

Title 38 Decision Paper
Department of Veterans Affairs (VA)
Portland Health Care System (Medical Center)

FACTS

On July 26, 2019, the Director at the VA Portland Health Care System (Medical Center) notified a registered nurse that the Medical Center was conducting an initial review of her “clinical practice” to ascertain whether the care she provided “may have so significantly failed to meet generally-accepted standards of clinical practice as to raise concern for the safety of patients.” The letter providing the notice identified eight instances involving patient care in which the registered nurse did not meet performance expectations. (Attachment A.) The notification also advised “[S]hould the review result in a tentative determination to make a report to the appropriate SLB, you will be further advised and provided an opportunity to address what is proposed to be reported.” (Id.)

On August 20, 2019, the American Federation of Government Employees, Local 2157, (Union) requested the documentation related to the impending review. (Attachment B.) The VAMC responded that “[I]f at the end of the review (as described in the letter) a decision is made to initiate a report to the appropriate State Licensing Boards, the employee will receive all due process, including supporting documentation, she is entitled to under the law and VA policy.” (Id.) Also, the Medical Center noted this “matter concerns a pure T[itle] 38 employee, in their probationary period, and relates to a question arising out of professional conduct or competence.” (Id.) The Medical Center also stated the matter “seem[s] to be excluded from collective bargaining entirely by 38 USC 7422, and not an appropriate matter for use of Official Time.” (Id.)

On August 29, 2019, the Medical Center advised the Union that the time spent representing the Registered Nurse must be documented as annual leave. The Union representative disagreed with this determination. (Attachment C.)

On September 18, 2019, the Union filed a Step Three Grievance indicating that 38 U.S.C. § 7422 “does not address official time” and the “Agency has unlawfully broadened the scope of 7422 by applying it to the use of official time.” (Attachment D.)

On October 3, 2019, the Medical Center denied the Step Three Grievance because the “initial review concerns the employee’s direct patient care and clinical competence.... Therefore, it is excluded from collective bargaining.” (Attachment E.) And, since the “initial review by Management is excluded from collective bargaining, the employee did not have a right to union representation in the matter. In the absence of an employee

right to union representation in a matter, denial of Official Time to a union official to provide representation in that matter is appropriate.” (Id.)

On October 15, 2019, the Union invoked arbitration on the grievance. (Attachment F.)

On October 31, 2019, the Medical Center objected to the Union’s Notice to Invoke Arbitration, since “38 USC 7422 applies in this case because the matter for which you requested Official Time concerned the bargaining unit employee’s direct patient care and clinical competence, so it is a matter concerning or arising out of professional conduct and/or competence. Therefore, it is excluded from collective bargaining.” (Attachment G.)

On December 19, 2019, the Medical Center submitted a request for a 38 U.S.C. § 7422 determination. (Attachment H.) The Medical Center indicated that the issue related to the arbitration is outside the scope of collective bargaining per 38 U.S.C. § 7422(b), as the clinical care review encompasses direct patient care, clinical competence, and peer review, and therefore, the use of Official Time is inappropriate. (Id.)

On January 24, 2020, the Union submitted its response to the Medical Center’s request. (Attachment I.) The Union asserted “the right to representation is a fundamental right unrelated to, and not constrained by any of the restrictions on the scope of bargaining or grievance proceedings. Moreover, nothing in the plain language of the section provides for placing restrictions on official time for a non-Title 38 employee. And finally, the previous § 7422 decisions relied upon by the Department are distinguishable from the specific facts and circumstances arising in the instant matter, and therefore cannot be a valid basis for a § 7422 declaration.” (Id.)

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 J.)

ISSUE

Whether the grievance and request for arbitration over the Medical Center’s denial of Official Time to a Union representative who represented an RN during a clinical care review 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. §§ 7401-7405, the Secretary sets forth the procedures by which the VA sets the terms and conditions of initial appointment and continued employment of health care personnel as may be necessary for VHA to operate health care facilities. This authority includes requiring health care professionals to obtain and maintain a current license, registration or certification in their health care field.

In addition, VA Handbook 1100.18, Reporting and Responding to State Licensing Boards sets forth the requirements for health care facilities’ procedures regarding reporting and responding to state licensing boards. (Attachment K.) The Handbook states, “VA is responsible for ensuring that its patients receive appropriate and safe health care. Similarly, VA has an obligation to reasonably ensure that its health care staff meet or exceed generally-accepted professional standards for patient care and, as such, has the obligation to alert those entities charged with licensing health care professionals when there is serious concern regarding a licensed health care professional's clinical practice. This obligation includes notifying SLBs of VA's concern with regard to the clinical practice of current or former professionals and responding to inquiries from SLBs concerning the clinical practice of those professionals.” (Attachment K, VA Handbook 1100.18, ¶ 3(a.))

The State Licensing Board (SLB) reporting program contains the following five stages: initial review stage, comprehensive review stage, decision stage, concurrence stage and reporting stage. (Attachment K, VA Handbook 1100.18, ¶ 9.) At the initial review stage, “[T]he Director, or head, must ensure that within 7 calendar days of the date a licensed health care professional leaves VA employment, or, information is received suggesting that a current employee’s clinical practice has met the reporting standard, an initial review of the individual's clinical practice is conducted to determine if there may be substantial evidence that the individual so substantially failed to meet generally-accepted standards of clinical practice as to raise reasonable concern for the safety of

patients. Usually this review is conducted and documented by first and second level supervisory officials. There must be reasonably-detailed documentation that this review was performed.” (Attachment K, VA Handbook 1100.18, ¶ 10.)

In accordance with VA Handbook 1100.18, on July 26, 2019, the Director provided the probationary registered nurse with notice of an impending clinical review outlining eight separate patient care incidents that provided the basis of “an initial review” of her clinical practice “to determine if there may be substantial evidence that the individual so substantially failed to meet generally-accepted standards of clinical practice as to raise reasonable concern for the safety of patients.” (Attachment A.) (Attachment K, VA Handbook 1100.18, ¶ 10.)

The use of Official Time during processes designed and utilized to assess a clinician’s professional conduct or competence (i.e. direct patient care or clinical competence), and peer review has been addressed in prior 38 U.S.C. § 7422 decisions. In 2016, the Hines VAMC notified a primary care physician that a panel had been assigned to conduct a “comprehensive focused-clinical care review” in accordance with the Medical Center bylaws due to “concerns regarding care issues.” (Attachment L, (VAMC Hines, (March 15, 2018)). The Union filed a ULP charge that the Medical Center improperly denied a primary care physician Union representation during a comprehensive focused-clinical care review. (Id.) The Executive in Charge determined that the “comprehensive focused-clinical care review was an objective investigation and administrative in nature, not adversarial. Furthermore, the underlying cause of the review was based on the primary care physician’s care and treatment, which is a matter that involves direct patient care and clinical competence. As such the issue whether the Union may represent the employee before the comprehensive focused-clinical care review, is a matter concerning or arising out of professional conduct or competence and peer review as defined within meaning of 38 U.S.C. § 7422(b), and thus, excluded from collective bargaining.” (Id.)

In VAMC Hampton, the Under Secretary for Health concluded that the “the issue of union representation of an employee in a [Quality Assurance] investigation concerns or arises out of professional conduct or competence as well as peer review under Title 38, United States Code and is outside the scope of collective bargaining.” (Attachment M, VAMC Hampton, (January 4, 1993)). The purpose of the investigation in Hampton was to conduct an inquiry into an incident involving patient care by the employee. (Id.) The Union was permitted to attend the inquiry; however, they were not “allowed to speak or otherwise participate in the meeting.” Id.; see also Nat’/ Fed’n of Fed. Emps. Local 589 v. Federal Labor Relations Auth., 73 F.3d 390, 393-94 (D.C. Cir. 1996) (Secretary of Veterans Affairs exercises complete discretion over peer review procedures, including

representational rights).

In VA – Official Time, it was recently determined that “[G]iven that the severe staffing shortage is an agency-wide matter, where it is difficult to recruit and retain Title 38 personnel, I believe an agency-wide limitation to official time for Title 38 personnel is appropriate. VA’s mission as stated by President Lincoln is ‘[t]o care for him who shall have borne the battle, and for his wife, and his orphan’ by serving and honoring the men and women who are America’s veterans. An agency-wide decision on official time for all Title 38 employees is appropriate, to cure past staffing deficiencies and to address potential prospective problems.” (Attachment N, VA - Official Time (April 26, 2019)). Additionally, “[T]itle 38 personnel still have the opportunity to: (1) utilize official time as required by 5 U.S.C. § 7131 (a) and (c); (2) work with management to participate in union duties during non-working hours; and (3) be represented by non-Title 38 union representatives for those matters excluded from collective bargaining. To that end, I find that not permitting Title 38 personnel to official time is not denying such individuals the right to form, join, or assist, but rather prioritizing Veterans within the Secretary’s right under 38 U.S.C. § 7422.” (Id.). Title 38 employees may only use official time for representational purposes under 5 U.S.C. § 7131 (a) and (c). (Id.).

As illustrated by decisions cited above, the Secretary has repeatedly held that union representation or the use of official time during processes designed and utilized to assess a clinician’s professional conduct or competence are matters relating to direct patient care, a component of professional conduct or competence within the meaning of 38 U.S.C. § 7422(b).

RECOMMENDED DECISION

The grievance and request for arbitration over the Medical Center’s denial of Official Time to a Union representative who represented an RN during a clinical care review concerns or arises out of professional conduct or competence (i.e. direct patient care or clinical competence) within the meaning of 38 U.S.C. § 7422(b).



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

February 9, 2021

Date