

**Title 38 Decision Paper
Department of Veterans Affairs (VA)
Memphis VA Medical Center**

FACTS

In November 2019, the Memphis VA Medical Center “identified lapses in the quality of patient care provided in the facility’s Spinal Cord Injury (SCI) Inpatient unit.” (Attachment A.) In order to “insure high quality patient care as a SCI Hub,” the Medical Center determined that it was necessary to “temporarily curtail operations for a safety stand down, retrain all SCI nursing staff to a high standard of competency, properly review physician medical practice, then return to operations to provide the highest possible standard of care.” (Id.) During this period of temporary curtailment of operations, the “Internist Physicians on the SCI unit worked as Hospitalists to care for SCI and others on inpatient units.” (Id.) The duties of the physicians did not change; they continued to diagnose and treat in-patients with acute and chronic medical conditions. (Id.)

On November 14, 2019, the Medical Center submitted an Issue Brief outlining its temporary curtailment of SCI Inpatient services for twelve-weeks. (Attachment A & B.) During the twelve-weeks, the Medical Center provided periodic status updates to the Issue Brief including an update to reflect the reassignment physicians in SCI to the Medical Center’s Hospitalist Section. (Attachment B.)

On January 21, 2020, the SCI Service Chief notified the physicians in SCI with Internal Medicine/Family Practice credentials that they were being realigned under the Hospitalist Section of Medicine Service, effective March 1, 2020. (Attachment C.)

Also, on January 21, 2020, the SCI Service Chief notified the American Federation of Government Employees (the “Union”) of management’s intent to realign the physicians. (Attachment D.) The notice explained that the safety-stand down and further review of the SCI organizational structure brought about this change. (Id.)

On January 27, 2020, the Union demanded to bargain the physicians’ realignment. (Attachment E.)

On February 12, 2020, the Union and Medical Center management met regarding the realignment. (Attachment F.)

On that same day, the Union filed an Unfair Labor Practice (“ULP”), arguing that when the SCI Service Chief realigned the Internal Medicine/Family Practice physicians, the realignment consisted of “changes in their working conditions” (Attachment E.)

On August 27, 2020, the Medical Center submitted a request for a 38 U.S.C. § 7422 determination. (Attachment A.)

On October 27, 2020, the Union submitted a response to the Medical Center's request. (Attachment N.)

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 October 18, 2017, the Secretary delegated his authority to the Under Secretary for Health (USH). (Attachment G.)

ISSUE

Whether the ULP charge concerning the Medical Center's decision to realign physicians on the SCI unit with Internal Medicine/Family Practice credentials to the Hospitalist Section of Medicine Service involves a matter or question concerning or arising out of professional conduct or competence (i.e. direct patient care or clinical 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 (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).

Pursuant to 38 U.S.C. § 7421(1), the Secretary has prescribed regulations contained in VA Directive/Handbook 5005, Part IV, Chapter 3, Sections A and B to implement assignments, reassignments, and details. (Attachment H.) Section A, paragraph 4(b) provides that in exercising the authorities covered in this handbook, "primary consideration will be given to the efficient and effective accomplishment of the VA mission." (Id.) "Employees will only be assigned to duties and responsibilities for which they have appropriate credentials[.]" (Id. at paragraph 4(d)) The assignment and placement of Title 38 healthcare personnel is fundamental to the patient care mission of all VA health care facilities.

In prior decisions, the Secretary has determined that similar management actions were critical to patient care. For example, in 2011, management for the Fargo, North Dakota, VA Health Care System determined that there was a need to readjust the provider

coverage at two Fargo Community Based Outpatient Clinics (CBOCs), Grand Forks and Bemidji. Management identified that the two providers at the Grand Forks CBOC were assigned “too few patients” while the providers at the Bemidji CBOC were assigned “too many patients.” (Attachment I, VAMC Fargo (December 17, 2012.)) As a result, management had the two providers of the Grand Forks CBOC go to the Bemidji CBOC “a couple of days a week” to render patient services during the staffing shortage. (Id.). The Secretary concluded that “the detail of two physicians from the Grand Forks CBOC to the Bemidji CBOC, as well as request for overtime compensation, concerns professional conduct or competence and employee compensation within the meaning of 38 U.S.C. § 7422(b)” and therefore, was excluded from collective bargaining. (Id.).

Similarly, in response to a 2008 expanding mental health initiative, the West Haven VA Medical Center (VAMC) reassigned a nurse from the Homeless Veterans Program to the Mental Health Program based upon patient care needs to provide nursing assessments of clients and to administer medications and assess response to these medications. (Attachment J, VAMC West Haven (October 9, 2008.)) The USH concluded that “the reassignment of [an] RN concern issues of professional conduct or competence within the meaning of 38 U.S.C. § 7422(b) and are therefore outside of the scope of collective bargaining within the meaning of 38 U.S.C. § 7422(b).” (Id.).

Additionally, in January 2014, in order to address nurse staffing imbalances at the Ann Arbor VAMC, the “Medical Center decided to *temporarily* rotate some Registered Nurses to different shifts to ensure the appropriate number of nurses were available for each shift.” (Attachment K, VAMC Ann Arbor (August 8, 2015.) (emphasis added)) Although the Union expressed scheduling concerns, management maintained that the “Medical Center reserved the right to schedule RNs based on patient care needs.” (Id.). The Secretary concluded that “schedule changes for PCS nurses without completing bargaining is a matter or question concerning or arising out of professional conduct or competence within the meaning of 38 U.S.C. § 7422(b).” As illustrated by the above-described decisions, the Secretary has held that both detailing and reassigning Title 38 providers frequently concern professional conduct or competence within the meaning of 38 U.S.C. § 7422(b) and, as a result, are excluded from collective bargaining.

Similar to the cases discussed above, the Medical Center conducted an internal “High Reliability Organizational Assessment” of the SCI inpatient wards over a three-week period which identified “intermittent lapses of standard of care” in important areas of patient care. (Attachment B.) Additionally, a further review of the SCI organizational structure identified that “Spinal Cord Injury Services in other 1A hospitals [did] not have internal medicine credentialed licensed independent providers directly assigned to Spinal Cord Injury Service.” (Id.) As a result, in order to better facilitate patient care services, management decided that the employees credentialed as Internal Medicine Physicians or Family Practitioners would be realigned (or reassigned) from the SCI Unit to the Hospitalist section under Medicine Services, and that when physician services would be needed in the SCI Unit, “MD’s under Medicine Service with internal medical backgrounds would be allocated to the SCI Inpatient Ward for rounds and patient care.” (Attachment D.) In both instances of the reassignment of internal/family medicine

physicians, patient care was the paramount consideration. Therefore, the decision to realign the internal and family medicine physicians from the SCI Unit to the Medicine Service is directly related to direct patient care and is exempt from collective bargaining and 38 U.S.C. § 7422(b).

RECOMMENDED DECISION

The ULP charge concerning the Medical Center's decision to realign physicians in SCI with Internal Medicine/Family Practice Credentials to the Hospitalist Section of Medicine Service involves a matter or question concerning or arising out of professional conduct or competence (i.e. direct patient care or clinical competence) within the meaning of 38 U.S.C. § 7422(b).



February 1, 2021

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

Date