

**Title 38 Decision Paper
Department of Veterans Affairs
Mountain Home VA Health Care System (HCS)**

FACTS

On July 23, 2015, the American Federation of Government Employees, AFL-CIO, Local 1687 (Union) filed a 3rd step grievance alleging the Mountain Home VA HCS violated its scheduling policies for bargaining unit physicians. Specifically, the Union alleges that VA has:

- (1) Regularly assigned physicians to perform work in excess of 40 hours per week;
- (2) Regularly assigned physicians to perform work in excess of 12 hours per day;
- (3) Failed to determine the 40-hour tour of duty of a physician prior to the beginning of the work week; and
- (4) Failed to award physicians compensatory time for work in excess of the 8 hour workweek.

(Attachment A). The claim regarding compensatory time was subsequently withdrawn by the Union (Attachment J).

On August 28, 2015, the medical center Director met with the Union to discuss this grievance, providing a detailed response. (Attachment B). On September 1, 2015, the medical center Director rejected the grievance on the grounds that physician scheduling is based on direct patient care needs and is therefore excluded from the negotiated grievance/arbitration process in accordance with 38 U.S.C. § 7422. *Id.*

On September 18, 2015, the Union invoked arbitration. (Attachment C). VA requested that the arbitration be held in abeyance because the issue was precluded by 38 U.S.C. § 7422. (Attachments D, E, F, and G).

On May 19, 2016, the medical center formally requested a 38 U.S.C. § 7422 determination with the Under Secretary for Health (USH). (Attachment I).

On June 8, 2016, the Union submitted a position paper to the USH, claiming a violation of VA Handbook 5011, Hours of Duty and Leave. (Attachment J).

AUTHORITY

The Secretary has final authority to determine whether a matter or question concerns or arises out of professional 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 USH. (Attachment H).

ISSUE

Whether the issues underlying the Union's grievance relating to: (1) regularly assigning physicians to work in excess of 40-hour work weeks; (2) regularly assigning physicians to work in excess of 12-hour days; and (3) failing to determine the 40-hour tour of duty of a physician prior to the beginning of the work week 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 thereby, excluded from collective bargaining.

DISCUSSION

The Department of Veterans Affairs Labor Relations Improvement Act of 1991, codified in part at 38 U.S.C. § 7422, granted collective bargaining rights to Title 38 employees under 38 U.S.C. § 7422(a). However, for Title 38 employees described in 38 U.S.C. § 7421(b), collective bargaining may not cover any matter or question concerning or arising out of professional conduct or competence (i.e., direct patient care or clinical competence), peer review, or any matter or question concerning or arising from employee compensation, as determined by the Secretary. 38 U.S.C. § 7422(b). The following employees are described in 38 U.S.C. § 7421(b)—physicians, dentists, podiatrists, optometrists, registered nurses, physician assistants, expanded-duty function dental auxiliaries, and chiropractors. *Id.*; see 38 U.S.C. § 7401(1).

Pursuant to 38 U.S.C. § 7421(a), the Secretary has prescribed regulations for physicians and other Title 38 employees schedules based on the principle that duty schedules for title 38 health care employees are established as “appropriate and necessary for performance of services in the care and treatment of patients and other essential activities within the administration of the Under Secretary for Health or designated officials.” VA Directive 5011 ¶ g. (Attachment K). “Efforts will be made to mitigate the adverse effects of [the] authorities covered by this handbook. However, primary consideration will be given to the efficient and effective accomplishment of the VA mission.” VA Handbook 5005, Part IV, Chapter 3, Section A, ¶ 4(b) (Attachment N). VA Handbook 5011, Part II, Chapter 3 ¶ 2(a) states:

For full-time physicians and dentists appointed under 38 U.S.C. chapters 73 or 74, the basic workweek consists of a 40-hour tour of duty during the administrative work week (i.e., Sunday through Saturday). The workday shall not be less than 2 hours and may not exceed 12 hours. The 40-hour tour of duty may vary each administrative work week but must be determined prior to the beginning of the workweek.

(Attachment M). Paragraph 2(a) also states that “full-time physicians, dentists, podiatrists, chiropractors, and optometrists to whom the provisions of this chapter apply shall be continuously subject to call unless officially excused by proper authority. This

requirement to availability exists 24 hours per day, 7 days per week.” *Id.* Furthermore, VA Handbook 5011, Part II, Chapter 1 ¶ 2(d) notes that the proper care and treatment of patients is the primary consideration in scheduling tours of duty. “Duty schedules shall be established as appropriate and necessary for the care and treatment of patients within the administrative discretion of the [USH] or designated officials.” (Attachment L). In addition, ¶ 2(d), provides that “[b]ecause of the continuous nature of the services rendered at hospitals, the facility Director, or designee (in no case less than a chief of service) has the authority to prescribe any tour of duty to ensure adequate professional care and treatment to the patients, consistent with these provisions.” *Id.*

VA policies recognize management’s right and obligation to manage providers’ tours of duty, work weeks and assignments in a manner that ensures consistent access and timely and professional treatment of patients. It is well settled that management decisions that change physician schedules for patient care purposes are not subject to bargaining. In his response to the grievance, the Director provides a detailed response to the Union indicating that, to the extent that there have been any scheduling variances, the variances were made to address the direct patient care needs of the facility. The facility stated that it does not regularly schedule physicians in excess of 12 hours per day, nor does it fail to provide physician schedules in advance of the workweek as the polices require. Primary care physicians are scheduled to see 12-13 patients per day including phone clinics. Because they are subject to call 24 hours a day and seven days a week, they will on occasion exceed 12 hours a day and forty hours a week to meet patients’ needs. (Attachment B). Additionally, although efforts are made to issue physician schedules prior to the beginning of the administrative work week, the unscheduled leave of physicians, Nurse Practitioners, and Physician’s Assistants will require shuffling of physician schedules to meet patient needs. *Id.*

Changes in physician schedules to meet patient care needs has been addressed in prior 38 U.S.C. § 7422 decisions. In 2008, the Spokane Medical Center changed hospitalists’ tours (inpatient physicians) to provide for weekend rounds. *Spokane VAMC* (Attachment O). The USH determined that the decision to change the hospitalists’ tours was directly related to patient care and was excluded from collective bargaining. *Id.* In *VAMC Charleston*, the Charleston VA Medical Center began assigning additional Primary Care providers to the Urgent Care Unit which included scheduled “late stay” coverage requiring the providers to work in excess of an 8-hour day. (Attachment P). The issue of assigning physicians to the Urgent Care Unit involves matters of professional competence and conduct including direct patient care and is therefore, non-negotiable under 38 U.S.C. § 7422.

Here as in other cases, the USH has repeatedly held that a change in physician schedules to meet patient care is a matter relating to direct patient care, a component of professional conduct or competence.

DECISION

The Union's grievance, alleging that VA violated its scheduling policies for bargaining unit physicians by: (1) assigning physicians to work in excess of 40-hour work weeks; (2) regularly assigning physicians to work in excess of 12-hour days; and (3) failing to determine the 40-hour tour of duty of a physician prior to the beginning of the work week 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 is thereby excluded from bargaining and the grievance procedure.

APPROVED XX

DISAPPROVED _____



1-21-2022

Steven L. Lieberman, M.D.
Deputy Under Secretary for Health,
Performing the Delegable Duties of the
Under Secretary for Health

Date