

Title 38 Decision Paper
Department of Veterans Affairs (VA)
Miami VA Healthcare System, Miami, Florida

I. FACTS

On May 26, 2020, a senior radiologist, in coordination with the American Federation of Government Employees, Local 515 (Union), filed a Step 2 Grievance stating that the Chief of Imaging Services adjusted the tour of duty of a less senior radiologist physician to a 4-day work schedule, Monday through Thursday, although he (the more senior radiologist) made the exact same request which was disapproved. Attachment A.

On May 28, 2020, the Chief of Imaging Service responded to the Step 2 Grievance explaining that due to patient care there were no plans to “change your schedule as a full-time employee. It is [in] the department’s interest not to decrease the number of house staff on the premises on Fridays.” Attachment B. The Chief of Imaging Service further explained that reducing the hours of the less senior radiologist, who works in Nuclear Medicine, allowed the facility to increase the hours of a fellowship trained nuclear medicine radiologist. Attachment B and Attachment T.

On June 15, 2020, the more senior radiologist, in coordination with the Union, filed a Step 3 Grievance again asserting that he had continually requested a 4-day work schedule of Monday through Thursday, and the Chief of Imaging Services did not honor his request but rather, approved such schedule for a less senior physician. Attachment C.

On June 30, the Chief of Staff who had been delegated the 3rd Step Grievance authority by the Medical Center Director, responded to the grievance reasserting that “[T]he service had a need to adjust some of the schedules due to patient care needs” and that the role of the less senior radiologist is “not interchangeable, and the schedule adjustment was made to serve the need of the patients, not the providers.” Attachment D, Attachment E.

On July 21, 2020, the Union invoked arbitration. Attachment F.

On July 30, 2020, the Medical Center formally requested a 38 U.S.C. § 7422 determination concerning the decision not to change the more senior radiologists schedule to a 4-day work schedule, Monday through Thursday. Attachment G. The Union did not submit a response to the issues raised in the Medical Center’s request for determination.

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 H.

III. ISSUE

Whether the Medical Center's decision to deny a more senior radiologist a 4-day work schedule, Monday through Thursday, while approving a less senior radiologist a 4-day work schedule, Monday through Thursday 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 I. VA policy requires that "proper care and treatment of patients" serve as "the primary consideration in scheduling tours of duty." Attachment J, VA Handbook 5011, pt. II, ch. 1, ¶ 2b. "Duty 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 Handbook 5011, pt. II, ch. 1, ¶ 2b. A VA Facility Director or his or her designee "has the authority to prescribe any tour of duty to ensure adequate professional care and treatment to the patient, consistent with these provisions." Attachment K, VA Handbook 5011, pt. II, ch. 3, ¶ 2d. Together these VA policies recognize management's right and obligation to manage patient scheduling and provider tours of duty and assignments in a manner that ensures consistent access and timely and professional treatment of patients. *Id.*

The more senior radiologist's initial compensation panel action dated September 19, 2012, states that he would be responsible for "[ultrasound], mammography and general radiology." Attachment L. Additionally, the panel findings set forth the need for the specialty/assignment at the facility was for him to "take over as Chief of Ultrasound, with his addition we will be able to provide 5 day a week mammography attending coverage 52 weeks a year". Of note, his initial compensation panel does not indicate any training in Nuclear Medicine. ¹ *Id.* Whereas, the less senior radiologist's initial compensation panel action dated August 26, 2013 states that "[S]he is an authorized user of Nuclear

¹ Between July 2018 and June 30, 2020, he completed 0 nuclear medicine interpretations. Attachment M.

Medicine radiotracers, is trained in I123 Thyroid Therapies. She has expertise in other areas of radiology such as CT colonography, MR enterography, and prostate MR.” Attachment N. Additionally, the panel findings set forth the need for the specialty/assignment at the facility was for her to take over the Nuclear Medicine section and she would “be in charge of PET-CTs readings, will provide help to other sections such as Body CT/MR, US and General.”² *Id.*

The more senior radiologist met with the Medical Center’s Chief of Staff during the Step 3 grievance meeting. Attachment E. The more senior radiologist requested to be off on Friday’s and felt that he “should have been considered first” since he had been an “employee here longer than she has.” *Id.* The Chief of Staff explained that the “service had a need to adjust some of the schedules due to patient care needs” and that he and the other radiologist’s skillset “are not identical, your roles are not interchangeable, and the scheduled adjustment was made to serve the need of the patients, not the providers.” *Id.* Additionally, the facility explained that the swap of 8 hours was made between the two radiologists assigned to the Nuclear Medicine section. The recipient is fellowship trained in Nuclear Medicine. The less senior radiologist is assigned to the Nuclear Medicine section but is not fellowship trained. Imaging Service felt the need to have a fellowship trained individual Monday to Friday. The more senior radiologist does not work in the Nuclear Medicine section and workload requires him to continue to work 5 days per week. Attachment T.

Changes in the schedules of Title 38 professionals to accommodate patient care needs have been determined to be excluded from collective bargaining by 38 U.S.C. § 7422. In *VAMC Northern California*, “in an effort to provide an adequate shift hand-off for the safety and well-being of the Veterans,” the VAMC implemented a schedule change for the night shift RNs in the community living center.” Attachment Q, (*VAMC Northern California* (October 30, 2018)). The Secretary held that “based upon direct patient care needs, a medical center may set or change title 38 RN schedules without initiating or completing bargaining with the union.” *Id.*

In *VAMC Ann Arbor*, the Medical Center decided to temporarily rotate some RNs to different shifts to address “nurse staffing imbalances.” Attachment R, (*VAMC Ann Arbor* (August 8, 2015)). In *VAMC Ann Arbor*, 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).” *Id.*

In *VAMC Indianapolis*, management assigned nurses on 12-hour compressed work schedules to a single 8-hour “off tour” each pay period to provide safe, quality, patient care on the evening shift. Attachment S, (*VAMC Indianapolis* (May 29, 2013)). The

² Between July 2017 through July of 2019, she completed 1330 nuclear medicine interpretations, and between July 2019 through June of 2020, she completed 622 nuclear medicine interpretations. Attachments O and P.

Secretary determined that the facility's nurse scheduling was a matter that concerned professional conduct or competence and, as a result, was excluded from collective bargaining under 38 U.S.C. § 7422(b). *Id.* The Secretary explained that VA's "authority to control [T]itle 38 work schedule goes to the heart of professional conduct or competence because [VA's] ability to provide direct patient care would be severely impacted without the flexibility to assign [T]itle 38 personnel to shifts where their services are most needed. The workweeks, tours of duty, and work schedules for [T]itle 38 professional – RNs [registered nurses], in particular – are fundamental to ensuring the level and quality of patient care provided by" VA. *Id.*

As illustrated by the above decisions, the Secretary has held that based upon direct patient care needs, a medical center may set or change title 38 provider schedules without initiating or completing bargaining with the union.

V. CONCLUSION AND DECISION

The Medical Center's decision to deny a more senior radiologist a four-day work schedule, Monday through Thursday, while approving a less senior radiologist a four day work schedule, Monday through Thursday 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.



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Date