the at-issue ULP charge concerns or arises out of professional conduct or competence (i.e., direct patient care) within

V. CONCLUSION AND DECISION

The Medical Center's refusal to bargain over the termination of CWS for Primary Care physicians and registered nurses, and the ULP charge filed by the Union about that refusal to bargain, is 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 excluded from collective bargaining.



January 26, 2021

Richard A. Stone, M.D.
Acting Under Secretary for Health

Date

the meaning of 38 U.S.C. § 7422(b) renders inapplicable conflicting provisions of Article 21, Hours of Work and Overtime, of the Master Agreement.